THE SCOTS DIGEST

1800-1873

EDITOR

R. CANDLISH HENDERSON, LL.B., Advocate

ASSISTED BY

J. B. BALLINGALL, A. C. BLACK, J. SMITH CLARK, M. MILLAR CRAIG
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JOHN S. MACKAY, W. J. ROBERTSON
AND ALEXANDER TAYLOR

Advocates

THE SCOTS DIGEST

OF SCOTS APPEALS IN THE HOUSE OF LORDS FROM 1707
AND OF THE CASES DECIDED IN THE

SUPREME COURTS OF SCOTLAND

1800 TO 1873

VOLUME III

LANDLORD AND TENANT

TO

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LANDLORD AND TENANT

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1. Entry—Term—Garden-Ground—Back-Green.—The ordinary term of entry and removal to and from gardens is Candlemas; but where a piece of ground passes as part and pertinent of a town house, the term must

be regulated by that of the house. *Renton* v. *Younger*, 1823, 2 S. 244.

2. Entry — Payment of Rent before Obtaining Possession.—It was stipulated in a minute of tack that the tenant should pay his rent in advance before getting possession. The entry was at Martinmas, and the tenant offered his rent on the 23rd of November, and demanded entry, and was refused possession, as having failed to enter and pay on the term day. *Held* that the landlord was bound to give possession, or pay damages for failure. *Smith* v. *Robertson*, 1831, 9 S. 751; 6 Fac. 488; 10 S. 807, 829.

3. Fixtures — Fencing. — *Held* that wire fencing, wooden palings, and wooden folds, voluntarily erected by the tenant of a sheep farm at his own expense for the purpose of trying experiments in rearing sheep, and not in substitution of previously existing fences, or necessary for the proper management of the farm, could be removed by the tenant. *Duke of Buccleuch* v. *Tod's Trs.*, 1871, 9 M. 1014; 43 J. 552.

4. Fixtures — Greenhouses, etc.—Greenhouses, forcing-pits, and hotbed frames, erected by nursery gardeners for the purposes of their trade, may, in so far as not consisting of brickwork, be removed by them at the expiration of their lease. *Question*, whether the brickwork might not also have been removed. *Syme* v. *Harvey*, 1861, 24 D. 202; 34 J. 98.

5. Fixtures — Shop Fittings, etc. — Singular Succession.—A large counter fixed by bolts to the floor, and shelves and drawers by wooden wedges to the wall of a shop, and a dresser table and shelves fixed in a kitchen in the same way, and chimney grates built into the fireplaces in the usual manner, *held* not to be fixtures. *M'Knight* v. *Irving*, 1805, Hume 412.

6. Hypothec — Arrestment — Preference.—An arrestment in the hands of the clerk of court, of the proceeds of a sale of a tenant's effects, under a warrant of sequestration at the instance of the landlord, *sustained* in preference to a claim by the landlord not covered by his hypothec. *M'Farlane* v. *Forrester*, 1823, 2 S. 505.

7. Hypothec—Arrestment—Competition.—A landlord obtained a sequestration against his tenant, but, instead of selling under a judicial warrant, rouped, with the tenant's consent, the farm stocking. The price exceeded the arrears covered by the hypothec but not the whole arrears; and bills were taken to the landlord for the price. On the same day dung belonging to the tenant was sold by private sale. *Held* that a creditor of the tenant arresting the price of the dung was preferable to the landlord. *Deas* v. *Walker*, 1830, 8 S. 670.

8. Hypothec—Assignation of—Payment Tendered. — *Question*, whether a landlord is bound to assign to the agent of his tenant, whose crop was under sequestration, his hypothec, on the agent tendering payment of the rent. *Graham* v. *Gordon*, 1841, 1 Rob. 251; 14 J. 321; 1842, 4 D. 903; 14 J. 325.

9. Hypothec—Assignation of—Payment of Rent by Poinding Creditor—Re-Let of Premises by Creditor—Title to Grant Lease.—A poinding creditor of a tenant paid the rent to the landlord, on condition of an assignation to the right of hypothec over the effects, which were thereupon sold; and the creditor, on the desertion of the tenant, let the premises, till the end of the lease, to another, who refused to pay the rent, in respect the creditor held no assignation from the landlord, who refused to grant it, and the action was thereupon dismissed. *Held* that the creditor had a good title in himself to insist for payment of the rent, independent of the assignation. *Bannatyne* v. *Finlayson*, 1824, 2 S. 751.

10. Hypothec—Competition with Crown Debts.—The landlord's right of hypothec *held* not to be preferable to the Crown. *Ogilvie* v. *Wingate*, 1792, 3 Pat. 273.

11. Hypothec—Competition with Crown Debts.—Although a landlord had obtained and executed a warrant of sequestration of his tenant's effects and got a warrant to sell, yet, as the tenant was subsequently fined for illegal distilling, and the process of the Crown was issued before the effects were sold, *held* that the Crown was preferable to the landlord. *Robertson* v. *Jardine*, 6 July 1802, F. C.; M. 7891.

12. Hypothec — Preferable Claims — Medical Attendance on Tenant's Deathbed.—A surgeon's claim for the deathbed charges of a tenant is preferable to the landlord's claim for rent under his hypothec; and it is of no consequence that the landlord has obtained sequestration before the tenant's death, and that the effects were sold, and an order issued for payment to the landlord. *Drysdale* v. *Kennedy*, 1835, 14 S. 159; 11 Fac. 135.

13. Hypothec—Cheese.—*Held* that cheeses, the produce of a farm, are subject to the landlord's hypothec. *Goldie* v. *Oswald*, 1839, 1 D. 426.

14. Hypothec—Crop—Extent of—Bona fide Purchase.—A landlord has a right of hypothec over grain grown on the farm, and may vindicate the same against *bona fide* purchasers, unless the grain is sold in bulk in a public market. *Ogilvy* v. *Smart*, 1796, 3 Pat. 490.

Where there were arrears of rent, *held* that the landlord's hypothec extended over the crop for the rent of the year only of which it was the produce. *Stewart* v. *Rose*, 1816, Hume 229.

15. Hypothec—Crop—Sale of Grain by Sample in Public Market.—A sale of grain by sample, in public market, by a tenant does not protect a purchaser, who afterwards obtains delivery, from second payment of the price, at the instance of the landlord, whose rent is unpaid. *E. of Dalhousie* v. *Dunlop & Co.*, 1830, 4 W. & S. 420. Affg. 6 S. 626; 3 Fac. 654.

16. Hypothec—Crop—Oats—Conversion into Meal—Bona fide Purchase of Meal.—*Held* (1) that oats do not cease to be liable to the landlord's hypothec by being converted into meal; (2) that the purchase of meal by a meal-dealer in his own premises was not purchase in public market. *Barns* v. *Allan & Co.*, 1864, 2 M. 1119; 36 J. 559.

17. Hypothec—Excisable Liquors—Order for Delivery.—Intimation of a sale and order of delivery of spirits to the excise storekeeper of a warehouse, situated within the premises of a distiller, in which spirits have been deposited under the 4 Geo. IV. c. 94, does not affect the landlord's hypothec for the rent of the premises. *Wyld & Co.* v. *Richardson*, 1832, 10 S. 538; 7 Fac. 406.

18. Hypothec — Furniture — Debtor in Possession.—*Held* in a question with creditors, who after the sequestration of the estates of their debtor allowed him to retain possession of his furniture, that the landlord's hypothec for the rent of the house extended over the furniture. *Wilson* v. *Spankie*, 1813, 17 Dec. 1813, F. C.; 14 May 1814, F. C.; 12 Nov. 1814, F. C.

19. Hypothec — Furniture — Bona fide Sale.—A party who had the charge of a sale by public auction of the furniture of a house, allowed to be sold along with it a few articles which were part of the furniture of another house belonging to the tenant of that house, and which had been sequestrated by his landlord for rent; and having received the money, and paid it, in ignorance of the sequestration, to the tenant, *held* not liable in repetition to the landlord. *Laing* v. *Robertson*, 1829, 7 S. 335; 4 Fac. 440.

20. Hypothec—Furniture—Property of Third Party.—*Held* that furniture brought into a dwelling-house by the tenant, who was tortuously withholding it against the true proprietor, and pending legal proceedings to recover it, was not subject to the landlord's hypothec, though no intimation was made to him by the proprietor. *Jaffray* v. *Carrick*, 1836, 15 S. 43; 12 Fac. 40; 9 J. 22.

21. Hypothec — Furniture — Sold for Crown Debt—Left in Possession of Debtor's Wife.—Furniture was sold in the debtor's house under Crown diligence. Previous to the sale the debtor had absconded. The purchaser allowed it to remain in the house, where it was used by the debtor's wife and family. Nine weeks after the sale the landlord of the house sequestrated the furniture for the current year's rent. *Held* that the furniture was freed from his hypothec by the sale, and that the right of hypothec had not revived. *Adam* v. *Sutherland*, 1863, 2 M. 6; 36 J. 7.

22. Hypothec—Hired Musical Instrument.—A musical instrument lent out for hire is, as well as hired furniture, liable to the landlord's hypothec for rent. *Penson* v. *Robertson*, 6 June 1820, F. C.

23. Hypothec—Hired Piano—Loan of Piano to Third Party.—A music-seller hired a piano to A, who gave the use of it to B, residing in a furnished house. *Held* that the landlord had no hypothec over it for the rent due by B, and that the music-seller was entitled to vindicate it. *Gow & Sheppard* v. *Anderson*, 1808, Hume 517.

24. Hypothec — Implied Surrender — Agreement with Poinding Creditor.—A landlord consented to a poinding creditor selling his tenant's effects, on condition of being paid out of the proceeds the rents due him, and in consequence did not execute a warrant of sale obtained by himself under a sequestration. *Held* (in a question with the other creditors claiming a *pari passu* preference with the first) not to have abandoned his right of hypothec *quoad* the effects poinded and sold. *Russell* v. *Cochrane*, 1831, 9 S. 304.

25. Hypothec — Machinery. — *Question*, whether a landlord had a hypothec over part of a machine which a manufacturer was employed to make, for his rent of the mill in which it was placed, it being alleged that the property had not been transferred. *Girdwood & Co.* v. *Pollock & Co.*, 1827, 5 S. 507.

26. Hypothec—Machinery—Property of Third Party.—Claim of hypothec over the machinery of a mill refused, in respect that the alleged tenant was not the tenant for the year in question; and *observed*, that although the machinery of a third party lies for a term within the mill, yet unless the mill be effectually let to a tenant, no hypothec can exist. *Girdwood* v. *Wilson*, 1834, 12 S. 576.

27. Hypothec—Pactional Rent.—*Question*, whether pactional rent payable in case of divergence from prescribed rotation is secured by the landlord's hypothec? *Robertson* v. *Clark*, 1842, 11 D. 1317, *doubted*. *Witham* v. *White*, 1866, 2 S. L. R. 80; 38 J. 586.

28. Hypothec — Sale of Hypothecated Subject—Right of Purchaser to Deduct Rent from Price.—A trustee on a sequestrated estate having sold the furniture of the bankrupt, *held* that the purchaser was entitled to retain from the price sufficient to clear the furniture of the landlord's hypothec for rent, for which it was liable. *Mitchell* v. *Major*, 1856, 19 D. 30; 29 J. 6.

29. Hypothec—Shrubs—Nursery Garden.—*Question*, whether shrubs, plants, etc., in a nursery garden be *pars soli*, or, as moveables, fall under the landlord's hypothec. *Begbie* v. *Boyd*, 1837, 16 S. 232.

30. Hypothec—Stock—Property of Tenant's Son.—*Held* that horses reared and worked on a farm, and which were claimed as the property of the son of the tenant, living in family with the tenant, were liable to the landlord's hypothec. *Napier* v. *Kissock*, 1825, 4 S. 304.

31. Hypothec—Stock—Turnips to be Eaten off by Sheep—Interdict against Removing Sheep till Price Paid.—*Held* that a farmer, who had sold to a sheep-dealer some acres of turnips, to be consumed on the ground,

the price of the turnips to be paid before the removal of the sheep, was justified in craving interdict against removal of the sheep until caution had been found for due payment of the price of the turnips. *Question*, whether the contract was one of sale or lease, and whether the farmer had a hypothec over the sheep. *Ferguson* v. *Fyffe*, 1868, 6 S. L. R. 68.

32. Hypothec — Stock — Bona fide Purchase.—Parties purchasing cattle at a public roup by a tenant two days before the term, and made aware, before carrying them off, that the rent had not been paid, *held* liable to restore the cattle, and not entitled to claim the price from the landlord. *Cooper* v. *Bone*, 1823, 2 S. 598.

33. Hypothec—Subtenant—Rent Paid by Principal Tenant — Right of Principal Tenant to Enforce Hypothec.—A principal tenant, who has paid the year's rent to his landlord, is entitled to enforce his claim of hypothec *super invecta et illata* of the subtenant, within three months after the expiry of the year's possession, in preference to the landlord's claim against the subtenant (to whom, on the expiry of the first year, he had granted a tack as principal tenant) for the next term's rent. *Christie* v. *M'Pherson*, 14 Dec. 1814, F. C.

34. Hypothec—For what Available.—A proprietor let premises for a manufactory, and bound himself to communicate to them a supply of steam-power by means of a shaft from an engine in adjoining premises belonging to him, and to furnish a supply of water; and the rent for the premises was fixed, but the amount of the consideration for the steam-power and water was left to the determination of arbiters. *Held* that his right of hypothec over the *invecta et illata* in the premises let was available in security for the whole consideration, including that for the power and water. *Catterns* v. *Tennent*, 1835, 1 S. & M'L. 695. Revg. 12 S. 686; 9 Fac. 360.

35. Landlord — Liability — Damage to Crops — Flooding. — A party, as a trustee, entered into a lease which made special reference to an embankment which was partly on the trust estate, partly on his own private estate. *Held* relevant to support an action of damages brought by the tenant against him as an individual, to allege that the lands let had been flooded, and the crops damaged, in consequence of acts done by him on his own ground which weakened the embankment, which acts he would have been entitled to do but for his position as a trustee; and although it was not averred that the acts had been done nimiously and recklessly. *Hill* v. *Kinloch*, 1856, 18 D. 722; 28 J. 285.

36. Landlord — Liability — Flooding — Injury to Tenant.—Damages found due to a tenant by a landlord for injury done to his farm by the overflowing of a river, against which the landlord was bound to defend it. *Scott* v. *Tait*, 1826, 4 Mur. 57.

37. Landlord — Liability — Fencing — Obligation to Furnish Stobs and Rails.—Missives of lease provided that "as to the fences which are not sufficient, it is understood that sufficient stob and rail will be furnished" by the landlord. In an action by the tenant for damages in respect that the landlord had failed to implement this obligation, it was proved that the tenant had not made a direct demand for more materials for his fences till three years before the termination of his tenancy. *Held* that the tenant was entitled to damages, in respect of the landlord's failure to fence, only for the years after his direct demand. *Burrell* v. *Gebbie*, 1868, 6 S. L. R. 187. See also No. 56.

38. Landlord — Liability — Damage by Game.—A tenant of a farm *held* not entitled to damages against the landlord, on the ground of the latter having increased the game upon the farm beyond a fair average stock. *Wemyss* v. *Wilson*, 1849, 6 Bell 394; 21 J. 379. Revg. 10 D. 194; 20 J. 51.

39. Landlord — Liability — Damage by Game—Where Shootings Let.—A farm was let to an agricultural tenant, and the whole shootings upon it were let to another person. The agricultural lease contained a reservation of game (no mention being made of rabbits), and also a reservation of power to resume possession of any part of the farm which the landlord might require for planting. The landlord availed himself of his right of planting, and the rabbits bred in the plantations and did considerable injury to the crops. In an action of damages brought by the agricultural tenant against the landlord and the game tenant, *held* that the landlord and not the game tenant was liable. *Inglis* v. *Moir's Tutors, etc.*, 1871, 10 M. 204; 44 J. 123.

40. Landlord — Liability — Damage by Game—Payment of Rent—Personal Bar.—A tenant, at the expiry of his lease, brought an action of damages against his landlord for injury done to his crops during the last seven years of the lease, from alleged excess of game on the farm. He stated that each year, when he paid his rent, he claimed a deduction on account of the loss by game, but that the landlord attributed the loss to other causes, admitting, however, the excessive quantity of game, and promising to repress it. In point of fact no deduction of rent was allowed. The receipt for the last year's rent alone contained a reservation of the tenant's claim for damages. *Held* that, he having paid rent without making any claim for damage, except for the last year of the lease, the damage done during that year could alone competently form the subject of an issue. *Broadwood* v. *Hunter*, 1855, 17 D. 340; 27 J. 587.

41. Landlord — Liability — Damage to Crops by Game. — Circumstances in which *held* that a tenant had no claim against his landlord for damages on account of injury done to his crops by game. *Drysdale* v. *Jameson*, 1832, 11 S. 147.

42. Landlord — Liability — Increase of Game—Construction of Lease.—A lease con-

tained a clause reserving game, rabbits, etc., to the landlord, "without being liable to compensate the tenant in respect of the reservation." *Held*, in an action by the tenant against the landlord, that though the clause could not be read as excluding all liability on the part of the landlord for damage caused from the increase of game, the tenant had not proved such an increase as to entitle him to damages. *Morton* v. *Graham*, 1867, 6 M. 71 ; 40 J. 37.

43. Landlord—Liability—Reservation by Landlord to Work Coal — Trespass by Colliers. — A landlord having in a lease reserved right to work coal, on payment of damages occasioned by his operations, *held* that the tenant was not entitled to damage for injury by unauthorised trespasses by the colliers. *Young* v. *Colt's Trs.*, 1832, 10 S. 666.

44. Landlord—Liability—Operations in Vicinity of Tenant's Garden—Injury to Tenant.—Circumstances in which a claim of damages by a tenant against his landlord, for injury suffered by operations of the landlord on premises in the vicinity of the tenant's garden, was rejected. *Clugston* v. *Goold*, 1823, 2 S. 308.

45. Landlord—Liability—Operations on Adjoining Property.—A tenant of a public-house raised an action of damages against his landlord for loss of custom in consequence of injury to amenity by building operations by his landlord on adjoining premises. *Held* that he must prove that the operations were either illegal or were negligently executed. (Cases of *Callender* v. *Eddington*, 1826, 4 Mur. 108 ; *Douglas* v. *Monteith*, 1826, 4 Mur. 130 ; and *Cleghorn* v. *Taylor*, 1856, 18 D. 664 ; 28 J. 287 ; commented on). *Laurent* v. *Lord Advocate*, 1869, 7 M. 607 ; 41 J. 329.

46. Landlord—Liability—Uninhabitable Condition of House — Violenti non fit injuria.—In an action of assythment raised by the widow and children of a parish schoolmaster against the heritors of the parish, the pursuers alleged, that while the defenders were under a statutory obligation to provide a suitable house for the deceased, they had culpably failed to do so, the house provided by them having been left in a state unfit for human habitation for several years prior to the death of the deceased, which was thereby caused. *Held* that the action was irrelevant, in respect, it was averred, that the schoolmaster had continued to live in the house after it had become uninhabitable. *Birrell* v. *Anstruther*, 1866, 5 M. 20 ; 39 J. 20.

47. Landlord — Liability — Unroofing Tenant's Dwelling-House.—A landlord found liable in damages for illegally unroofing his tenant's dwelling-house. *Bisset* v. *Whitson*, 1842, 5 D. 5.

48. Landlord — Liability — Wrongous—Interdict.—It is incompetent under an issue whether a landlord in violation of a lease interdicted his tenant to prove that the tenant had acted illegally and in violation of his lease. *Roberts* v. *E. of Rosebery*, 1825, 4 Mur. 3.

49. Landlord — Liability — Violent Dispossession of Tenant.—A tenant brought an action of damages against his landlord, on the allegation that he had been violently dispossessed of a part of the premises let to him. He took an issue upon that footing, and proposed also to take an issue claiming damages for being violently dispossessed, even upon the supposition that the portion of the premises of which he had been dispossessed was not embraced in the lease, but that he had been in lawful possession as a matter of favour. *Held* that he was not entitled to this issue. *Burnet* v. *Stewart*, *etc.*, 1863, 1 M. 524; 35 J. 312.

50. Landlord — Liability for Acts of Tenant—Act not Authorised by Lease—Bursting Embankment of Dam.—A proprietor granted a lease of a mill and mill lands to a tenant, his heirs and assignees, for a period of ninety-nine years. The lease empowered the tenant "to erect dams for collecting the water" in certain lands, "he always paying damages to the tenants and possessors of the adjacent lands occasioned thereby." The tenant erected a dam of great extent, and afterwards assigned away the lease. Some time after the new tenant was in possession, the embankment of the dam gave way, and the water rushing out, occasioned extensive injury to some inferior property. The parties injured raised an action of damages against the tenant, and also against the representative of the granter of the tack, as liable jointly and severally with the tenant, or at least subsidiarily for him. They alleged that the injury was occasioned by the culpable negligence of the tenant in failing to keep the embankment in a state of sufficient repair. *Held* that, assuming this to be true, still the injury had resulted solely from the fault of the tenant, which was not authorised by the lease, and for which, therefore, the landlord was not responsible. *Henderson* v. *Stewart*, 1818 (footnote to *Dunn* v. *Hamilton*), 15 S. 868, Hume 522.

51. Landlord — Liability for Acts of Tenant—Nuisance.—In an action against a landlord, his tenant and subtenants, by an inferior heritor on a stream, to interdict, as a nuisance, a dyework on the banks of the stream, the landlord, in his defences, stated that the operations of the subtenants did no injury to the water, or if any injury occasionally happened, it arose from the fault of the subtenants, for which he was not responsible. *Held* that the judge did wrong in directing the jury, that even if nuisance was proved against the subtenants, still as there was nothing but the lease to connect the landlord and tenant therewith, there was no ground in law for holding that they, or either of them, had authorised or were answerable for that nuisance ; in respect that he should have told them that, besides the act of granting the lease, the tenor of the landlord's defences, alleging the water to have sustained no injury, was a ground in law for holding him to have authorised the nuisance, if there was a nuis-

ance. *Dunn* v. *Hamilton*, 1838, 2 S. & M'L. 356. Affg. 15 S. 853; 12 Fac. 815.

52. Landlord—Obligations—Bankruptcy of Landlord—Liability of Trustee.—A landlord who had granted a lease, in which he bound himself to erect a farm steading, became bankrupt, and his estate was sequestrated. The trustee entered into possession and drew the rents, which the tenant paid under a reservation of his claims. The tenant thereafter sued the trustee for implement of the obligations in the lease as to erecting a steading, and for damages for non-implement; and the trustee in the meanwhile sold the property. *Held* that, to the extent of the rents drawn by the trustee, the claim of the tenant was well founded, but that the trustee was not under any obligation to a greater extent. *Harvey* v. *Haldane*, 1833, 11 S. 872.

53. Landlord — Obligations — Custom-House Dues—Prosecution for by Tenant—Implied Sanction.—The magistrates of a burgh were bound to support the tacksman of their customs in prosecuting for payment of dues, "on a representation made to them for that purpose, and having their sanction"; and they received an intimation, under protest, of the tacksman's intention to prosecute for certain dues, and calling on them to support him. *Held* that their returning no answer to such protest did not infer a sanction of the prosecution, and liability for the expenses. *Anderson* v. *Mags. of Linlithgow*, 1826, 4 S. 676.

54. Landlord—Obligations — Draining—Non-Implement.—A landlord bound himself, by missives of lease, in 1813, to perform draining, etc., and the tenant to pay interest on the outlay, and to perform carriages—the operations to be made at the sight of a person mutually chosen. The tenant, after entering into possession, attempted to repudiate the missives; but in 1817 he was decerned to implement them; and he continued to pay his full rent till 1822. *Held*, in an action of damages against the landlord for non-implement of the draining, etc., that the landlord was not liable in damages prior to 1817, nor after 1817, unless the tenant could show that he had expressly required the landlord to implement the stipulation. *Reay* v. *Chalmers*, 1834, 12 S. 860; 9 Fac. 452.

55. Landlord—Obligations — Drainage—Evidence of Agreement.—A farmer possessing on a verbal lease for nineteen years, raised an action of damages against his landlord for non-fulfilment of certain stipulations as to draining, etc., alleged to have been agreed to when the lease was entered into. The landlord on record admitted the verbal lease, but denied the stipulations. *Held* that the stipulations were part of the constitution of the lease as alleged by the pursuer, and could only be proved by the landlord's writ or oath. *Paterson* v. *E. of Fife*, 1865, 3 M. 423; 37 J. 204.

56. Landlord—Obligations — Fencing.—One of two neighbouring tenants, under the same landlord, cut down a part of a thorn hedge between the same farms, but not in a way which was alleged to be prejudicial or unnecessary for the ultimate improvement of the hedge, and offered to put up a temporary fence at a mutual expense; and the other tenant refused this. *Held* that the latter was not entitled to reparation for damages suffered in consequence of the want of a fence. *Thomson* v. *Purves*, 1829, 7 S. 730.

57. Landlord — Obligations — Furnished House—Taxes.—In conformity with usage, the landlord of a furnished house is bound to pay, or to relieve the tenant of, taxes exigible in respect of tenancy or occupancy, unless the lease contains an express stipulation to the contrary. *Macome* v. *Dickson*, 1868, 6 M. 898; 40 J. 508.

58. Landlord — Obligations — Habitable House—Vermin.—*Held* that a tenant was entitled to throw up the lease of his house, as being not habitable on account of vermin infesting it; and that as the nuisance was one which could not be easily cured, he was not bound to wait till the attempt was made to do away with the nuisance. *Kippen* v. *Oppenheim*, 1847, 10 D. 242; 20 J. 74.

59. Landlord — Obligations — Habitable Dwelling-House—Necessary Repairs.—The tenant of a dwelling-house was found entitled to have two rooms lathed and strapped for him by his landlord. *Marianski* v. *Jackson*, 1872, 9 S. L. R. 480.

60. Landlord—Obligations — Tenantable Condition — Subjects not Inspected by Tenant.—*Held* that a tenant who had entered into a lease of a country house on the faith of advertisements, and without looking at it, was not entitled to throw up the lease on the ground that he had been refused possession of some of the rooms, and that the house was not in tenantable order. By the agreement, the tenant had accepted the house as in tenantable order. *Webster* v. *Lyell*, 1860, 22 D. 1423; 32 J. 648.

61. Landlord—Obligations – Uninhabitable House.—Tenants of an urban tenement in good repair at the commencement of the lease, in which the tenants bound themselves "to be at the expense of any further repairs they might require," after some years deserted the premises, and ceased to pay rent. In defence to an action brought by the landlord, while there were several years of the lease to run, it was pleaded that the tenement had become uninhabitable from a cause specified, for which the landlord was averred to be responsible. On a proof, it was established that it was liable to be flooded, but the cause was not proved, nor that any demand for repairs had been made. The court gave decree for payment down to the end of the lease. *Opinion* that, notwithstanding the terms of the lease, there might be repairs of such a nature that the landlord might be liable at common law to execute. *Lowndes* v. *Buchanan*, 1854, 17 D. 63; 27 J. 7.

62. Landlord—Obligations—Repairs to Houses and Fences.—A missive of lease was entered into for nineteen years of part of an estate, without any stipulation as to the repair of houses or fences, which were in a dilapidated state; and it was in evidence that the landlord had declined to incur any expense in relation to them. *Held* that, independently of express agreement, a landlord is not obliged to erect or repair houses or fences. *Haining & Douglas* v. *Sir Robert Grierson*, 1807, Hume 829.

63. Landlord—Obligations—Buildings in Tenantable Repair.—*Held* that the landlord of a farm let for £6 a year, with certain trifling payments in kind, was not, without special stipulation, bound to put the buildings into tenantable repair. *Harrold* v. *Pollexfen*, 1844, 6 D. 1103.

64. Landlord—Obligations — Upkeep of Road.—A tenant under a lease reserving to the landlord right to work minerals, but with an obligation to satisfy the tenant for all damage, repaired a road passing through his farm, and necessary to it, on the faith that the landlord was to discontinue working a quarry situated on that road; but the landlord let the quarry, and the road was rendered nearly impassable by the carting of the stones. *Held* that the landlord and his tenants in the quarry were bound to keep the road in repair so long as they used it for the quarry. *Wight* v. *Wight's Trs.*, 1828, 6 S. 1116.

65. Landlord — Obligations — Rebuilding of House Destroyed by Fire.—*Held* that a landlord was not bound to rebuild a farm-house destroyed by accidental fire, on the demand of the tenant. *Walker* v. *Bayne*, 1815, 3 Dow 233; 6 Pat. 217. Revg. 30 May 1811, F. C.

66. Landlord—Obligations—Destruction of Premises by Fire.—*Question* raised, and a remit made to a jury under the stat. 6 Geo. IV. c. 68, to ascertain whether a party who held a lease of premises which had been destroyed by fire, had such an interest as to entitle him to the value of the lease from commissioners authorised to appropriate the ground for public purposes. *Budge* v. *Trs. for Courts of Justice in Scotland*, 1829, 7 S. 278.

67. Landlord — Obligations — Delayed Entry—Premises Injured by Fire—Right of Tenant to Abandon Lease.—Where the landlord of a subject, let for five years as business premises, was unable to give possession till a month after the term of entry, owing to an accidental fire which had occurred in the premises about a fortnight before the term, *held* that the tenant was entitled to abandon the lease. *Drummond* v. *Hunter*, 1869, 7 M. 347; 41 J. 203.

68. Landlord — Obligations — Rebuilding of House Destroyed by Fire.—*Held* that although a tenant was bound by his lease to keep the houses in tenantable and habitable repair, yet the landlord was liable to rebuild a house destroyed by fire, caused by negligence on the part of a servant of the tenant, but which did not amount to *culpa* by the tenant. *Swinton* v. *M'Dougall*, 16 Jan. 1810, F. C.

69. Landlord — Obligations — Erections by Tenant—Construction of Lease.—By a stipulation in a lease it was provided that if the tenant should, within ten years from its date, form enclosures, the landlord should pay the value, according "as the same shall be estimated and ascertained, immediately after the perfecting of every enclosure, by two neutral persons," such enclosure or enclosures being always made at the direction of "the landlord"; and the tenant, after expiration of the ten years, and without observing the above conditions, formed several enclosures. *Held* that he had no claim against the landlord for their value. *Grant* v. *Baird*, 1810, Hume 855.

70. Landlord — Obligations — Erections by Tenant — Extravagant Buildings. — A landlord, who by a lease bound himself at the end of it to pay for the value of all sufficient houses or enclosures, having entered into a new lease containing a similar obligation, *held* that he was not entitled to object at the expiration of it that houses and enclosures erected during the currency of the first lease were extravagant or unsuitable. *Macdonald* v. *Brown*, 1839, 2 D. 184; 15 Fac. 168.

71. Landlord — Obligations — Meliorations by Tenant—Singular Successor.—A singular successor or purchaser of an estate is not liable to implement in favour of a tenant an obligation for payment of meliorations granted by the former proprietor, not contained in his tack or title of possession, the obligation being effectual only against the former proprietor; but *held* that there existed circumstances sufficient to constitute in favour of the former proprietor a right of relief against the singular successor. *Bruce* v. *M'Leod*, 1822, 1 Shaw's App. 213.

72. Landlord — Obligations — Meliorations by Tenant—Singular Successor.—A singular successor is bound by a stipulation in a lease to pay for the value of houses which were erected prior to his purchase of the property. *Fraser* v. *Maitland*, 1824, 2 Shaw's App. 37.

73. Landlord — Obligations — Meliorations by Tenant.—Pending a dispute as to the validity of missives of lease of certain urban subjects, between the landlord and the tenant, who had abandoned them, the court authorised the sheriff-clerk of the county to let them in the meantime, and to make such alterations, at the sight of both parties, as might be necessary to insure their being set. The sheriff-clerk directed alterations to be made to a considerable extent, and these were executed without objection on the part of the tenant, and the premises were let. *Held* that the expense of the alterations was in the meanwhile a proper charge on the rents received, reserving to the tenant a claim against the landlord, on the expiry of the missives, for the value of such alterations as should

appear to be permanent improvements on the property. *Douglas* v. *Jones*, 1833, 11 S. 741.

74. Landlord — Obligations — Meliorations by Tenant—Action by Tenant against Landlord's Trustee—New Landlord in Possession. — An action for meliorations was directed by a tenant at the expiry of his lease against the trustee and executor of his late landlord, who had died a few years before the lease expired. *Held* that it was unnecessary to call the landlord in possession at the expiry of the lease as a party to the action. *Cumine* v. *Bayley*, 1856, 19 D. 97; 29 J. 46.

75. Landlord — Obligations — Meliorations by Tenant.—Parties obtained a lease of a mill for twenty years from magistrates of a burgh, stipulating that they were to receive the value of their meliorations at the end of the twenty years, or obtain a new lease. They continued to possess for more than twenty years additional after the twenty years, but without getting any express renewal; and thereafter obtained a charter from the magistrates of two-thirds of the subjects, and erected works and machinery upon the whole of it. This charter was afterwards set aside as void, in respect of their not having the authority of an Act of Council thereto. *Held*, with reference to a claim for meliorations made in that action, that the parties could not claim the value of those on that third to which they had obtained no charter, nor of erections made prior to the charter, nor of moveable machinery; but that they had a claim for all fixtures and permanent erections, which improved the property resumed, made after the date of the charter, and prior to decree of reduction. *Mags. of Selkirk* v. *Clapperton*, 1830, 9 S. 9.

76. Landlord — Obligations — Meliorations by Tenant — Bona fide Possession without Lease.—*Held* that a tenant without a lease had no claim against the landlord for the value of meliorations made *bona fide* in the belief that he was entitled to hold for nineteen years. *Thomson* v. *Fowler*, 1859, 21 D. 453; 31 J. 246.

77. Landlord—Obligations—Meliorations by Tenant—Entailed Estate.—Circumstances in which *held* that at the expiry of his lease the tenant of a farm on an entailed estate had a good claim for meliorations against the executors of the heir of entail who had granted the lease. *Runcie* v. *Lumsden's Exors.*, 1857, 19 D. 965; 29 J. 447.

78. Landlord—Obligations—Meliorations by Tenant—Entailed Estate.—A husband of an heiress of entail granted an obligation to a tenant at will by which he became bound to reimburse the tenant for meliorations in case of his removal. On the death of the heiress, the lands passed to the next heir of entail. The tenant having continued to possess by tacit relocation for many years under the new heir and made meliorations, *held* that he had no claim against the representatives of the husband for meliorations made subsequent to the date when the lands passed to the next heir of entail. *Ross* v. *Hawkins*, 1848, 10 D. 1288; 20 J. 471.

79. Landlord — Obligations — Entailed Estate.—An heir of entail in the lease of a farm bound himself to trench, drain, and lime part of it. He died and was succeeded by his son, who did not represent him. *Held*, in an action of damages at the tenant's instance against the son for non-implement of the above obligation, that it was not binding on succeeding heirs of entail who did not represent the granter. *M'Kenzie* v. *Sir K. M'Kenzie*, 1849, 11 D. 596; 21 J. 169.

80. Landlord—Obligations—Meliorations—Assignation—Entailed Estate.—A tenant of a farm on an entailed estate was at the expiration of his lease entitled to £95 of meliorations. The meliorations were valued by the next heir of entail, who alleged that the tenant being indebted in £71 of arrears of rent it was arranged that both arrears and the meliorations should be postponed to the end of the renewed lease, and that the meliorations should then be applied in satisfaction *pro tanto* of the arrears, but he did not allege that he got any assignation from the tenant to the meliorations which were due by the representatives of the former heir. *Held*, in a question with an assignee of the whole estate of the tenant, that even if the allegations of the heir were proved, the assignee was preferable. *E. of Fife's Trs.* v. *E. of Fife*, 1852, 1 Stuart 271.

81. Landlord—Obligations—Payment to Tenant of Cost of Machinery Put in Spinning-Mill—"Put in."—A landlord agreed to pay to a tenant £200 to build a spinning-mill, payable as soon as machinery to the extent of £200 value was "put in the mill." *Held* not relevant to allege that machinery to that amount was "put in," but not erected within the mill. *Readdie* v. *Mailler*, 1841, 3 D. 488; 16 Fac. 483.

82. Landlord — Obligations — Outlay by Tenant—Repayment at Expiry of Lease—Conventional Irritancy.—A grain mill and adjoining lands and offices were let for nineteen years, with a stipulation that the tenant should lay out a certain sum in repairing the offices which was to be repaid by the landlord at the expiry of the lease. The tenant implemented his obligation, but having become bankrupt during the currency of the lease, the landlord availed himself of a conventional irritancy applicable to that event and resumed possession of the subjects. In an action against him at the instance of the trustee in the tenant's sequestration, *held* that notwithstanding the premature termination of the lease the landlord was liable to repay the said sum at the date when the lease would naturally have expired. *Pendreigh's Tr.* v. *Dewar*, 1871, 9 M. 1037; 43 J. 557.

83. Landlord—Obligations—Water-Pipes—Valuation.—A landlord wrote to his tenant —"If you lay pipes for bringing water to the house, etc., you are to be paid their value at

the end of the lease." *Held* that this did not mean the value of the pipes as old metal, nor the cost incurred in laying them down, but the value to the landlord and incoming tenant at the end of the lease. *Frier* v. *E. of Haddington*, 1871, 10 M. 118; 44 J. 76.

84. Landlord — Obligations — Water Supply—Upper and Lower Mills.—A landlord of several mills on a stream of water advertised them for lease, and represented that they had an abundant and regular supply of water. A party took one of the inferior mills, without any special stipulation as to the water. The landlord let the upper mill under the condition that the tenant of it should keep his sluices open at least three hours in the day. *Held* that the tenant of the lower mill was not entitled to withhold payment of his rent, or to claim damages from the landlord, on the ground of having, by the above condition, been deprived of a sufficient supply of water, reserving his claim of damages against the tenant of the upper mill, if he any had. *Tassie & Co.* v. *Mags. of Glasgow*, 1822, 1 S. 503. *Mags. of Glasgow* v. *Aitchison*, 1825, 1 W. & S. 153. Affg. 1 S. 506.

85. Landlord—Obligations—Water Supply—Obstruction by Upper Heritor with Sanction of Landlord.—In an action raised by a tenant of mills and water-power against his landlord and an upper heritor, who had acquired his right by a feu-contract granted by the landlord subsequent to the date of the pursuer's lease, for damage alleged to have been done to his right to water by obstructions erected by the upper heritor, as was averred, with the landlord's sanction and authority, *held* that as the feu-contract admittedly reserved the tenant's rights, the averments of sanction by the landlord were irrelevant to infer liability on his part. *Gardner* v. *Walker & Donald*, 1862, 24 D. 1430; 34 J. 600.

86. Landlord—Obligations—Possession—Warrandice—Subtenant—Title to Sue.—A tack was granted to the tenant, "his heirs, assignees, and subtenants," with warrandice to him and "his foresaids." The tenant subset the farm with absolute warrandice, but without any assignation to the warrandice in the principal lease, and the principal lease was reduced, as *ultra vires* of the landlord. *Held* that the subtenant had no title to bring an action of damages against the landlord under the warrandice. *Maxwell* v. *D. of Queensberry's Exrs.*, 1831, 5 W. & S. 771. Revg. 5 S. 935; 2 Fac. 668.

87. Landlord — Obligations—Repayment of Expenditure by Tenant.—A landlord let a farm for twenty-one years, on condition *inter alia* of the tenant expending £1100 in erecting a steading, to be repaid at the end of the lease. The tenant laid out £600, and within three years became bankrupt and fled the country; decree of removal was pronounced, and it did not appear that the landlord was *lucratus*. *Held*, in a question with the creditors of the tenant, that the landlord was not liable to repay the £600. *Morton* v. *Lady Montgomerie*, 1822, 1 S. 344.

88. Landlord — Obligations — Improvement Expenditure—Application by Tenant to Ascertain Sufficiency of Operations.—A landlord bound himself in a lease to expend a certain sum in drainage operations upon the farm, the tenant agreeing to pay interest. Operations involving the expenditure of a large part of the stipulated sum having been executed, the tenant petitioned the sheriff for a remit to ascertain the sufficiency and utility of the work already done, and to have the landlord *ordained* to expend the remainder of the stipulated sum at the sight of a judicial inspector. *Held* that this would be an undue interference with the wide discretion given to the landlord by the lease, and petition *dismissed*. *M'Beath* v. *Sinclair*, 1869, 41 J. 441.

89. Landlord — Obligations — Employment for Tenant's Horses and Men.—Special question as to a claim of damages made by a tenant on account of the landlord not finding full employment for three horses and men, which the tenant was taken bound to keep at the landlord's command. *Russell* v. *Freen*, 1835, 13 S. 752; 10 Fac. 486.

90. Landlord — Obligations — Discharge by Tenant of Claims—Construction.—An outgoing tenant rendered to the landlord a detailed account of claims, and appended a receipt for the sum, "as the amount of my claims as outgoing tenant of the farm of Castlemains; and the said" (landlord) "is hereby discharged of said claims accordingly." *Held* that this was a specific discharge applicable only to the particular items to which it was appended, and did not imply an abandonment of any other claims which the tenant might have against the landlord. *M. of Tweeddale* v. *Hume*, 1848, 10 D. 1053.

91. Landlord — Obligations — Toll-Bar—Shutting up Road.—In an action of damages by the tacksman of a toll-bar against the road trustees, for wrongfully shutting up one of four roads, after letting the toll-duties thereon to him, verdict for the pursuer. *Murray* v. *Douglas*, 1837, 15 S. 890.

92. Landlord — Obligations — Toll-Bar—Mora.—The tacksman of toll-dues raised an action against the road trustees, concluding partly for repetition of rent paid, and partly for damages, in respect of alleged non-implement of obligations undertaken by the trustees in the articles of roup, under which he had become tacksman. *Held* that the stat. 1 and 2 Will. IV. c. 43, s. 118, did not reach such action, and that the right to insist was not cut off, although more than six months had elapsed from the date of the wrong complained of before raising the action. *Sommerville* v. *Gordon*, 1842, 5 D. 383; 15 J. 171.

93. Landlord — Obligations — Compensation to Tenant—Fallow—Common Law.—By a lease, a portion of the land during the

last year of the lease was to be reserved to the landlord for fallow and green crop, and for which the tenant was to receive merely 10s. per acre for ploughing. *Held* that the rights of parties being thus settled by the contract, the tenant could claim no additional compensation for the fallow, as at common law. *Shireff* v. *Lord Lovat*, 1854, 17 D. 177; 27 J. 66.

94. Landlord—Obligations—Interdict by Neighbour.—A bleacher obtained right from the tenant of a farm, for an annual payment, to carry off the water on the farm in any direction he pleased, but without absolute warrandice. He was interdicted from leading it off in a particular direction by a neighbouring proprietor, whose right to interdict him must have been known to the bleacher. *Held* not entitled to recover damages from the tenant. *Reid* v. *Shaw*, 1822, 1 S. 334.

95. Landlord — Obligations — Counter-Claims—Compensation.—*Held* that a liquid claim by a tenant for the price of stock transferred by valuation to a landlord in terms of a lease, could not be compensated by illiquid and disputed claims at the landlord's instance. *Macrae* v. *Gordon*, 1842, 4 D. 1310; 14 J. 423.

96. Landlord — Obligations — Transmission against Representatives.—In a lease of a farm, the incoming tenant bound himself to pay to the outgoing tenant any sums he might be entitled to for meliorations; and the landlord bound himself, his heirs and successors, in respect thereof, to take the buildings on the farm at the expiry of the lease, on a valuation not exceeding a certain sum. The landlord having died during the currency of the lease, *held* that the landlord's obligation transmitted against his general representatives. *M'Gillivray's Exrs.* v. *Masson*, 1857, 19 D. 1099; 29 J. 530.

97. Landlord — Obligations — Allowance to Tenant to Build—Liability to Builder.—A landlord who had agreed to allow his tenant a certain sum to build houses, *held* not liable to the builder (on the failure of the tenant) for a larger sum, although his agent was present at the bargain between the builder and tenant. *Turnbull* v. *M'Dowall*, 1812, Hume 858.

98. Landlord—Obligations — Glass-Work—Erection of "Cutting-Shop"—Usage of Trade.—In an action of damages by the tenants of a glass-work against the landlord, who had by the lease agreed to erect a "cutting-shop," but refused to erect a steam-engine house and stalk as accessories thereof,—verdict for the pursuer, on evidence that, by the usage of trade, the understanding was, that an engine-house and stalk were comprehended under the term "cutting-shop." *Watson* v. *Kidston*, 1839, 1 D. 1254.

99. Landlord — Obligations — Enforcement of by Subtenant.—A landlord let a farm, excluding assignees, but with power to subset, and agreed, if required, to erect a steading; the tenant subset at a surplus rent, and assigned the surplus to a third party; the landlord, on the requisition of the subtenant, refused to erect the steading in respect of the insolvency of the principal tenant, and the subtenant thereupon abandoned the farm. *Held* that the assignees and heir of the principal tenant had a title to insist on all the clauses of the lease being fulfilled by which the subrent might be increased. *M'Guffog* v. *Agnew*, 1822, 1 S. 342.

100. Landlord—Obligations—Machinery—Loss by damnum fatale.—A lease of a mill stipulated that within two years the tenant should spend not less than £800 in repairing, renewing, and adding to the machinery, and thereafter maintain it in good repair, and on his leaving the whole machinery so renewed in good working order, the proprietor should be bound to pay him £400 at the end of the lease. The tenant at the commencement of his lease spent upwards of £800 on the machinery. During the currency of the lease the mill and machinery were destroyed by fire, the machinery being at that time in first-rate working order, and worth more than £800. *Held* that the tenant having fulfilled his obligations, his inability, in consequence of a *damnum fatale*, to hand over the machinery to the landlord did not relieve the landlord from his obligation to pay the stipulated £400. *D. of Hamilton's Trs.* v. *Fleming*, 1870, 9 M. 329; 43 J. 155.

101. Landlord—Obligations—Non-Implement.—Damages awarded to a tenant against a landlord for non-implement of an obligation in a lease. *Stewart* v. *E. of Minto*, 1823, 2 S. 479.

102. Landlord—Obligations—Non-Implement—Liability.—Landlord *held* not liable in immediate implement of the obligations come under by him in a lease, which was to fall in the event of a party abroad not signing it within two years. *Galloway* v. *M'Pherson*, 1830, 8 S. 539.

103. Landlord—Obligations—Obligation by Tenant — Implement. — A landlord became bound to pay the tenant £65 on his producing vouchers of expenditure to that extent on the buildings of the farm. Before the buildings were executed, the landlord allowed the tenant to retain £65 out of his rent, on condition that the buildings were proceeded with the next spring. After the lapse of a year or two the landlord brought an action concluding alternatively for production of the vouchers or repayment of the £65. Objection to the competency of the action, that the only conclusions which the landlord was entitled to insist in were for damages, or to enforce implement, *repelled*. *Dods* v. *Fortune*, 1857, 19 D. 275; 29 J. 130.

104. Landlord — Obligations — Inserted in Lease by Agent—Ultra vires.—After a draft lease of a mill was approved of by both parties, it was extended during the landlord's temporary absence from this country by his

agent, who inserted a clause binding the landlord to make repairs on the mill, and the lease was subscribed by the tenant; but the landlord, on his return, refused to sign it until this clause was deleted. *Held* in an action of implement at the tenant's instance, that there had been no concluded contract between the parties, seeing that the tenant had failed to establish that the agent was authorised to insert the clause. *Dallas* v. *Fraser*, 1849, 11 D. 1058; 21 J. 404.

105. Landlord — Obligations — Upkeep of Embankment of Loch.—The landlord of a mill and loch, from which it was supplied with water, is, in a question with the tenant, not bound to keep up an embankment on the loch; but having erected a weir to avoid the risk of injury by the bursting of the loch, *held* that he must either remove it, or make it of such a height as to keep the loch at its former level. *Dudgeon* v. *M'Leod*, 1830, 8 S. 349.

106. Landlord — Powers — Access to Shrubbery Let to Tenant.—*Held* that the proprietor of a house with a garden and shrubbery attached to it, had not, during the occupancy of a tenant to whom the subjects were let, a right of access to the shrubbery, in order to prune the bushes, shrubs, and plants, to dress the ground, and to repair the fences. *Baxter* v. *Paterson*, 1843, 5 D. 1074.

107. Landlord—Powers—Alterations on Tenement. — The tenants of the third and fourth flats of an urban tenement enjoyed for several years, in common with the tenants of the two lower flats, the exclusive use of the principal stair and relative back stair leading to the upper flats, and the exclusive use of a water-closet at the top of the principal stair. The proprietor having built a new tenement on the immediately adjoining area, *held* that the tenants of the upper flats were entitled to interdict him from removing the water-closet, and striking out a door at the side thereof in the wall of the principal staircase, for the purpose of obtaining access to the new tenement by the principal staircase and back stair. *Begbie & Co.* v. *Frame*, 1857, 20 D. 81; 30 J. 52.

108. Landlord—Powers—Alterations on Tenement.—A landlord let as separate tenements a street flat and a sunk area. Long before the entry of the tenant of the street flat, an ornamental front had been put on the shop in the sunk area. The landlord procured a warrant from the dean of guild to substitute for this another of the same height, but projecting three feet from the wall. *Held* that the tenant of the street flat was entitled to prevent the proposed alteration. *Blanc* v. *Greig*, 1856, 18 D. 1315; 28 J. 668.

109. Landlord — Powers — Break — Singular Successor.—A landlord stipulated in a lease for "a break at the end of five years in favour of M. R. (the landlord), in case he chooses to take the whole or a part for himself or his brother." *Held* that this right was not personal merely to the landlord, but was available to a purchaser who sued in name of the landlord. *Ross* v. *M'Finlay*, 1807, Hume 832.

110. Landlord—Powers—Feuing.—In a lease of an arable farm, situated near a small town, the landlord reserved right to feu the whole or any part thereof, allowing recompense in proportion to the rent payable for the whole. He feued part of the farm by a feu-disposition for a principal sum, with a *reddendo* of one shilling. In an action of removing brought against the tenant, decree was *granted*. *Brisbane's Trs.* v. *Lead*, 1825, 1 W. & S. 68.

111. Landlord—Powers—Grass Park.—It is competent for the landlord of a grass park, let for a year from Whitsunday, to enter the park at or about Candlemas thereafter, and deposit soil within it for the purpose of dressing it for the ensuing season, without leave of the tenant, who is not entitled to graze it at that period of the year. *Hamilton* v. *Cuninghame*, 1830, 8 S. 955; 5 Fac. 790.

112. Landlord — Powers — Obscuring Light to Tenant.—*Question* as to the right of a landlord possessing the street floor to make a plat or communication from the street, having the effect of obscuring the light of his tenant's floor below. *Brown* v. *Robertson*, 1822, 1 S. 448.

113. Landlord—Powers—Resumption of Land.—Where there is a clause in a lease reserving right to the landlord to resume possession of part of the farm if he incline to do so, he is not bound to explain his reasons for exercising that privilege. *E. of Rosebery* v. *Brown*, 7 Mar. 1811, F. C.

114. Landlord—Powers—Resumption of Land—Opposition by Tenant's Trustee.—By a condition of the lease of a distillery it was stipulated that, in the event of the tenant's bankruptcy, the lease should be voided and possession ceded to the landlord; and the tenant became bankrupt, and the trustee on his estate opposed the landlord's resumption of possession. *Held* in an action at the landlord's instance, that averments in regard to loss sustained in consequence of this opposition were relevant to support a conclusion for damages against the trustee. *Richardson* v. *Spiers' Trs.*, 1835, 13 S. 972.

115. Lease—Articles of Set—Singular Successors. — A purchaser of lands *held* bound by articles of set signed by the former landlord and the tenantry, and containing a clause declaring that they should be as effectual as if engrossed in the leases, and according to which articles the lands were let, although leases were also granted, and they made no reference to the articles. *Macra* v. *M'Kenzie*, 1828, 6 S. 953.

116. Lease—Assignation—Approval of Assignees by Landlord—Liability of Tenant till Approval Obtained.—A lease was granted to a tenant and assignees, declaring that the assignees must be approved of by the landlord, or grant satisfactory security, and the tenant assigned. *Held* that it was the duty of the

tenant to deliver, and not of the landlord to require, this security, and therefore that the tenant was liable for arrears of rent and damages for miscropping. *Gemmel* v. *Low*, 1823, 2 S. 563.

117. Lease—Assignation—Presumption that Condition of Lease Known to Assignee.—A party who had made an offer for and obtained an assignation to a lease, must be presumed, in the absence of all proof, to have seen the lease, and to be aware of a restriction as to the power of subsetting. *Leechman* v. *Sievwright*, 1826, 4 S. 683.

118. Lease — Assignation — Sale of Machinery — Interim Execution. — Interim execution *refused* as to the sale of machinery under a lease, to which the court had preferred a trustee under a sequestration, in competition with an assignee. *Brock* v. *Cabbell*, 1823, 2 S. 291.

119. Lease — Assignation — Prior Sublease of Part of Lands — Liability of Cedent. — *Held* a relevant ground for an action of damages at the instance of the assignee of a lease, that the cedent had concealed the existence of a sublease of part of the lands, or had misrepresented its nature. *Duncan* v. *Cowie*, 1841, 4 D. 47 ; 14 J. 31.

120. Lease—Assignation—Exclusion of Assignees and Subtenants—Nomination by Tenant of Second Son as Heir—Objection by Landlord and by Eldest Son.—A landlord granted a lease secluding assignees and subtenants without his consent for thirty-eight years, and the lifetime of the tenant if then alive, "or of the heir or heirs" of the tenant "who shall at the end of the said thirty-eight years have succeeded to, and shall then be in possession of, the said lease"; and the tenant died before the lapse of the thirty-eight years, leaving a deed of settlement by which he nominated his second son, to the exclusion of his eldest, to be his heir. *Held* that the landlord was entitled to remove him, reserving any claim competent to the eldest son; but thereafter the landlord having consented to accept him as tenant, *held* that he had right to the lease, although the eldest son objected. *Cunningham* v. *Greive*, 1804, 4 Pat. 571 ; 1806, 6 Pat. 16. Affg. 8 Mar. 1803, F. C.

121. Lease—Assignation—Exclusion of Assignees—Management Left to Another.—A tenant whose lease excludes assignees and subtenants, forfeits it if he leaves the kingdom permanently and commits the management of his farm to another. *E. of Dalhousie* v. *Wilson*, 1 Dec. 1802, F. C.; M. 15311. *Arnot* v. *Bell*, 1805, Hume 576. *Monro* v. *Miller*, 11 Dec. 1811, F. C. *Watson* v. *Douglas*, 13 Dec. 1811, F. C. *Stirling* v. *Miller*, 29 June 1813, F. C. *Sydserff* v. *Todd*, 8 Mar. 1814, F. C.

122. Lease — Assignation — Exclusion of Assignees — Possession by Manager.—*Question* whether, under a lease in which assignees and subtenants were excluded, but the residence of the tenant was not required on the farm, it was competent for the heir of the tenant, on his death, to take up the lease *cum beneficio inventarii*, and possess by a manager for behoof of the tenant's creditors. *E. of Galloway* v. *M'Hutcheon*, 1807, 5 Pat. 169. Affg. 6 June 1803, F. C.

123. Lease — Assignation — Exclusion of Assignees and Subtenants—Consent of Landlord.—Under an exclusion of assignees and subtenants "without the landlord's consent," he is not bound to state any reasons for withholding his consent. *Muir* v. *Wilson*, 20 Jan. 1820, F. C.

124. Lease — Assignation — Exclusion of Assignee — Joint-Tenant — Consent — Contract. — A, a tenant in a lease, which excluded assignees and subtenants, formed a copartnery with B, and arrangements were set on foot for obtaining the consent of the landlord to B being assumed as a joint-tenant under the lease. In an action by the landlord against A and B as joint-tenants, *held*, that there was never any concluded agreement between the parties sufficient to infer liability against B as joint-tenant. *Wallace* v. *Wingate & Bruce*, 1867, 5 S. L. R. 42.

125. Lease — Assignation — Exclusion of Assignees, etc.—Bankruptcy of Tenant.—Under a clause in a lease, "secluding all assignees and subtenants, legal and conventional, and all factors or other persons whatsoever," *held* that the tenant having become bankrupt and gone to America, and his estate sequestrated, the lease was void. *Young's Trs.* v. *Anderson*, 1809, Hume 843.

126. Lease — Assignation — Exclusion of Assignees — Right of Heir-at-Law of Tenant — Declarator — Title to Sue. — The tenant under an agricultural lease for nineteen years to A and his heirs, "but excluding and strictly debarring subtenants and assignees," died, leaving a settlement conveying to trustees generally, and without special reference to the tack, his whole estate and effects, heritable and moveable. The heir-at-law claimed the remainder of the lease, and the landlord intimated to the trustees that he repudiated any claim by them, and that the heir-at-law was the only person who could claim it. *Held* that the heir-at-law had a title to pursue a declarator of right to the lease, without the concurrence of the landlord as a pursuer in the action, and that his claim was well founded. *Murdoch* v. *Murdoch's Trs.*, 1863, 1 M. 330 ; 35 J. 206.

127. Lease — Assignation — Exclusion of Assignees—Removing—Personal Bar.—A lease secluded assignees. The tenant on his death assigned the lease to his widow. *Held* that the landlord having taken rent from her for three years could not remove her. *Aglionby* v. *Watson*, 1809, Hume 845.

128. Lease — Assignation — Exclusion of Assignees—Effect of.—A clause in a lease excluding assignees is pleadable only by the landlord; and therefore the heir-at-law of the tenant found not entitled to challenge

an assignation granted by the tenant to an illegitimate son. *Hay & Wood*, 8 Dec. 1801, F. C.; M. 15297. *M'Coag* v. *M'Sporan*, 1803, Hume 813.

129. Lease — Assignation — Consent of Landlord.—A farm was let to a tenant, his heirs and assignees, the assignees being always such as the landlord should be pleased with, and approve by writing. The lease was renewable for nineteen years, on the demand of the tenant, at the expiry of every period of nineteen years, for ever. During the currency of a renewed lease, the landlord, at the tenant's request, to enable him to pay his father's debts, gave the tenant a general written assent to assign or sell the lease, but the tenant did not then avail himself of that permission. At the expiry of that lease the tenant demanded a renewal; but the landlord withheld it, on the tenant intimating that, notwithstanding the provision as to assignees, he would now hold himself entitled to assign, without the landlord's control or interference. *Held* (1) that the landlord was not entitled to withhold the renewal of the lease; (2) that the assent given at one particular time to assign could not be extended to a future period, when the circumstances under which it was given were changed, and in particular that such consent was not binding on the heirs of the landlord who gave it; (3) that the landlord was not bound to justify or explain any refusal to approve of a proposed assignee, but under reservation of the tenant's right to seek redress in case at any future time the landlord should capriciously exercise his power of refusal. *Wight* v. *E. of Hopetoun*, 1855, 17 D. 364; 27 J. 158.

130. Lease — Assignation — Joint-Tenancy — Assignation to One of Joint-Tenants — Bankruptcy of Assignee — Restoration of Possession. — A lease was granted to three tenants, excluding assignees; two of the tenants, without consent of the landlord, assigned their interest to the other tenant, and he was deprived of possession during his absence from Scotland, and his estates were sequestrated. Circumstances in which *held* not entitled, in a question with the landlord and the co-tenants, to be restored to possession, although he offered caution for implement of all the obligations incumbent on him. *Taylor* v. *Taylor*, 1826, 2 W. & S. 101. Affg. 4 S. 450.

131. Lease — Assignation — Exclusion of Assignees, etc. — Interdict. — A tenant under an agricultural lease, which contained prohibitions against assigning and subletting, but allowed the tenant to let the mansion-house, entered into an arrangement under which a third party was to cultivate the farm with his own servants, horses, and implements, and purchase the seed, but without any agreement as to remuneration to be given to him for cultivating the farm. The tenant himself removed from the farm with his wife and family, and he also removed all his stock. *Held* that this arrangement was cession of possession by the tenant, and appeared designed to defeat the terms of the lease excluding subtenants and assignees: therefore interdict granted at the instance of the landlord against the tenant subletting or assigning, and against the third party from occupying or cultivating the farm in any manner of way. *Hamilton* v. *Somerville*, 1855, 17 D. 344.

132. Lease — Assignation — Bankruptcy of Tenant—Liability of Assignees to Tenant's Trustee.—Circumstances in which parties who had entered into possession of farms held by a bankrupt under leases, secluding assignees and subtenants legal and voluntary, were *held* not liable to account to the trustee on his sequestrated estate for the profits accruing therefrom. *Roberts* v. *Wallace*, 1843, 5 D. 760; 15 J. 348.

133. Lease — Assignation — Consent of Landlord.—A lease was granted to a tenant, his heirs and assignees,—such assignees to be approved of by the landlord. *Held* that the landlord was not entitled to impose new and more ample conditions in his own favour in giving his consent or approval. *Valentine* v. *Ramsay, Irvine, etc.*, 1791, 3 Pat. 287.

134. Lease—Assignation—Mortis causa Deed.—A deed by a tenant of the nature of a trust assignation *mortis causa*, but in part acted on during the lifetime of the tenant, *held* to be an evasion of a prohibition against assigning a lease, and set aside accordingly. *Porter* v. *Patterson*, 1813, Hume 862.

135. Lease—Assignation—Exclusion of Assignees and Subtenants—Option with Landlord — Bankruptcy of Tenant. — A tenant under a lease excluding assignees and subtenants, without the consent of the proprietor, was sequestrated. The landlord gave his consent to the judicial assignation in favour of the trustee, on condition of his renouncing the lease in terms of an arrangement by which the landlord was to pay a certain sum for the stock, and £10 for the lease. The transaction was approved by the accountant in bankruptcy and by the creditors, but was challenged by the tenant, on the ground that the lease was not carried by the sequestration, that a conditional acknowledgment of the trustee as tenant was ineffectual, and that a private sale of the estate under circumstances which implied that there could be but a single offer was not a compliance with the provisions of the Bankrupt Act. *Held*, by the whole court, that the exclusion of assignees only operated in favour of the landlord, and did not prevent the lease from vesting in the trustee, provided the landlord did not object; that the acknowledgment was effectual, and that there was no infringement of the provisions of Bankrupt Act. *Dobie, etc.* v. *M. of Lothian*, 1864, 2 M. 788; 36 J. 393.

136. Lease—Assignation—Retrocession—Consent of Landlord.—A lease excluded assignees and subtenants, except with the landlord's consent; and an assignation was granted by the original tenant, with the land-

lord's consent, *ex facie* absolute, but truly in security of debt. *Held* that a retrocession could not be made without the landlord's consent, and that the assignee remained bound to him, notwithstanding a decree of reduction of the assignation obtained by the trustee on the tenant's sequestrated estate, as the result of a compromise with and for a sum paid to the assignee. *Ramsay* v. *Commercial Bank*, 1842, 4 D. 405; 14 J. 152.

137. Lease—Assignation—Discharge of Cedent.—A tenant having, in terms of a permission in his lease, assigned it to one of his sons, and the landlord having, by his acts and deeds, approved of the assignee, the liability of the original tenant and of his representatives *held* discharged. *Skene* v. *Greenhill*, 20 May 1825, F. C.; 4 S. 25.

138. Lease—Assignation—Exclusion of Assignees, etc.—Bankruptcy of Tenant.—A bankrupt obtaining a *cessio*, ordained to assign to his creditors a lease, though it contained a clause excluding assignees and subtenants. *Martin* v. *His Creditors*, 17 Dec. 1808, F. C.

139. Lease—Break—To whom Available.—By a lease of a mansionhouse and other subjects, granted by a trustee for creditors, a break was stipulated in favour of the "proprietor," to be exercised in the event only of his resolving to enter into the natural possession. *Held* that it was not available to the trustee, although he proposed to enter personally to the possession. *Davidson* v. *Girvan*, 1838, 16 S. 1125.

140. Lease—Constitution—Draft Lease—Rei interventus.—*Held* that a draft lease of a farm had been validated *rei interventu*, so as to constitute a valid lease for nineteen years. *Bathie* v. *Lord Wharncliffe*, 1873, 11 M. 490; 45 J. 318.

141. Lease—Constitution—Draft Minute Signed by Tenant.—*Held* that a draft minute, supplementary to a lease, although subscribed by the tenant, being admitted to have been only intended as a draft, was not binding on him. *Sinclair* v. *M'Beath*, 1868, 7 M. 273; 41 J. 165.

142. Lease — Constitution — Holograph Lease — Rei interventus — Possession. — Terms of a holograph lease, which, although of an unusually imperfect and defective character, were *held* to contain all the essentials of a lease, and to be sufficient if followed with possession. *Burnett* v. *M'Kimming*, 1835, 14 S. 74; 11 Fac. 53.

143. Lease — Constitution — Long Lease—Parole Evidence.—*Held* that a long lease, which was claimed on as giving an ownership qualification, was not instructed by the production of receipts for "long tack-duty" which did not specify the endurance of the tack, and entries in the landlord's collection lists for forty-seven years, and that parole evidence was incompetent. *Craig* v. *Bell*, 1871, 10 M. 8; 44 J. 14.

144. Lease — Constitution — Licence to Take Stone.—An agreement between a railway contractor and a landed proprietor by which the former was allowed to take building stone from any part of certain lands at a certain rate per superficial yard, *held* not to be a lease. *Brand & Son* v. *Bell's Trs.*, 1872, 11 M. 42; 45 J. 34.

145. Lease—Constitution—Letters—Rei interventus—Singular Successor.—A letter by a factor to a subfactor, stating the terms of a lease to a tenant for nineteen years, and directing him to put the tenant into possession, which he did, and delivered the letter to the tenant, who thenceforth paid the rent specified in the letter,—*held*, in a question with a purchaser, to constitute an effectual lease. *Arbuthnot* v. *Reid*, 1804, Hume 815.

146. Lease — Constitution — Correspondence—Entries in Rental Books—Construction—Destination.—Circumstances in which *held* from correspondence and entries in rental book, etc., that a valid lease had been granted for a period of years, and that it was descendible to heirs. *Gray* v. *Low*, 1859, 21 D. 293; 31 J. 157.

147. Lease — Constitution — Memorandum — Rei interventus — Possession Prior to Term of Entry.—A memorandum of terms for a lease was signed by the parties. It made reference to certain regulations applicable to the landlord's whole estate, but it was held that it did so only as concerning drains, and that the reference did not embrace a regulation to the effect that heirs-portioners were excluded from succession. *Held* that by the memorandum an agreement for a lease was entered into, to which the three daughters of the tenant were entitled to succeed as heirs-portioners. Can possession before the term of entry, specified in an informal lease, validate it *rei interventu*? *Pratt* v. *Abercromby*, 1858, 21 D. 19; 31 J. 9.

148. Lease — Constitution — Missives — Rei interventus. — A tenant addressed a missive offer for a nineteen years' lease to the landlord, who wrote a letter to his factor desiring him to accept the offer, and extend a tack upon certain conditions, which were never fulfilled. The tenant was allowed to enter to the premises, and to possess them for six years, but the possession was not, in the circumstances, referable to any finished contract for a lease. *Held* competent to remove the tenant, at the end of the six years, as a tenant-at-will. *Cairns* v. *Gerrard*, 1833, 11 S. 737.

149. Lease — Constitution — Missives — Reference to Oath.—A landlord *held* not entitled to refer to the oath of a party alleged to be his tenant, whether a lease for a term of years, at a higher rent than he had accepted for ten years from the person in possession of the farm, had been constituted by missives defective as to the term of entry and period of endurance. *Thomson* v. *Young*, 1828, 7 S. 32.

150. Lease — Constitution — Missives — Singular Successors.—The proprietor of an urban tenement granted a missive letter in 1795 to a husband and wife, signed by his initials before witnesses, "to continue you and your wife as tenants" during their lives; and they accordingly continued in possession. *Held*, in a question with a singular successor in 1801, that the missive letter was binding and effectual. *Macarthur* v. *Simpson*, 6 July 1804, F. C.; M. 15181.

151. Lease — Constitution — Missive — Duration not Specified—Rei interventus.—A missive of lease, in which the term of endurance was not specified, *held* good only for a year, no sufficient *rei interventus* having taken place. *Clark* v. *Lamont*, 27 Jan. 1816, F. C.

152. Lease — Constitution—Improbative Missive—Rei interventus. — A missive of lease holograph of one of the parties and signed by both, but unattested, containing no term of entry, and not followed by *rei interventus*, *held* invalid as a lease. *Sinclair* v. *Weddell*, 1868, 5 S. L. R. 601, 664.

153. Lease—Constitution—Missive Unsigned by Tenant — Rei interventus. — A missive of lease, signed by the landlord but not by the tenant, *held* binding on the tenant, he having thereupon taken possession. *M'Pherson* v. *M'Pherson*, 12 May 1815, F. C.

154. Lease — Constitution — Informal Missive — Rei interventus. — An informal missive of lease *held* to have been validated by *rei interventus* on the part of the landlord, so as to prevent the tenant from resiling. *Spencer Sutherland & Co.* v. *Hay*, 1845, 8 D. 283; 18 J. 133.

155. Lease — Constitution — Informal Missive—Rei interventus.—A tenant who possessed under a lease, which was to expire at Whitsunday and Martinmas 1805, obtained, on 7th January 1804, an informal missive of lease for nineteen years from expiration of the former; and thereupon erected a small barn, and made other improvements on the farm, prior to expiration of the lease, under the eye of the proprietor. *Held*, in a question with his heir, that the tenant was entitled to enjoy possession under the informal missive, on the faith of which the improvements were held to have been made. *Murdoch* v. *Moir*, 18 June 1812, F. C.

156. Lease — Constitution — Informal Missives.—Circumstances in which a party who founded on an irregular missive of lease was *held* not entitled to possession of heritable subjects. *Gower* v. *M'Kay*, 1834, 13 S. 177.

157. Lease — Constitution—Improbative Lease—Rei interventus.—A minute of lease which was improbative, and not followed by possession, *held* not to entitle the tenant to insist for implement, nor damages for non-implement. *Sprout* v. *Wilson*, 1809, Hume 920.

158. Lease — Constitution — Informal Lease—Rei interventus—Validity against Singular Successors.—*Held* that an informal lease, upon which no possession had followed, was not good against singular successors. *Cameron* v. *Cameron*, 1796, 3 Pat. 474.

159. Lease — Constitution—Improbative Obligation to Pay Meliorations—Rei interventus.—An improbative obligation to pay meliorations is not effectual without *rei interventus*. *Barclay* v. *E. of Fife*, 1829, 7 S. 708; 4 Fac. 985.

160. Lease — Constitution — Minute of Lease—Terms—Personal Bar.—A minute of lease for nineteen years was executed in 1825, which contemplated a fuller minute and a rise of rent in 1831, and a new mode of computing that rent; in 1828 a fuller minute was extended, specifying, *inter alia*, the precise mode of computing the increase of rent in 1831; and the tenant signed it and took a copy of it, and made no objection to it till 1831, when he averred that it materially varied from the minute of 1825, and that he had not sufficiently adverted to the precise terms of the document. *Held* that the minute of 1828 was binding. *Carruthers* v. *Thomson*, 1836, 14 S. 464.

161. Lease—Constitution—Offer—Parole Evidence.—A party having made an offer for a lease of certain subjects and given a reference as to his responsibility, *held* that this was not a concluded agreement and that parole evidence was inadmissible to prove that it was. *Morrison & Brechin* v. *M'Kirdy*, 1841, 14 J. 100.

162. Lease — Constitution—Offer—Duration not Specified — Rei interventus. — A landlord advertised a farm to let for a term of eighteen years. A party made an offer of lease in reference to the advertisement, containing various conditions necessarily indicating a lease of considerable endurance, but the precise term was not specified. The offer was accepted; and considerable repairs were made, and possession for some years followed. *Held* that a valid contract of lease for eighteen years had been completed, though no written lease was ever extended, and the missive offer did not *in gremio* specify any definite term of endurance. *Russell* v. *Freen*, 1835, 13 S. 752; 10 Fac. 486.

163. Lease — Constitution — Offer — Rei interventus — Possession. — Tenants made written offers for fifteen years' leases of their farms, upon the footing of making improvements and paying only a small increase of rent. No written acceptance was returned to their offers, nor probative leases gone into; but they entered into possession, made improvements, and paid rent for nine years, when they were warned to remove. In an action of removing, *held* that the leases or agreements for leases did not expire until the end of the fifteen years. *Keir & Others* v. *D. of Atholl*, 1815, 6 Pat. 130.

164. Lease — Constitution — Offer — Rei interventus.—A party offered to take a lease of a quarry, the offer to be binding "till the 20th current." The landlord did not accept within that time, but allowed him to begin to clear

the superincumbent soil, "till the business relative to the tack was brought to a conclusion." *Question*, whether there was a concluded lease. *Hamilton* v. *Dixon*, 1824, 3 S. 242.

165. Lease — Constitution — Offer — Rei interventus.—Circumstances not sufficient to imply the existence of a written offer as the title of a subtenant's possession. *Fraser* v. *Fraser*, 1833, 11 S. 565.

166. Lease — Constitution — Written Offer and Circumstances Inferring Acceptance—Rei interventus.—*Held* that a valid and binding lease for a term of years had been constituted by a written offer from the intending tenant stating rent and ish, combined with circumstances, both before and after its date, which inferred acceptance by the landlord or his agents, and followed by such outlay on the tenant's part as amounted to *rei interventus*. *Forbes* v. *Wilson*, 1873, 11 M. 454; 45 J. 276.

167. Lease—Constitution—Offer to Let—Whether Binding on Landlord.—A letter by a landlord, promising to a party the first and last offer of a farm, *held* not binding so as to compel him to let the farm, or subject him in damages. *Lockwood* v. *Davidson*, 1825, 4 S. 28.

168. Lease — Constitution — Offer — Acceptance—Consensus in idem placitum.—A party made offer in August for a farm by a letter addressed to the landlord, "on conditions explained by you." The landlord's agent sent a draft lease to the offerer, with a note stating that the rent in the lease was less than was agreed on, but the reason of this the landlord would explain when they met. The offerer's agents, in October, and some time after a renewed application by the landlord's agents requesting the lease to be returned, did return it to be extended; but the landlord's agent then proposed to insert further conditions, and reduce to writing certain matters which had been verbally agreed on. In the meantime, the offerer had made purchases at the displenishing sale, and ordered implements for the farm. The landlord applied for interdict against his taking possession of the farm. *Held* that there was no *consensus in idem placitum*, and therefore no concluded though informal contract between the parties, which could be validated *rei interventu*. *Fraser* v. *Brebner*, 1857, 19 D. 401.

169. Lease — Constitution — Offer and Acceptance—Conditional Acceptance.—A party made a written offer for a farm. The landlord sent a written acceptance, under certain conditions and stipulations. In an action by the offerer, founding on the offer and letter of acceptance as forming a contract of lease, *held* that there was no concluded agreement. *Opinions*, that if such letters had been followed by possession the offerer might have been held to have acquiesced in the stipulations contained in the landlord's acceptance, so as to make a concluded contract. *Waldie* v. *Gordon's Trs.*, 1867, 5 S. L. R. 40.

170. Lease — Constitution — Offer and Acceptance — Conditional Acceptance. — *Held* (1) that an offer "to take a lease of the corn and flour mills, and pigs' houses and boilings, etc., for the period of ten years, entry at Whitsunday first, at the yearly rent of £80 sterling," followed by acceptance "of your offer for my mill, subject to lease drawn out in due form," constituted a lease of the premises mentioned in the offer, there being no doubt as to the meaning of the parties, although the acceptance did not in terms precisely meet the offer; and (2) that the words "subject to lease drawn out in due form" did not import a condition into the acceptance, the landlord being entitled to require a formal lease if a valid contract was constituted by the missive. *Erskine* v. *Glendinning*, 1871, 9 M. 656; 43 J 320.

171. Lease—Constitution—New Lease—Unsigned by Landlord.—A tenant holding a fourteen years' lease, and entering into possession in terms of it, *held* not entitled to found on an alleged new lease for nineteen years, granted during its currency, which, though signed by the landlord, was never delivered, and for which a stipulated grassum had never been paid. *Hamilton* v. *D. of Queensberry's Exrs.*, 1833, 12 S. 206.

172. Lease — Constitution — Unsigned Agreement—Rei interventus. — An agreement of lease between the factor of a landlord and a tenant, which was verbal, and afterwards written by the factor and delivered to the tenant, and possession given and enjoyed for several years, *held* binding, although not signed by either of the parties. *D. of Gordon* v. *Carmichael*, 1800, Hume 805.

173. Lease — Constitution — Unsigned Lease—Rei interventus—Possession.—An offer for a lease was made in writing by several joint tenants, and the landlord's factor wrote to the subfactor, through whom the offers had come, that the landlord had read the offers, would let the lands for the period named, but at a higher rent, and that various other points were not fixed. He afterwards wrote as to these, with instructions to get the lease drawn out on stamp and signed by the tenants. This was done, the rent being stated at the sum named by the landlord, and the lease was forwarded to him for signature; but he kept it for two years, and died without signing it. In the meantime, he had allowed possession to be taken by the tenants; and on the faith of it they had proceeded to make dykes and other improvements, and had paid two years' rent. *Held* that the lease was as effectual as if it had been signed by the landlord. *Stewart* v. *Countess Dowager of Moray*, 1773, 2 Pat. 317. Affg. M. 4392.

174. Lease — Constitution — Unsigned Lease — Rei interventus — Possession.—*Question*, whether a lease extended on stamped paper, but signed by neither party, would have been valid (but for special circumstances), in respect of possession having followed on it. *Girdwood* v. *Wilson*, 1834, 12 S. 576.

175. Lease — Constitution — Unsigned Lease — Rei interventus — Possession.—A tenant whose lease was signed only by the landlord, but who had possessed on the lease for forty years, *assoilzied* in an action of removing against him at the landlord's instance. *Carlyle* v. *Baxter*, 1869, 6 S. L. R. 425.

176. Lease — Constitution — Unsigned Entries by Landlord—Rei interventus.—A landlord gave notice of his intention to let his estate on new nineteen years' leases, in consequence of which several offers were made; whereupon he wrote a state specifying the names of those whose offers he accepted, and the rents, but without mentioning the duration. One of the entries referred to a tenant who had a current lease which was not to expire for a year, and for which the new rent was double the amount of the old. *Held* that the entry in the state, although signed by neither party, combined with payment of the new rent and possession, and the admission of the landlord that he had intended the lease to be for nineteen years, was effectual as a lease for that period, although he alleged that the tenant had made stipulations which put an end to such intention. *E. of Aboyne* v. *Ogg*, 1810, Hume 847.

177. Lease — Constitution — Entries in Rental Books.—*Question*, whether entries in the rental book of an estate, under which rents had been paid, constituted written leases, or were merely written evidence of verbal leases. *E. of Dalhousie* v. *Crokat*, 1868, 6 M. 659; 40 J. 341.

178. Lease—Constitution—Verbal Agreement—Accessory.—Bill of suspension passed to try the question, whether a duty-house, as accessory to customs, could be let by a verbal bargain for more than one year. *Greig* v. *Boyd*, 1827, 6 S. 250; 7 S. 592.

179. Lease—Constitution—Verbal Agreement—Rei interventus—Proof of.—In an action to have the defender ordained to grant a lease of 999 years, the pursuer alleged that a verbal bargain to grant such a lease had been entered into between his predecessor and the defender, and had been followed by *rei interventus*. He also contended that a receipt for a year's rent was sufficient to instruct the lease *scripto*. The court *refused* to allow a proof *prout de jure*; and also *held* that the receipt could not be regarded as constituting a written lease. *Gowan's Trs.* v. *Carstairs*, 1862, 24 D. 1382; 34 J. 700.

180. Lease—Constitution—Verbal Agreement—Rei interventus—Possession—Proof of.—*Held* that a verbal agreement to take furnished lodgings for sixteen months at a certain rate per month, which had been followed by possession, but by no other *rei interventus*, could not be proved *prout de jure* even to the extent of establishing a contract for a year. *Question* whether, if such an agreement were proved by writ or oath, it would be valid even for a year. *Fowlie* v. *M'Lean*, 1868, 6 M. 254; 40 J. 141.

181. Lease—Constitution—Verbal Agreement—Proof of—Letter to Third Party—Rei interventus.—In a suspension of a decree of removing against a tenant who had been in possession of a farm for several years without a written lease,—*held* (1) that a letter written by the husband of the proprietrix to the surveyor of taxes, for the purpose of enabling him to complete the valuation-roll, was equivalent to the writ of the proprietrix herself, and was competent evidence in proof of an agreement for a lease for nineteen years; (2) that in respect a verbal agreement to let the farm for nineteen years from Whitsunday 1856, which had been followed by possession and *rei interventus*, had been instructed *scripto*, the proprietrix was not entitled to remove the tenant. *Emslie* v. *Duff*, 1865, 3 M. 854; 37 J. 457.

182. Lease—Constitution—Verbal Agreement—Proof of—Rei interventus.—*Held* that a lease for three years, alleged to have been constituted by verbal agreement, followed by *rei interventus*, could not be proved by parole evidence; but that a reference to the oath of the alleged lessor was competent. *Opinion*, that a lease for a term of years may be constituted by verbal agreement, followed by *rei interventus*, but that the verbal agreement can be proved only by writing or oath of party. *Walker* v. *Flint*, 1863, 1 M. 417; 35 J. 253.

183. Lease—Constitution—Verbal Lease—Proof of.—Proof of a lease for nineteen years by witnesses is incompetent. *Neil* v. *E. of Cassillis*, 22 Nov. 1810, F. C. *Craig* v. *Bell*, 1871, 10 M. 8; 44 J. 14.

184. Lease—Constitution—Verbal Lease—Offer — Implied Acceptance.—A landlord intimated to a tenant possessing a verbal lease from year to year, certain new terms under which he was to be allowed to occupy for the succeeding year, and to which he was to object within eight days if he did not accede to them. *Held* that, having made no objection within the time specified, he must be taken to have consented. *Morrison* v. *Campbell*, 1842, 4 D. 1426; 14 J. 518.

185. Lease—Constitution—Verbal Lease—Rei interventus.—A tenant who had a verbal lease for thirteen years *held* not entitled to maintain possession as on a written lease, in respect of an entry by the landlord in his ledger of the rent, and a memorandum on the margin "$\frac{1802}{1817}$," which he deponed had reference merely to the intended duration of the verbal lease. *Maxwell* v. *Grierson*, 1812, Hume 849.

186. Lease—Constitution—Verbal Lease—Rei interventus.—In a question between a tenant and a subtenant, where the former attempted to remove the latter, *held* that although the subset was verbal for nineteen years, yet as the subtenant had paid a grassum and built a house, it was effectual for the whole period. *Macrorie* v. *M'Whirter*, 18 Dec. 1810, F. C.

187. Lease—Constitution—Verbal Lease—Rei interventus.—A verbal lease of arable ground to be converted into garden ground, for nineteen years, followed by such conversion at an expense of about £200, which could only be repaid by possession for several years, *held* binding on the landlord. *Campbell* v. *Dougall*, 1813, Hume 861.

188. Lease — Constitution — Right to Resile.—A person took a lease of certain premises on 7th June. He entered into possession and made certain alterations, but on 17th August intimated that he resiled unless the landlord would make certain alterations to remove alleged damp. *Held* that he could not resile. *Whitelaw* v. *Fulton*, 1871, 10 M. 27; 44 J. 37.

189. Lease—Constitution—Singular Successors—Entry on Building Lots on Advertised Terms—Rei interventus.—The town of Tobermory was founded towards the end of last century by the British Fisheries Society on land acquired by the society, and granted out in building lots advertised to be let on leases for ninety-nine years, renewable for ever on payment of a grassum, with certain privileges attached thereto, including a privilege of pasture on a piece of moor ground adjoining the village, for which a yearly sum by way of rent was charged in addition to the rent of each lot. A number of persons took lots on the advertised terms, and built houses thereon as required by the society, some of them subsequently obtaining formal leases embodying these terms, while others did not do so. *Held* that persons who had entered and possessed on the terms advertised by the society, whether with or without formal leases, had valid contracts of lease of their lots for the first period of ninety-nine years, with a right of pasture attached as a pertinent thereto effectual against singular successors of the society. *Campbell* v. *M'Lean*, 1870, 8 M. (H. L.) 40; 42 J. 392.

190. Lease — Constitution — Successive Leases—Effect—Singular Successors.—On the same day on which a lease for two years was executed, the same parties executed an agreement for a lease of ten years, to commence at the expiry of the lease for two years. *Held* that the two contracts stood on a different footing, and did not together constitute one lease for twelve years. *Question*: Is a prorogation of a tack during its currency effectual against a singular successor? *Birkbeck* v. *Ross*, 1865, 4 M. 272; 38 J. 147.

191. Lease — Constitution — Suspensive Condition.—A lease, duly executed, contained a provision "that the engines, rails, and other articles belonging to" the proprietor "are to be given over to and taken by the said lessees, conform to inventory of the same hereunto appended, and signed by both parties as relative hereto." No possession followed, and no inventory was prepared or signed, a dispute having arisen as to the extent of the subject let. In an action to compel the tenant to take possession and implement the contract, or alternatively for damages, *held* that the lease was not ineffectual on the ground that an inventory had not been signed, the signature of an inventory being, not a suspensive condition, but one of the obligations of the lease. *Steuart* v. *Neilsons*, 1864, 2 M. 817; 36 J. 406.

192. Lease — Construction — Duplicate Copies — Disconformity.—Conditions of an agricultural lease for fourteen years were written in duplicate (but no formal lease was extended), and bore to be between the tenant and the factor. The landlord's copy bore that there was to be a break at the end of seven years. The tenant's copy bore, in addition, the words, "optional to the tenant." Circumstances in which *held* (1) that in construing the lease, both copies were to be looked at; and (2) that the landlord was not entitled to put an end to the lease. *Grant* v. *Sinclair*, 1861, 23 D. 796; 33 J. 415.

193. Lease — Construction — Alterations on Premises.—A tenant of a tavern, who was permitted to throw two rooms into one for a tap-room, and to put a stove in an apartment and conduct the smoke by an iron pipe into the tap-room vent, *held* not entitled to enlarge the one room and diminish the other, by taking down the partition and putting up a new one, and to carry through that partition the iron pipe, which thereby had set fire to the house. *Muir* v. *Wilson*, 1822, 1 S. 406.

194. Lease — Construction — Breeding Stock of Rabbits.—A tenant, at entry, having paid for the whole live stock in a rabbit-warren, the landlord bound himself to pay for the stock at the tenant's removal, or to allow him a certain time to kill and market the stock, "reserving right to as many rabbits as I may consider requisite for a breeding stock"; and the landlord gave the tenant unlimited right to kill the stock, reserving no breeding stock. *Held* that the landlord was not bound to pay for a breeding stock which the tenant alleged he had left in the warren. *Lockhart* v. *Cathcart*, 1833, 11 S. 339.

195. Lease—Construction—Right to Kill Rabbits.—*Held*, on construction of missives of lease and possession, that a tenant of a country house and grounds, including some fields let for agricultural purposes, had a right to kill rabbits over the estate generally by shooting or by such other means as might be necessary for keeping them down, and not merely on the agricultural subjects. *M'Douall* v. *Caird*, 1869, 6 S. L. R. 583.

196. Lease — Construction — Right to Shoot Game—Rabbits.—A game lease gave the tenant "the whole game and shooting of every description" upon certain lands, "with the sole and exclusive right of hunting for and killing the same in terms of law." *Held* that this included the right of shooting rabbits, to the exclusion of the landlord, or any persons alleging express right from him. *North & George* v. *Cumming*, 1864, 3 M. 173; 37 J. 70.

197. Lease — Construction — "Corns" — Green Crop.—A lease entered into at a time when green crops were not grown in the district, gave the tenant a right to the *corns* on the farm in the year of removal. *Held* that this did not include green crop. *E. of Dalhousie*, 1869, 6 S. L. R. 689.

198. Lease — Construction — "Clear Ground of Stones" — Rocks. — *Question* whether, under an obligation "to clear the ground of stones," a tenant was bound to remove the tops of rocks. *Elrich's Trs.* v. *Duff*, 1824, 3 S. 343.

199. Lease — Construction — Clause of Reference.—An agricultural lease contained certain obligations on the tenant as to the planting, cutting, and using of timber; and it provided that he should be allowed for repairs such timber as should be judged necessary by the landlord, and also that, "in the event of any differences arising," the same should be referred to arbitration. The tenant brought an action of damages against the landlord for alleged violation of his obligation to grant timber or refer the demand for it to arbitration, founding on the assumption that the obligation on the landlord was absolute either to grant the timber demanded or to refer the demand to arbitration. The summons also contained conclusions for implement. *Held*, upon a consideration of the conclusions for damages, (1) that there was *prima facie* an obligation to some extent incumbent on the landlord to grant timber, and therefore that the action, in so far as it concluded for damages, was not irrelevantly laid, although laid as on an absolute obligation; and (2) that, under the clause of reference, the tenant was not bound, before bringing his action, to have applied to the court to compel the nomination of arbiters, —the landlord being bound either to perform his obligation, or to refer without such compulsitor. *Wight* v. *E. of Hopetoun*, 1855, 18 D. 118; 28 J. 42.

200. Lease — Construction — Custom. — A proof of usage may be allowed for the exposition of a lease, or ambiguous contract, to ascertain the true intention of parties; and therefore a proof allowed of an allegation by a tenant under a verbal lease, that by the custom of a barony the houses were appraised at the entry and again at the removal of the tenant, and that the landlord paid for the increased value, if any. *M'Intosh* v. *Ogilvy*, 1806, Hume 822.

201. Lease—Construction—Destination —"Whom Failing."—*Held* that, under a lease granted by trustees, in implement of a trust settlement to A. and B., and the longest liver of them, whom failing, to their son N. and his heirs and assignees, and that for the space of thirty-eighty years, N. had a right to take on the death of both A. and B., which right B., who survived A., could not defeat by granting a subtack to endure beyond his own life; and *observed*, that the words "whom failing," occurring in a lease, were not to be construed as in a destination of real estate, or in a testamentary writing. *Question*, whether the directions in the trust settlement could be looked at at all. *Macalister* v. *Macalister*, 1859, 21 D. 560; 31 J. 297.

202. Lease—Construction—Destination. —A lease was granted to a tenant, his heirs and executors, secluding assignees and subtenants. *Held*, in a question between the *mortis causa* assignee and executor of the tenant and his heir-at-law, that the heir was preferable. *Lowden* v. *Adam*, 21 Nov. 1805, F. C.; M. "Tack" App. No. 10.

203. Lease—Construction—Destination. —The proprietor of an estate, on the unconditional renunciation by another of a wadset over part of it, spontaneously granted him a lease of a farm "for your natural life, and for the natural life of any of your sons to whom you may assign it"; and the tenant having died without assigning to any of his sons,—*held*, in a question with an heir of the proprietor, that the lease did not thereby fall, but vested in the eldest son. *Fraser* v. *Fraser*, 1805, Hume 819.

204. Lease—Construction—Destination. —A lease was taken to a party and his heirs-male for nineteen years, and for the lifetime of his second son. *Held*, in a question between the heir-male and the second son, that, under the circumstances, this clause could not be construed as intended to be in favour of the second son for his life after the expiry of the nineteen years; and an improbative declaration by the heir-male, disclaiming any right on his part, held not binding on him. *Dunn* v. *Dunn*, 1835, 13 S. 590.

205. Lease—Construction—Destination. —Under a lease to two tenants, "their heirs and successors whomsoever," *held*, in a question with a surviving tenant, that the heir of the predecessor was entitled to the joint possession and benefits under the lease. *Dickson* v. *Dickson*, 1821, 1 S. 113; 2 S. 462.

206. Lease—Construction—Destination —Husband and Wife.—A lease to a husband and wife, their heirs and assignees, *held* not to be vested in the husband, but jointly in the spouses. *Forrester* v. *Milligan*, 1830, 8 S. 992.

207. Lease — Construction — Destination.—A lease was granted to John and "Thomas, his eldest son, and the longest liver of them two during all the days of their lifetimes, and to the heirs to be procreated of the said Thomas's body, male or female, during all the days of their lifetime, and the assignees of one or other of them, and their heirs during their lifetime, and for three nineteen years after the termination of the last heirs above related, their entry to the said lands"; and on the death of John and Thomas without assigning, the eldest son of Thomas assigned the lease to a third party and his heirs. *Held* that the three nineteen years commenced to run from the death of the heir of the assignee. *Græme* v. *Whytock*, 1819, More 246.

208. Lease—Construction—Destination — Congregation — Secession. — A lease of

subjects was granted to the managers of an Antiburgher congregation, and their successors, who should profess the principles of the Antiburgher Associate Synod, to be held by them for behoof of the minister, who should be a member of the Synod, and of the same principles; whom failing, the subjects to belong exclusively to the landlord. Possession was given to a minister, who was afterwards excommunicated, and renounced the possession in favour of the landlord's representatives, who enjoyed it for several years; and the greater part of the congregation seceded. *Held* that the minority were entitled to possession of the subjects for behoof of a minister elected by them, and professing the principles of the Synod. *Craig* v. *Muckersy*, 1823, 2 S. 224.

209. Lease—Construction—Destination.—A lease was granted for two nineteen or thirty-eight years, "and the lifetime of the person having right to this present tack at the expiry of the said two nineteen years, either as heir or assignee," provided such assignation be made within twenty-nine years from the commencement of the lease, failing which, the lease to belong to the heir of the tenant. The tenant remained in possession for the whole period, and during his own lifetime. *Held* that a party claiming right as heir could not insist on possessing during her lifetime. *Carnegy* v. *Scott*, 1822, 1 Shaw's App. 114.

210. Lease — Construction — Destination —Heir-Female—Mora.—The destination of a lease was in favour of the tenant and his heir, secluding assignees, unless with consent of the proprietor, without prejudice to an assignation in favour of one of the tenant's children; declaring that when the succession fell to heirs-female without any assignment, the eldest should succeed without division, "such assignment or succession not to become effectual without the proprietor's approval." The proprietor declared no option. *Held* (1) that the eldest heir-female was entitled to the farm; (2) that she was not barred by *mora* from taking it up, although fourteen years had elapsed after her father's death without her claiming it, in respect she had been all the time in America, and the landlord did not aver that she knew the terms of the lease. *Crichton* v. *Lady Keith*, 1857, 19 D. 713; 29 J. 329.

211. Lease—Construction—Duration of Lease.—A farm was let for nineteen years from Whitsunday 1850, the crop of 1850 being declared to be the first grain crop. *Held* that the tenant's possession continued to Whitsunday 1869. *Udny* v. *Esson*, 1869, 6 S. L. R. 576.

212. Lease—Construction—Duration.—*Forbes* v. *Watt*, 1872, 9 S. L. R. 657. Affg. 8 S. L. R. 88.

213. Lease — Construction — Duplicate Copies—Discrepancies—Powers of Factor.—An agricultural lease for fourteen years was entered into with the landlord's factor, but no formal lease extended. The conditions were written in duplicate, and bore to be between the tenant and the factor. The landlord's copy, which was duly signed, bore that there was to be a break at the end of seven years. The tenant's copy bore, in addition, "optional to the tenant," and also contained certain marginal additions, not in the landlord's copy, but which the landlord admitted he had authorised, although he repudiated the words "optional to the tenant," and denied the authority of the factor to insert them. *Held* (1) that in construing the lease, both copies of the lease were to be looked at; (2) that the factor having admittedly had power to grant a lease, must be presumed to have had power to modify or alter the conditions of it; (3) that there being no charge of fraud against the tenant, the circumstances warranted the presumption that the words "optional to the tenant" were inserted by authority of the factor; and that the landlord was not entitled to put an end to the lease. *Grant* v. *Sinclair*, 1861, 23 D. 796; 33 J. 415.

214. Lease—Construction—Dyework—Nuisance to Neighbours — Liability of Landlord.—Direction to a jury, that, under a lease of premises situated on a stream, declaring that they were to be used "for the purpose of bleaching, dyeing, or printing, and any other operations connected with bleaching, dyeing, or printing," if the tenant establish a dywork which creates a nuisance to the injury of the proprietors or tenants of inferior properties, such operations are not authorised by the lease so as to render the landlord responsible for the damage thereby occasioned. *Collins* v. *Hamilton*, 1837, 15 S. 895.

215. Lease — Construction — Extrinsic Evidence.—Averments which *held* not relevant to admit of proof in explanation of the terms of a written missive of lease. *Stewart* v. *Grant*, 1867, 3 S. L. R. 361.

216. Lease—Construction—"Heirs and Successors."—*Question* as to the meaning of the words "heirs and successors" in a lease. *Aglionby* v. *Watson*, 1809, Hume 845.

217. Lease—Construction—Meliorations.—Terms of a lease by which a tenant *held* entitled to the value of certain meliorations, notwithstanding no valuation had been made of the buildings, etc., at the date of the lease, as therein stipulated for. *Fraser* v. *Fraser*, 1835, 13 S. 988; 10 Fac. 760.

218. Lease—Construction—Meliorations.—Terms of a clause in articles of lease drawn up by the landlord's agent, under which it was *held* that a tenant was entitled to the value of certain meliorations of a permanent nature on the farm, dwelling-house, and offices, as instructed by a valuation made at his entry, and another valuation, provided to be made by the articles of lease, at his removal. *Gammell* v. *Anderson*, 1836, 15 S. 233.

219. Lease—Construction—Meliorations — New House.—Under a clause binding a tenant of a farm to leave the houses in good

habitable condition, but providing that, if the houses should be found at the end of the lease "to have been ameliorated," he should have allowance thereof, *held* that a new house, which was not inadequate to the size of the farm, though larger than the old one, which had become ruinous, was a melioration, and that the landlord was bound to pay for it as such. *Ducat* v. *Countess of Aboyne*, 14 May 1803, F. C.; M. 15264.

220. Lease — Construction — Cultivation —Miscropping.—In an action by a landlord for additional penal rent under an agricultural lease, in respect of miscropping, *held* that the farm consisted of two portions,—one being arable land permanently under rotation, the other pasture, the fields of which were only occasionally broken up; and that clauses prescribing the mode of cropping the "land under cultivation," and fixing a penal rent for miscropping, did not apply to the pasture land; and that the landlord had no claim for damage in respect of the cropping of the pasture land except at common law. *Threipland* v. *Munro*, 1861, 23 D. 1252; 23 J. 629.

221. Lease — Construction — Obligation to Refer to Arbitration.—A party having let land for a certain period by a written agreement, containing a condition that the tenant should cede possession at any time before the expiry of that period, on being allowed such compensation for the term which might then be to run as should be "fixed by men to be mutually chosen for that purpose," and the landlord having resumed possession, *held* that there was a valid obligation to refer, and that the tenant was not entitled to have the compensation due to him fixed in any other way. *Smith* v. *Duff* (*Lord Fife's Trs.*), 1843, 5 D. 749; 15 J. 345.

222. Lease—Construction—Obligation in Favour of Third Party — Jus quæsitum tertio.—A landlord, in granting a lease of a farm, stipulated that the tenant should allow a cottar and his wife to continue in possession during their lives, and the life of the survivor, at a particular rent. *Held* that the cottar had, on the principle of *jus quæsitum tertio*, acquired a right effectual against both the landlord and tenant. *Craigie* v. *Reid*, 1807, Hume 830.

223. Lease — Construction — Obligations —Feuing.—A lease of land for thirty-eight years, containing a clause, "that whatever house or houses the said tenant shall build on said lands, or gardens made thereon, they are to pay for whatever ground the same shall take up, twenty shillings per acre of yearly feu-duty, the same to commence at the expiration of the tack, and to have a right of feu accordingly,"—was *held* to entitle the tenant not only to build houses and gardens, but also to grant feus of the land for these purposes, with a view to demanding perpetual feus from the landlord, on the expiration of the lease. *Balderstone* v. *Hamilton*, 1808, 5 Pat. 234.

224. Lease — Construction — Obligations —Sublease.—The ground floor of a house in Princes Street in Edinburgh was let to a tenant who bound himself to convert it into "two handsome shops," and he subset part, which he converted into a shop, taking the subtenant bound not to alter it without his consent. The subtenant having erected a wooden screen or partition which had the effect of altering the shop into two shops, *held* that he was not entitled to do so. *Armstrong & Smith* v. *Bryson*, 1807, Hume 837.

225. Lease — Construction — Obligations — Upkeep of Machinery. — A party let premises as a manufactory with the half power of a steam-engine, the tenant being bound to "pay one-half of whatever expense is incurred in keeping the engine at work and in good repair; the other half to be paid by the landlord—each having a right to use one-half the power in their respective establishments." *Held* that the great gearing of the engine, which communicated the power to the premises of the tenant as well as to those of the landlord (who used the other half of the power), was meant to fall within the lease, and that the tenant was not bound to fit up separate great gearing for himself, or to repair the gearing appertaining to the engine, when it had given way. *Walker* v. *Turnbull*, 1843, 5 D. 1334; 15 J. 580.

226. Lease — Construction — Parole Evidence.—Incompetent to prove by parole the meaning of a clause in a tack, but competent so to prove the fact of the tenant's entry to possession. *Hamilton* v. *Hamilton*, 1825, 4 Mur. 8. *Macleod* v. *Macleod*, 1824, 3 Mur. 432.

227. Lease—Construction—Parole Evidence.—*Held* competent to prove the practice of an estate by parole evidence but not the conditions of a lease. *Dalziel* v. *D. of Queensberry's Exors.*, 1825, 4 Mur. 14.

228. Lease — Construction — Penalty.—By an agricultural lease, written by the landlord, a piece of land was let for twenty years, a specified portion thereof to be improved by the end of the lease, under a penalty. Two additions were made to the lease, and of same date with it, by the first of which the landlord let the land at the same rent to the tenant's son at the expiry of the twenty years, and by the second of which he let "to the said Hugh Craig (the elder) his liferent, and then to the said Hugh Craig (the younger) after his death (the elder)." *Held* that the penalty was not exigible at the expiry of the twenty years, nor till the death of the father, who had a liferent lease of the lands. *Gillanders* v. *Craig*, 1856, 19 D. 116; 29 J. 56.

229. Lease — Construction — "Public Burdens"—Road Money.—Where a lease bound the landlord to pay the "whole public burdens affecting the lands during the currency of the lease," *held* that in a question between landlord and tenant, road money was to be considered a public burden in the sense

of the contract. *Brown* v. *Weir*, 1839, 1 D. 1237.

230. Lease—Construction—Qualification by Subsequent Separate Lease.—A party, by one lease, let a strip of ground to a tenant for thirty years, absolutely, and another strip, by a separate lease, for the same period, but with a power to resume possession at any time on paying damages. *Held* that this latter lease could not be held as qualifying the other. *Dicksons Brothers* v. *Rocheid's Trs.*, 1824, 2 S. 768.

231. Lease—Construction—Reference to Former Lease.—A new missive of lease was granted "on the same conditions with the former lease." *Held* that these words applied not only to the mode of cultivation, but to the duration. *Hay* v. *M'Cracken*, 1807, Hume 832.

232. Lease — Construction — Renunciation—Option.—A granted to B a lease to endure for three nineteen years, with this clause, "to renounce at Lammas before expiry of each of the said three nineteen years, in the option of the said A and of the said B the lessee." In a removing at the end of the first nineteen years at the instance of A's heir, B averred that the understanding was that the option could be exercised only with consent of the tenant, and that in that faith he had entered into possession and executed expensive improvements. *Held* that the clause imported an option to be exercised by the landlord alone. *Lord Falconer* v. *Taylor*, 1775, 2 Pat. 373.

233. Lease — Construction — Renunciation—Option.—A clause in a lease for fifty-seven years bound the tenant to renounce at Lammas, before the expiry of the first nineteen years, or prorogate the same for three years, in the option of the said A (the landlord) and the said B (the tenant). *Held* that this was an option that might be exercised by either landlord or tenant. *Lord Falconer* v. *Lawson*, 1778, 6 Pat. 799.

234. Lease — Construction — Renewal.—*Held*, on a construction of a lease, where a question arose, whether a demand for a renewal made on 1st August of the year prior to the expiry of the nineteen years was not too late, that the lease had a Whitsunday entry, and expired at Whitsunday, and that the demand for a renewal fell to be made at least twelve months before the last term of Whitsunday. *E. of Hopetoun* v. *Wight & Others*, 1864, 2 M. (H. L.) 35; 36 J. 542; 4 Macq. 729.

235. Lease — Construction — Renewal—Insanity of Heir of Lessee.—A nineteen years' lease contained an obligation on the landlord, that, upon the expiry of the term, and upon the tenant tendering and paying a certain fine, and demanding a renewal "at least twelve months before the expiry of the above term of nineteen years," he should renew the lease for other nineteen years and so forth thereafter, that the tack should be renewable, "from nineteen years to nineteen years for ever," on the like payment, tender, and demand. The term of entry was declared to be, as to the houses and grass, at the term of Whitsunday; and as to the arable land, at the separation of the crop from the ground. After several renewals, the landlord, in respect of alleged contraventions, said to infer forfeiture, refused to comply with a demand for renewal duly made by the tenant in 1841; but the tenant continued to possess the farm without a lease. He died during the currency of the period to which the renewal would have been applicable if granted, leaving a trust-disposition by which he assigned the lease to trustees, who took possession and paid the rents. His son and heir-at-law was insane. In an action at the instance of the landlord, raised after the expiry of the nineteen years to which the demand made by the deceased tenant applied, and no demand for renewal applicable to the succeeding nineteen years having been made, *held* that the landlord was not entitled to declarator that the right to demand renewal was at an end. *E. of Hopetoun* v. *Hunter & Others*, 1865, 3 M. (H. L.) 50; 4 Macq. 972; 37 J. 489.

236. Lease — Construction—Reservation of Powers to Landlord—Damage to Tenant.—Missive of lease reserved to the landlord right to "straighten marches, lay out watercourses, plant trees, and make roads." *Held* that, without offering compensation, the landlord was not entitled to plant, nor, without the tenant's consent, to alter the character of the fences, deprive the tenant of an access, and change the direction of the flow of water; and lands having been flooded in consequence of the landlord's interference with the drainage, damages awarded to the tenant. *Menmuir* v. *Airth*, 1863, 1 M. 929; 35 J. 550.

237. Lease—Construction—Sale of Turnips to be Consumed on the Ground—Sale or Lease—Hypothec.—A farmer let to a sheep-dealer 15 acres of turnips to be consumed on the ground, the rent or price to be payable partly at Martinmas and partly on the removal of the sheep from the farm. On failure to pay the instalment due at Martinmas, and on proof that the sheep-dealer was *vergens ad inopiam*, interdict was *granted* against the removal of the sheep till caution was found. *Question*, whether the contract was one of sale or lease, and whether the farmer had a right of hypothec over the sheep. *Ferguson* v. *Fyffe*, 1868, 6 S. L. R. 68.

238. Lease — Construction — Steam-Engine—"Stoppages."—A stipulation in a lease of a steam-engine to make up stoppages by extra work, or a deduction of rent, includes stoppages only of common occurrence, and the lessee is entitled to damages for extraordinary stoppages caused by the imperfection or fault in the engine. *Wilson* v. *Norris*, 10 Mar. 1810, F. C.

239. Lease — Construction — Subjects Let — Extent — Reference to Missive.— *Question*, whether it is competent to explain or qualify a formal tack, in relation to the quantity of ground let, by the terms of the previous missive. *E. of Fife's Trs.* v. *Duncan*, 1824, 3 S. 241.

240. Lease — Construction — Term of Entry. — Special case in which *held* that, under missives of lease, with entry at Whitsunday, entry had been given as well to the arable land as to the houses, grass, and fallow at that term, the whole being at the time in the possession of the proprietor. *Observed*, that there is no presumption that a Whitsunday entry means an entry to the houses and grass at Whitsunday, and to the arable land under crop at Martinmas. *Duff* v. *Wilson*, 1864, 3 M. 173.

241. Lease—Construction—Termination—Option.—A minute of lease was written by the factor of a landlord, by which he let a farm "for the space of seven or thirteen years from Martinmas 1798." *Held* that, there being no indication in the minute as to which of the parties was to have the option, it was to be construed against the writer, and therefore the tenant allowed the option. *Sir W. Johnston* v. *Gordon*, 1805, Hume 822.

242. Lease — Construction — Timber for Repairs—Usage.—An agricultural lease, containing a clause of renewal, "with and under the same conditions, provisions, and qualifications contained in this present tack," bore that the tenant was to have such timber as should be judged necessary "for repairing of houses now upon the farm." After successive renewals, *held*, on a construction of the lease, and in conformity with the usage of the parties, that the tenant was entitled, at the commencement of each renewal, to timber for the repair of houses erected during the currency of the expired lease, in so far as these were necessary for the proper working of the farm. *Wight* v. *E. of Hopetoun*, 1858, 20 D. 955; 30 J. 560.

243. Lease—Construction—Valuation of Crop—Custom.—An obligation by an incoming tenant to take an outgoing tenant's crop at a valuation, "to be made on such fair terms as the parties can agree," cannot be construed to mean that the valuation must be made according to the usage of the country in similar bargains. *Still's Trs.* v. *Chivas*, 1829, 8 S. 9; 5 Fac. 14.

244. Lease—Construction—Verbal Agreement. — A verbal agreement that a tenant entering to a farm under a written lease should at end of it leave dung on the farm may be proved by witnesses. *Wilson* v. *Swan*, 1804, Hume 817.

245. Lease — Construction — "Winter Dung."—What held to be included under the term "winter dung" in a lease. *Lyle* v. *Graham*, 1824, 3 S. 125.

246. Lease — Destination — Heir-Male — Adoption by Landlord—Jus tertii. — A lease was destined to the heir-male of the tenant, on condition that the subjects were left completely stocked. The tenant died intestate, so that the stocking went to his executors, who for some years possessed under the lease; but the heir-male acquired the stocking before expiry of the lease, paid the last half-year's rent, and concurred with the landlord in naming parties to appraise meliorations payable at the end of the lease. *Held* that, although the landlord might have excluded the heir-male, yet that, having recognised him as tenant, it was *jus tertii* to a party liable for the meliorations to plead that the heir-male was not entitled to the lease under the destination. *Fraser* v. *Fraser*, 1831, 9 S. 849.

247. Lease—Fishings—Warrandice—Injury to—Erection of Dry Dock—Personal Bar.—Although a party was aware that the proprietor of fishings was about to erect a dry dock on the station, yet, as he obtained a lease of the fishings, as formerly possessed, with absolute warrandice, *held* entitled to damages for any injury caused to the fishings by the erection of the dry dock posterior to the date of the lease. *Hall* v. *Ross*, 1813, 1 Dow 201; 5 Pat. 729.

248. Lease—Game—Singular Successors.—*Held* that a lease of lands for sporting purposes is a proper lease binding on singular successors. *Opinions* that a lease of shootings without the land would be equally binding. *Farquharson*, 1870, 9 M. 66; 43 J. 31.

249. Lease—Game—Singular Successor.—A lease of game, although possession has been taken, is not effectual against a singular successor. *Pollock & Co.* v. *Harvey*, 1828, 6 S. 913; 3 Fac. 968. *Birkbeck* v. *Ross*, 1865, 4 M. 272; 38 J. 147.

250. Lease—Irritancy.—Circumstances in which a judgment of the Court of Session, refusing a bill of suspension of a decree of irritancy of a lease by a sheriff, was affirmed. *Taylor* v. *Boyle*, 1824, 2 Shaw's App. 30.

251. Lease—Irritancy—Arrears of Rent—Reponing.—Tenants who had incurred an irritancy of their lease by non-payment of rent were reponed against it. *Knowles* v. *Bings*, 1826, 4 S. 530.

252. Lease—Irritancy—Arrears of Rent—Purging.—A lease provided that if two terms' rent were allowed to be resting and owing unpaid at one time, the tack should *eo ipso* become void and null, with a fifth part of termly moiety in case of failure. The tenant fell four years in arrear of rent, alleging a counter claim, which the landlord refused to admit. In an action brought under the annulling clause in the lease, *held* that the irritancy was purgeable at the bar. *Hogg* v. *Hogg*, 1780, 2 Pat. 516.

253. Lease—Irritancy—Arrears of Rent—Removing.—Where an irritancy was agreed not to be purgeable in the event of one term's rent being allowed to remain due for six months, *held* that, to authorise a removing, the

term's rent must have remained six months unpaid, either by diligence or otherwise, at the date of raising the action. *Hog* v. *Morton*, 1825, 3 S. 617.

254. Lease—Irritancy—Arrears of Rent—Tenant Interpelled from Payment.—A tenant being interpelled by diligence from payment of rent, is not liable to have his lease irritated as being in arrear of rent. *Gordon* v. *E. of Fife*, 1825, 4 S. 229.

255. Lease — Irritancy — Bankruptcy.—A father and his three sons took a lease of subjects for carrying on a dyework, to be forfeited, "in the event of the bankruptcy, by sequestration of the party or parties carrying on the work." One of the sons quitted the concern, without withdrawing his name from the lease, and a new partner was assumed, and thereafter the estates of the parties carrying on the dyework were sequestrated. *Held* that, although the son who retired continued solvent, yet as he was not only not a party carrying on the dyework, but was engaged in another dyework, the lease was forfeited in terms of the clause to that effect. *Tennent* v. *Macdonald*, 1836, 14 S. 976; 11 Fac. 818.

256. Lease—Irritancy—Bankruptcy of Tenant—Composition—Discharge—Reponing.—Under a clause in a lease it was agreed that it should "at once be irritated and made void by the statutory or actual bankruptcy of the tenant, instructed by the appointment of trustees, compounding of his debts, the sequestration of his effects, or otherwise"; and his estates having been sequestrated two days before decree of removing was obtained before the sheriff, his creditors agreed to accept a composition, and thereafter he was discharged. *Held*, in an advocation of the decree, that it was good, although no declarator of forfeiture had been obtained, and that he was not entitled to be reponed in respect of the discharge. *Copland* v. *Gordon*, 7 Dec. 1805, F. C.; M. "Tack" App. No. 11.

257. Lease — Irritancy — Bankrupcy of Tenant.—In a lease (including various farms previously possessed by different tenants), the term of entry was, to certain of the farms, after the separation of crop 1826 as to arable lands and outhouses, and at Martinmas to grass lands and dwelling-houses; to certain other farms, at Whitsunday of the same year as to grass, etc., and the separation of the crop as to arable lands. The term of removal as to all the farms was at Whitsunday 1845 from the grass and houses, and at the separation of the crop from the arable land. The rent was payable at "Candlemas and Lammas immediately succeeding the crop for which such rent was payable"; and it was stipulated that the tenant should keep at all times a full and sufficient stocking on the lands, and that, "in case of the bankruptcy of the tenant, his creditors shall have no power under it to appoint a manager, or in any manner of way to interfere with the subjects let, or for the tenant himself to continue his possession, directly or indirectly, for behoof of his creditors." The tenant became bankrupt in August 1829, and the trustee for his creditors reaped the crop. *Held*, in a question with the creditors, that the above clause did not infer a voidance of the lease, and that as each year's possession was to be considered as extending from Whitsunday to Whitsunday, the landlord was entitled to enforce the performance of the prestations for the year 1829–30 against the creditors. *Bruce* v. *Kinloch*, 1831, 9 S. 831.

258. Lease — Irritancy — Bankruptcy of Tenant — Personal Bar. — A tenant held under a lease by which irritancy on bankruptcy was declared, and the rent due at Martinmas and Whitsunday was payable at Lammas and Candlemas of the subsequent year. He became bankrupt, and after a year the landlord brought a declarator of irritancy and removing. *Held* that the receipt, during the year of the bankruptcy, of the rent due for the preceding year, did not imply abandonment of the right to irritate. *Anstruther* v. *Greenshields*, 1855, 18 D. 59; 28 J. 15.

259. Lease — Irritancy — Bankruptcy of Tenant — Personal Bar. — A lease gave a landlord an option to declare it void, if the tenant should be sequestrated. Circumstances in which *held* that the right to exercise the option had not been abandoned. *Lindsay* v. *Hogg*, 1855, 17 D. 788; 27 J. 407.

260. Lease — Irritancy — Bankruptcy of Tenant—Interdict.—*Held* that a clause of irritancy in a lease binding the tenants to remove in the event of bankruptcy, could not be enforced by way of interdict against them or the trustees on their sequestrated estates occupying or using the ground. *Rankin* v. *M'Lachlan*, 1864, 3 M. 128; 37 J. 83.

261. Lease—Irritancy—Entailed Estate—Competency of Declarator.—*Held* (1) that a declarator of irritancy against a tenant for failure to implement the conditions of the lease anent erecting fences and keeping them in repair was incompetent, the lease containing no irritant clause; and (2) that an improving lease by an heir of entail, which contained the statutory conditions in regard to fences, was in no different position from a lease by a fee-simple proprietor containing the same conditions. *Hamilton* v. *Hamilton*, 1845, 8 D. 308; 18 J. 136.

262. Lease — Irritancy — Failure to Possess by own Stock—Sublease.—A lease provided an irritancy in case of failure to pay rent, and took the tenant bound to possess by his own stock. The tenant died bankrupt, and the crop was sold. The tenant's manager put on his own stock, and paid rent and burdens in the heir's name, but without any authority. About a year after, the bankrupt's brother served to him *cum beneficio inventarii*, inserting in the inventory the lease, and entered into an agreement with the manager, which was held to be a sublease to him. *Held* (1) that the heir could not be held to have abandoned the lease; (2) that the granting

the sublease did not infer irritancy; (3) that the heir was bound to possess by his own stock. *Forbes* v. *Ure*, 1856, 18 D. 577; 28 J. 232.

263. Lease—Irritancy—Joint Tenancy—Absence of one Tenant.—A lease was granted to a mother and son, the latter of whom afterwards settled in England, while the mother continued in possession of the farm. *Held* that the mother being evidently a principal party, the lease was not irritated by the absence of the other joint tenant. *Sir W. Honeyman* v. *Gordon*, 1806, Hume 824. Cf. *Dalhousie* v. *Wilson*, 1 Dec. 1802, F. C.

264. Lease—Irritancy—Non-Residence.—Under a statute, commissioners granted a lease of lands to a person who had been in military service, subject to a provision, in terms of the statute, that the lease should be void in case of subsetting, or that the tenant should not occupy, cultivate, and be resident on the said lands. *Held* that, having subset and gone into military service, and so become non-resident, the lease was void. *Cameron* v. *Cameron*, 18 Dec. 1810, F. C.

265. Lease — Irritancy — Conventional Irritancy—Purging.—A lease declared that if, by allowing the rent to run into arrear, sequestration should be applied for and awarded, then the lease should, in the option of the landlord, become *eo ipso* null and void, and the tenant should be obliged to renounce the lease and possession. The landlord applied for and obtained sequestration, and thereafter brought an action of removing. *Held* that the irritancy in the lease was fair and reasonable, and having been once fairly incurred, the tenant was not, as in the case of a legal irritancy, entitled to purge it. *Stewart* v. *Watson*, 1864, 2 M. 1414; 36 J. 710.

266. Lease — Irritancy — Purging — Waiver.—An irritancy arising on the execution of a private trust deed for behoof of creditors, *held* not purged by a composition-discharge; and the right to purge is held to be waived by a letter from the tenant admitting the irritancy, and consequent termination of his lease. *Hall* v. *Lady Grant*, 1831, 9 S. 612; 6 Fac. 410.

267. Lease — Irritancy — Purging. — Irritancy of a tack under the A. S. 14 Dec. 1756, *held* purgeable by consignation of the arrears before extract, without finding caution for the five succeeding crops. *M'Donald* v. *Jardine*, 1825, 4 S. 227.

268. Lease — Irritancy — Possession "with own Stock Allenarly."—A tenant having become bankrupt, the stocking was sold by his creditors, and bought by a younger son, and the tenant found caution in terms of the A. S. 1756. Thereafter, in an action of irritancy on a condition in the lease that the tenant should possess "with his own stock allenarly" on pain of nullity of the lease, the Lord Ordinary decerned; and the tenant having then assigned the lease, and the younger son the stocking, to the eldest son, *held* that the landlord was not entitled to decree. *Lord Stonefield* v. *M'Arthur*, 18 Nov. 1800, F. C.; M. "Removing" App. No. 3.

269. Lease — Irritancy — Reponing. — The tenants in a perpetual tack containing a condition that the right should be *ipso facto* irritated by failure to pay the tack-duty for three years, failed to make payment and deserted the premises; and the landlord, after four years' duty had become due, and the premises had been deserted for two years, entered into possession, without any proceedings at law, and retained possession unchallenged for twelve years. *Held* that the irritancy had taken effect, and that the tenants were not entitled to be reponed. *Ogilvie* v. *Duff*, 1834, 12 S. 857; 9 Fac. 447.

270. Lease — Irritancy — Suspension by Trustees of Creditors — Title to Sue. — Trustees for behoof of the creditors of a tenant, under a tack secluding assignees, are entitled to pursue a suspension of a decree of irritancy of the tack, so as to preserve their right to claims due to the tenant for meliorations, etc., at the end of the lease. *Gordon* v. *E. of Fife*, 1825, 4 S. 329.

271. Lease—Joint Tenancy—Prospective Partnership—Sale of Lease.—A lease being taken in the joint names of two individuals with a view of entering into a partnership, but this purpose having been broken off, one of the parties *held* not entitled to resist an application for sale of the lease, and for his removal from the premises. *M'Whannell* v. *Dobbie*, 1830, 8 S. 914.

272. Lease—Lease to Company.—A tack may be validly granted to a company *socio nomine*. *Denniston, M'Nair, & Co.* v. *M'Farlane*, 16 Feb. 1808, F. C.; M. "Tack" App. No. 15.

273. Lease — Occupancy by Tenant — Absence — New Lease. — A party took a lease of a house and shop in December for a year from the next Whitsunday. She in February removed from the house she then occupied, with all her effects, to England. The proprietor thereupon let the house and shop to another, and the party returned before Whitsunday, and was excluded by the new tenant. *Held* that the proprietor was not warranted in granting the new lease. *Topping* v. *Barn*, 1830, 8 S. 973.

274. Lease — Purchase of — Landlord's Title not Produced. — An objection by a purchaser of a tack for nineteen times nineteen years from the tenant, that the landlord's title was not produced, *repelled*. *Dennistoun, M'Nair, & Co.* v. *M'Farlane*, 16 Feb. 1808, F. C.; M. "Tack" App. No. 15.

275. Lease—Reduction—Act 5 Geo. IV. c. 74—Personal Bar.—Parties entered into missives of lease in which the rent was fixed at half a boll of wheat, three firlots of barley, and six pecks of oats, for each Scots acre, payable by the fiars prices, but the proportions not expressed which these several measures bore to

the imperial standard measure. The landlord raised an action, after the tenant had entered into possession, to reduce the lease, libelling upon the Act 5 Geo. IV. c. 74, for uniformity of weights and measures. *Held* that the statute was not applicable to the case; and opinion expressed that, at any rate, the landlord having drawn the missive himself, was barred *personali exceptione* from pleading the statutory objection. *Henry* v. *M'Ewan*, 1834, 7 W. & S. 411. Affg. 10 S. 572; 7 Fac. 430.

276. **Lease—Reduction—Entailed Estate—Title to Sue—Warrandice.**—An heir of entail in possession granted a lease of unusual endurance, with absolute warrandice. The next heir of entail, after drawing the rents under the lease for above twenty years without challenge, raised a reduction of it, as *ultra vires* of the granter, which was insisted in, after her death, by her son. She executed a new deed of entail in favour of a different series of heirs, which deed, though subsisting at her death, her son passed by, and took up the estate under an original entail. *Held* that, as the prior entail did not prohibit the contraction of debt, the tenant under the warrandice in the lease would, if the lease were reduced, have a claim of damages affecting the estate, and good against any heir taking it up, and therefore that no such heir could insist in a reduction. *Oliphant* v. *Scott*, 1830, 8 S. 985; 5 Fac. 810.

277. **Lease—Reduction—Entailed Estate—Warrandice.**—An heir of entail granted a lease, with a clause of warrandice against all mortals as law will, for such term of years as he might have power to grant a lease. It was reduced as granted for grassums, contrary to the entail, and it was found that it could not be supported for any period. *Held* that the warrandice was not confined merely to the endurance, but applied to the heir's power generally to grant the lease. *Symington* v. *D. of Queensberry's Exrs.*, 1824, 2 Shaw's App. 80. Affg. 2 S. 162.

278. **Lease—Reduction—Entailed Estate—Warrandice—Liability to Tenant—Right of Relief.**—An heir of entail in possession granted a lease with absolute warrandice, and, on his death, a reduction of it was brought by the next heir, and thereupon an action of relief by the tenant against the executors of the heir. *Held* that the tenant was entitled to insist in the action of relief, although there had been no actual eviction, and that the executors of the granter were liable to him in relief. *Hyslop* v. *D. of Queensberry's Exrs.*, 1824, 2 Shaw's App. 63. Affg. 13 Nov. 1822, F. C.; 2 S. 8.

279. **Lease — Reduction — Fraud by Tenant.**—*Held* that a tenant whose lease was reduced was not entitled to damages against the granters; it appearing that there were fraud and corruption on the part of the tenant in obtaining the lease, to the defrauding of the granter's creditors. *Stewart* v. *York Buildings Co.*, 1801, 4 Pat. 214.

280. **Lease — Reduction — Liability for Rent.**—Circumstances in which a lease set aside and reduced, and the tenant found liable in a modified rent for the period of his occupation. *Riddell* v. *Grosset*, 1791, 3 Pat. 203.

281. **Lease—Reduction—Error in Extent of Subjects Let—Deduction from Rent.**—A tenant raised a summons of reduction of a lease, on the ground that the extent of the farm had been fraudulently represented as greater than it truly was, and concluding for deduction from the rent at so much for each acre deficient. An issue was sent to a jury, whether the representation as to the extent had been "false and fraudulent"; and a verdict was returned that it had been false, but not fraudulent. *Held* (1) that even if this verdict afforded ground of reduction, it must be total, and could not infer a mere deduction of rent; but (2) that the ground of reduction set forth in the summons being fraud, and not error *in essentialibus*, and fraud having been negatived by the verdict, there were no grounds for reduction. *Balmer* v. *Hogarth*, 1830, 8 S 715.

282. **Lease—Reduction—Misrepresentation as to Capacity of Grazing.**—Circumstances in which, in an action for reduction of missives of lease of a grazing farm, and restitution, or otherwise for damages on the ground of fraudulent misrepresentation of the quantity of stock on and capacity of the lands, issues were *granted*. *M'Pherson* v. *Campbell's Trs.*, 1869, 41 J. 634.

283. **Lease—Reduction—Misrepresentation—Mora.**—*Held* that a tenant who had possessed a grazing farm for ten years on a lease was barred by *mora* from reducing the lease on the ground that he had been induced to enter upon it by false representations made by the landlord as to the number of sheep the farm would keep. *Grieve* v. *Rutherford's Trs.*, 1871, 9 S. L. R. 60.

284. **Lease—Reduction—Title to Sue.**—It is no objection to a pursuer's title to sue an action of reduction of a lease, that he has not produced a service as heir. *Scott, etc.* v. *Cochran*, 1759, 6 Pat. 719.

285. **Lease — Reduction — Subtenant — Title to Sue—Warrandice.**—A subtenant in one of the Queensberry farms (the leases of all which had been challenged as in contravention of the entail of the estate), after decree of reduction had been pronounced in the leading case chosen to try the validity of the leases, granted a subtack, without any express warrandice, "for the length of the Queensberry lease." *Held* that the period for which the subtack was granted was that stipulated in the principal lease, had it been allowed to come to a natural termination; that where no warrandice is expressed in a lease, absolute warrandice is understood; and consequently, on the principal lease being reduced, the holder of the subtack was entitled to damages for the whole period of endurance in the original lease. *Middletons* v. *Megget*, 1828, 7 S. 76.

286. Lease — Reduction — Sublease — Warrandice. — A tenant whose lease was under reduction, having subset his farm, with an obligation on the subtenant to remove when required, on the lease being reduced, and without any express warrandice,—*held* that no warrandice was implied as to the duration of the lease. *Laidlaw* v. *Wilson*, 1830, 8 S. 440.

287. Lease — Reduction — Subtenant — Title to Sue.—A subtenant, who had no regular missive of subtack, but entered into possession, was *held* to have no title to pursue the landlord's executors for damages under the warrandice in the principal lease "to heirs, assignees, and subtenants," on its being set aside by a succeeding heir to the granter, as in contravention of the entail of the lands. *Hutchison* v. *D. of Queensberry's Exrs.*, 1828, 6 S. 849.

288. Lease — Reduction — Subtenant — Title to Sue.—A subtenant under a missive of subtack referring for the conditions to articles of set, raised an action of damages against the principal tenants, on the reduction of their leases and his removal. They objected to his title, that he did not produce the articles of set; and not having been recovered under a diligence, and circumduction having been pronounced against the parties, the Lord Ordinary dismissed the action; but the court remitted to allow further investigation as to the contents of the articles. *Crichton* v. *Laing*, 1828, 6 S. 403.

289. Lease — Reduction — Sublease — Warrandice — Liability of Tenant.—The principal tenant in a lease under reduction, containing a power to subset and clause of absolute warrandice, subset the farm for a part of the period still to run, with an obligation to communicate to the subtenant, if ejected before the expiry of the sublease, a proportion of the damages to be recovered under the warrandice "effeiring to his possession." *Held* that the representatives of the granter of the lease were liable to pay to the principal tenant such damage as the subtenant could instruct he had sustained by premature removal; and that the subtenant was thereupon entitled to recover the amount from the principal tenant. *Dick* v. *Taylor's Trs.*, 1831, 10 S. 19; 7 Fac. 16.

290. Lease—Registration—Requisites of Notarial Instrument.—In the notarial instrument presented in recording a lease under the Registration of Long Leases Act, it is only necessary to set forth the cedent's progress of titles to the lease, and not assignations creating latent securities granted by a prior lessee which had been redeemed. *Rodger* v. *Crawfords*, 1867, 6 M. 24; 40 J. 14.

291. Lease — Renewal — Agreement to Renew—Reference to Oath.—A reference to oath, that a landlord had promised to renew a lease for a year, is competent. *Brown* v. *Peacock*, 1822, 1 S. 359.

292. Lease — Renewal — Agreement to Renew—Removing.—A landlord during the currency of a liferent lease granted a missive to the tenant binding himself on its expiration to renew it in favour of his son. *Held* that on the death of the tenant the son could not be removed by the landlord's heir. *Wilson* v. *Henderson*, 1823, 2 S. 428.

293. Lease — Renewal — Verbal Agreement anterior to Written Renewal of Lease—Proof of.—Where a tenant who had obtained a renewal of his lease by a written minute afterwards brought an action against his landlord's representatives for damages for non-implement of a verbal agreement as to improvements on the farm, alleged to have been entered into anterior to the written minute, on the faith of which outlay had been made,—*held* that the verbal agreement could only be proved by writ (probation by oath being excluded by the fact of the landlord's death), the only *rei interventus* alleged being of a kind attributable to any ordinary contract of lease. *Philip* v. *Gordon Cumming's Exrs.*, 1869, 7 M. 859; 41 J. 456.

294. Lease — Renunciation — Agreement to Renounce—Bankruptcy of Landlord.—A tenant entered into an agreement with his landlord to renounce his lease at a particular period in consideration of a certain sum, and the landlord prior to that period became bankrupt, and conveyed his estates to trustees. *Held* that the tenant had no right to insist that the trustees should accept of the renunciation and pay the stipulated price, but that he was bound to elect either to retain his lease, or rank as an ordinary creditor under the trust for the price. *Ferrier* v. *Hector*, 1822, 1 Shaw's App. 159.

295. Lease — Renunciation — Agreement to Renounce — Penalty—Personal Bar. — Although it was stipulated in a lease that the tenant should renounce the lease six months prior to its expiration, under the penalty of paying thereafter double rent, yet *held* that as the landlord during the currency of the six months entered into a communing with the tenant for a renewal of the lease without asking for the renunciation, or apprising the tenant that if he continued to possess the penalty would be exacted, it was not due for three years' subsequent possession. *Sir W. Johnstone* v. *Thom*, 1810, Hume 585.

296. Lease — Renunciation — Implied Renunciation — Change of Possession. — *Held* that, notwithstanding a certain change of possession, and also of rent, during the currency of a lease for ninety-nine years, the lease had not been renounced. *Kennedy* v. *Carlyle*, 1836, 15 S. 102.

297. Lease — Renunciation — Reduction —Unstamped Missives—Admissibility of, in Evidence.—In an action to reduce the renunciation of a lease constituted by missives, *held* that the missives being unstamped, they could not be produced in evidence. *Summers* v. *Fairservice*, 1842, 4 D. 347.

298. Lease — Renunciation of Part of Subjects Let.—*Held* that a tenant of a sheep

farm, who had given up to the landlord a part of it intended for winter pasture, was entitled to keep possession of another farm for that purpose, of which he had obtained possession as a subtenant of a party who was removed. *Cameron* v. *Macdonell*, 1827, 2 W. & S. 592. Affg. 3 S. 340.

299. Lease — Renunciation — Title of Tenant to Sue for Meliorations.—*Question*, whether a tenant is entitled to sue for meliorations after renouncing his lease. *Jenkin* v. *Younger*, 1825, 3 S. 639.

300. Lease — Renunciation — Validity.—A tenant who possessed under an informal lease renounced it by an informal writing, delivered it up, and on his death recently thereafter possession was continued, not by the heir-at-law, but by the widow and younger children. *Held* that the renunciation was effectual. *Milne* v. *Forbes*, 1830, 8 S. 990; 5 Fac. 821.

301. Lease — Sublease — Assignation in Security — Intimation to Subtenant. — A tenant subset his lands for a surplus rent, and, in security of an annuity of £100, assigned the lease to the annuitant to the extent of £100 per annum of surplus rent. The annuitant allowed the tenant to draw the whole subrents, and received the £100 per annum from the tenant till he became bankrupt. Some time before this event the annuitant intimated his assignation to the subtenant, and the proprietor, also before the bankruptcy, sold the lands to a third party, who obtained from the subtenant a renunciation of his sublease. In an action by the annuitant for payment of the £100 of surplus rent against the purchaser, as coming in place of the subtenant, the court sent an issue to a jury, as to whether the purchaser had been in the knowledge of the assignation. *Balfour* v. *Lyle*, 1835, 2 S. & M'L. 1. Affg. 11 S. 906.

302. Lease — Sublease — Break in Principal Lease—Eviction of Sublessee—Construction of Sublease.—An agricultural lease for nineteen years reserved power to either party to terminate the lease at the end of ten years. The tenant sublet a portion of the farm by missive of lease "to the end of my lease." The landlord having taken advantage of the break in the principal lease, and evicted the subtenant, the latter brought an action of damages against the principal tenant for breach of contract. *Held*, on a sound construction of the missive of sublease, that the principal tenant merely undertook to give the subtenant the same tenure which he enjoyed himself. *Logan* v. *Weir*, 1872, 9 S. L. R. 268.

303. Lease — Sublease — Constitution — Jotting in Notebook—Rei interventus.—A tenant sublet part of his farm, and made in his notebook a jotting, which was signed both by himself and the subtenant. Possession followed in terms of that jotting. *Held* that the tenant, who averred that the jotting produced in an action against him was not the one he signed, but was false and fabricated, must undertake an improbation of it; and having done so in the course of the process, *held*, on the evidence, that he had failed to prove his averment. *Williamson* v. *Kennedy*, 1857, 19 D. 443; 29 J. 207.

304. Lease — Sublease — Exclusion of Subtenants — Waived by Landlord. — A stipulation in a lease excluding subtenants, unless by the written consent of the landlord, being a provision in his favour, may be waived by him, and his consent inferred *rebus ipsis et factis*. *Sir J. D. Hay* v. *M'Tier*, 1806, Hume 836.

305. Lease—Sublease—Homologation by Landlord.—*Held* that the receipt of rent by the landlord from a party who had obtained a subtack, but who was cautioner in the original lease, which prohibited subletting (the receipts not being granted in his name), did not import homologation of the subtack. *E. of Elgin's Trs.* v. *Walls*, 1833, 11 S. 585.

306. Lease—Sublease—Homologation by Landlord.—A tenant excluded from subsetting granted a sublease, and thereafter the landlord's factor wrote a letter, which was signed by the tenant, directing the subtenant to pay his rent in future to the factor, who accordingly received payment for two years from the subtenant. *Held* that the landlord had homologated the sublease. *Maule* v. *Robb*, 1807, Hume 835.

307. Lease — Sublease — Implied Power to Sublet.—The tenant of a farm having sublet the farmhouse, the landlord applied for warrant of ejectment against the subtenant. The tenant pleaded that power to sublet had been stipulated; but the lease having gone amissing, that at all events it must be presumed, because, when the lease was granted, the landlord was aware that he was tenant of another and larger farm, and therefore could not personally occupy the house; and that the landlord had acquiesced in previous subsets. *Held* that permission to subset was not to be presumed without proof, and that the tenant had failed to instruct any such power. *E. of Glasgow* v. *Hamilton*, 1851, 13 D. 1290; 23 J. 605.

308. Lease — Sublease — Implied Power to Sublet—Lease to Clergyman of Parish. —A lease to a clergyman during his incumbency in a particular parish, *held* to imply a power to subset. *Pringle* v. *M'Lagan*, 1802, Hume 808.

309. Lease — Sublease—Reconveyance—Intimation to Landlord.—The reconveyance of a sublease to the principal tenant, *held* not to require intimation to the landlord. *Underwood* v. *Richardson*, 1824, 3 S. 336.

310. Lease — Sublease — Reduction of Lease—Liability of Tenant.—A party who, a few weeks before the judgment of the House of Lords setting aside the Queensberry leases, obtained a sublease of one of the farms "to the termination" of the principal lease,

but without any clause of warrandice, *held* entitled to relief and damages from the principal tenant. *Middleton* v. *Yorstoun*, 1826, 5 S. 162; and 7 S. 77, note.

311. Lease — Sublease — Title of Sublessee to Sue Lessor for Culpa.—The purchaser of a house and adjacent ground proceeded to erect an adjoining house, and made use of the gable of the first house for this purpose, to the injury of a subtenant who occupied it. In an action for damages at the instance of the subtenant against the purchaser, the latter pleaded that he had bargained with the principal tenant for the injury done, and that it was *jus tertii* of the subtenant to object, although he might have an action against the principal tenant who had granted him his sublease. The court *repelled* the plea, and *granted* decree. *Duffy* v. *Mungle*, 1871, 8 S. L. R. 535.

312. Lease — Sublease — Warrandice — Representatives of Subtenant — Title to Sue.—The representatives of a subtenant were *held* not entitled to insist in an action of damages raised by the subtenant on the warrandice against the principal tenant. *Watson* v. *Turner*, 1831, 9 S. 688; 6 Fac. 444.

313. Lease — Termination — Agreement of Railway Company with Tenant—Rights of Landlord.—A tenant, under an arrangement with a railway company, received £5000 as compensation for injury to the lands, and undertook to make a branch for the conveyance of minerals. Thereafter, and without having made the branch, he threw up his lease under a provision contained in it. *Held* the landlord had no claim to any part of the £5000, either as effeiring to the unexpired years of the lease, or for the purpose of making the branch railway. *Peddie* v. *Brown & Co.*, 1857, 20 D. (H. L.) 1; 3 Macq. 65; 29 J. 388.

314. Lease — Termination — Bankruptcy of Tenant — Construction of Lease.—A lease provided that, in the event of the tenant's insolvency, it should become *ipso facto* null and void, as at the first term thereafter, and that the landlord should thereupon have "sole right to the whole lands in the state they might then be in, and to the straw and chaff of all the crop then on the ground or in the barn-yard," without any claim being competent to the tenant or his creditors; and the tenant having become insolvent, and the above provision of the lease coming into operation, *held*, in a question between the landlord and the trustee for the tenant's creditors, that the tenant was bound to cede possession to the landlord, at the first term after insolvency (Martinmas), of the whole lands, in whatever state they were, including those sown with wheat and grass seeds, without any claim against the landlord. *Moncrieff* v. *Hay*, 1842, 5 D. 249; 15 J. 84.

315. Lease — Termination — Bankruptcy of Tenant—Damages to Landlord.—In an agricultural lease for nineteen years there was a stipulation, that in the event of the tenant's bankruptcy he should have no power to continue the possession for behoof of his creditors. The tenant became bankrupt in the third year; and though the landlord was desirous that the creditors should continue the possession till the expiry of the lease, they gave it up, whereupon the landlord of new let the farm at a reduced rent, and claimed damages against the estate for the loss arising on the years to run of the original lease. *Held* that the stipulation was in favour of the landlord, who might avail himself of it or not at his option, and that he was entitled to damages. *Kinloch* v. *Mansfield*, 1836, 14 S. 905; 11 Fac. 741.

316. Lease — Termination — Bankruptcy of Tenant.—An agreement in a lease, that it should become void on the bankruptcy of the tenant, enforced, without an action of declarator of irritancy, the fact of bankruptcy being admitted. *Forbes* v. *Duncan*, 2 June 1812, F. C.

317. Lease — Termination — Bankruptcy of Tenant—Liability of Trustee for Wrongous Retention of Premises.—A trustee on the sequestrated estate of a bankrupt, who was tenant in manufacturing premises, the steam-engine and great gearing in which belonged to the landlord, and were expressly mentioned in the lease as part of the subject let, claimed this machinery as the property of the bankrupt, and refused to give up possession of the premises till the issue of a litigation, in which it was determined that he had no right to it; and during this period he refused to concur in any joint measures for letting the premises, but did not carry on any work therein. *Held* that although he had not adopted the lease so as to be liable as tenant, yet he was liable for the full damages sustained by the landlord from his retention of the premises. *Stead* v. *Cox*, 1835, 13 S. 280.

318. Lease — Termination — Buildings Erected by Tenant—Right of Removal.—*Held* that a tenant who makes additions to the houses on his farm, though at his own cost, has not a right to dismantle these new buildings, or carry off the materials at his removal; and this rule applied to the case where a tenant, having become a bleacher, erected a beetling-mill, and, along with another, carried off part of it. *Murray* v. *Bisset*, 1805, Hume 818.

319. Lease — Termination — Buildings Erected by Tenant—Right of Removal.—A tenant who had built houses on his farm, *held* not entitled at the end of the lease to remove them, nor bound to put them into repair. *Thomson* v. *Oliphant*, 8 Feb. 1822, F. C.; 1 S. 307.

320. Lease—Termination—Erections by Tenant—Right of Removal—Notice—Forfeiture.—In a lease of a piece of ground, it was stipulated that the tenant was to have

liberty to pull down a building to be erected by him, and carry away the materials, upon giving three months' notice of his intention to do so; and in the case of the landlord requiring the tenant to quit, he was to give him six months' notice. *Held* that, although the lease was terminated by the landlord's giving the six months' notice, yet it was not intended that the materials should be forfeited to the landlord, in the event of the tenant not giving notice of his intention to remove them during the currency of the lease. *Laing* v. *Stephenson*, 1848, 11 D. 142; 21 J. 28.

321. **Lease—Termination—Erections by Tenant—Right of Removal.**—A party who had taken a piece of waste ground for one or two years *held* entitled, at his removal, to the materials of erections made by him thereon. *Thomson* v. *Harvie*, 1827, 5 S. 227.

322. **Lease—Termination—Erections by Tenant—Destruction by Fire—Landlord's Claim.**—The tenant of a distillery was entitled, under his lease, to make new erections, and to carry them away at the end of the lease, if the landlord did not then take them at a valuation. He made erections of a value exceeding £100, and insured against fire for £100 on the distillery premises, and for other sums on his utensils and stock; and the premises, old and new, as well as the stock and utensils, were burnt during the currency of the lease. *Held* that the landlord was not entitled to claim from the insurance office, as an arresting creditor of the tenant, any part of the value of the buildings consumed, but that he was entitled to claim for rents due prior, but not posterior, to the fire. *Scottish Union Insurance Co.* v. *Macintosh*, 1831, 9 S. 310.

323. **Lease — Termination — Fences Erected by Tenant—Right of Removal.**—A tenant who has ultroneously erected fences upon his farm, must, at his removal, either clear them away, or put them in a state of repair. *Andrew* v. *Morrison*, 19 Jan. 1811, F. C.

324. **Lease—Termination—Fittings Put up by Tenant — Right of Removal.** — A tenant is entitled to take away trevisses, mangers, etc., with which he had fitted up a barn as a temporary stable. *Scott* v. *Ewart's Reps.*, 1824, 3 S. 344.

325. **Lease — Termination — Machinery Erected by Tenant — Right of Removal.** —A tenant, who was bound for a stipulated sum to erect a farm-steading, thrashing-mill, and offices, fitted up the mill with machinery. *Held* that the machinery belonged to the landlord. *Campbell* v. *Howden*, 1825, 3 S. 569.

326. **Lease — Termination — Removal of Doors and Windows—Custom.**—*Held* that where it was the local custom for tenants at the end of their leases to remove the doors and windows of their houses, and to receive the value of the buildings, this claim was effectual against a purchaser of the lands, without relief against the seller. *Bell* v. *Lamont*, 14 June 1814, F. C.

327. **Lease — Termination — Compensation—Valuation of Turnips Left on Farm.** —A tenant was bound by his lease to have ten acres under turnips during the last year of his lease, and for these he was to be paid by the landlord or incoming tenant the value as fixed by arbitration. *Held* that he was entitled to the full value of the turnips to the incoming tenant, viz. (1) their value as feeding for stock, and (2) their value to the land through the dung made by the stock fed on them. *Scott* v. *Ritchie*, 1869, 7 S. L. R. 135.

328. **Lease — Termination — Buildings Erected by Tenant—Valuation.**—A lease for fifty-seven years contained a clause binding the tenant to uphold the buildings, and obliging the landlord to remunerate him at the end of the lease, for any excess of value above what they were estimated at on his entry by the valuators. On the buildings becoming ruinous, the tenant erected new offices of a much larger size, and of which some were of a different description from those of the old steading. *Held* that he was entitled at the end of the lease to compensation for these buildings. *Jolly* v. *Graham*, 1831, 5 W. & S. 280. Revg. 6 S. 236; 7 S. 824; 3 Fac. 234; 4 Fac. 1125.

329. **Lease — Termination — Compensation — Fallow Ground.** — In a question between an outgoing and incoming tenant, the former *held* entitled to the value of fallow ground left by him. *Purves* v. *Rutherford*, 1822, 2 S. 59.

330. **Lease — Termination — Compensation—Improvements by Tenant—Custom —Construction of Lease.**—A provision in articles of lease as to buildings, *held* to supersede an alleged local custom as to remunerating the tenant for meliorations. *Gordon* v. *Thomson*, 1831, 9 S. 735; 6 Fac. 482.

331. **Lease — Termination — Compensation — Turnips to be Left on Farm — Valuation — Construction of Lease.** — An incoming tenant was taken bound "to pay the outgoing tenant for turnips and dung at a valuation," and "to leave turnips and dung at the end of his lease to be paid for in like manner by the next succeeding tenant." *Held* that they were to be valued at their market value, being what the outgoing tenant would have realised for them had he not been bound to leave them on the farm. *Erskine's Trs.* v. *Crombie, etc.*, 1870, 9 M. 54; 43 J. 24.

332. **Lease — Termination — Compensation—Fallow—Dung.**—A tenant having, on entering upon his farm, received, free of charge, ground in fallow, prepared with manure, claimed, at the expiry of his lease, the value of fallow and manure left by him. The lease having gone amissing, and no stipulation as to the matter being proved, *held* that the tenant was bound to leave the same quantity of fallow and manure free of charge

as he had received, and was entitled to payment only for the surplus. *Brown* v. *College of St. Andrews*, 1851, 13 D. 1355; 23 J. 626.

333. Lease — Termination — Compensation — Dung — Custom.—The custom of a small estate *held* not relevant to affect the rule of law, that the landlord must pay for the dung left by an outgoing tenant, when the matter is not regulated by the lease. *Allan* v. *Thomson*, 1829, 7 S. 784.

334. Lease — Termination — Compensation — Meliorations — New Lease. — A tenant was entitled to meliorations to be paid by the incoming tenant. His son, at the expiry of the lease, took a new tack under articles of set, which provided that he should be entitled, at the end of the new lease, to the meliorations paid to the former tenant; but no appraisement of the meliorations was made at the end of the old lease. *Held* that there was no claim, at the expiry of the new lease, for any meliorations as under the old lease. *Macra* v. *M'Kenzie*, 1828, 6 S. 935.

335. Lease — Termination — Dung — Construction of Lease.—Under a clause in a lease by which the tenant was obliged, during the currency, to consume upon the ground "the whole straw and fodder of every kind except hay produced by said lands, and lay the whole dung thereby produced on the said grounds," *held* that the landlord was entitled, without paying for it, to the whole dung produced from the penult crop which had not been laid upon the farm. *E. of Wemyss* v. *Wright*, 16 June 1801, F. C.; M. App. No. 7.

336. Lease — Termination — Dung — Fodder—Construction of Lease.—A tenant, the terms of whose removal were Martinmas as to the arable land, and the Whitsunday thereafter as to the grass and houses, bound himself by his lease "to eat the fodder on the grounds during the lease, and leave the fulzie thereon at removal." At his entry he received, without consideration, the dung left under the previous lease. *Held* that he was bound to leave the whole dung and the fodder unconsumed, without any consideration from the landlord. *Stirling* v. *Yuille*, 1827, 6 S. 251; 3 Fac. 248.

337. Lease — Termination — Dung — Valuation — Construction of Lease. — A tenant getting neither straw nor dung at his entry, and being taken bound to leave a year's dung as steelbow at his removal, on being allowed the "price" of the dung so left, is entitled to its full value. *Herriot* v. *Halket*, 1826, 4 S. 446.

338. Lease — Termination — Dung. — An outgoing tenant being bound to consume the whole fodder on the lands, and lay the whole dung thereon the last year of his tack, having withheld part of it from the lands at the last crop, *held* (1) that he was bound to leave to the incoming tenant the quantity so withheld without payment; and (2) that the incoming tenant had a preferable right, on payment of the value, to that part of the dung made after the bear seed-time. *Forrester* v. *Wright*, 19 Feb. 1808, F. C.; M. "Tack" App. No. 16.

339. Lease—Termination—Dung—Valuation.—An awaygoing tenant bound by his lease sufficiently to manure his lands, and consume on them all the fodder except that of the last crop, is entitled to the value of dung left on the farm, though made prior to the preceding bear seed-time, when, in relation to the nature and situation of the farm, it was inconsistent with good husbandry, and had been his practice during the preceding years of the lease, to preserve the dung to be consumed on wheat crops in autumn. *Berry* v. *Allen*, 1829, 3 W. & S. 417. Affg. 5 S. 212; 2 Fac. 130.

340. Lease — Termination — Dung. — A tenant was bound to consume on the farm the straw and fodder of the lands, and to lay the dung yearly on them, and leave all that was not consumed without recompense, except that of the last crop, which was to be paid for by valuation. *Held*, in a question with a poinding creditor, that the dung belonged to the landlord. *Dun* v. *Johnstone*, 1818, Hume 451.

341. Lease—Termination—Dissolution of Partnership.—*Question*, whether a lease to a partnership was vacated by its dissolution. *Gillespie* v. *Clark*, 1821, 1 S. 160.

342. Lease—Termination—Forfeiture of Estate.—A lease was granted for 1140 years, for a valuable consideration given, besides a yearly tack-duty. Sasine and possession followed. *Held*, on the forfeiture of the estate, that the lease was good both against the granter and the Crown. *Frazer* v. *His Majesty's Advocate*, 1762, 2 Pat. App. 66. Revg. M. 15196.

343. Lease — Termination — Heirs of Lessees.—A lease for 124 years *held* binding on the heirs of the lessees. *Warner* v. *Cunninghame*, 1815, 3 Dow 76.

344. Lease—Termination—Indefinite Ish —Singular Successors.—A tack, the termination or ish of which was indefinite, being granted to the tenant and his heirs so long as they desire to possess the same, *sustained* against singular successors. *Scott* v. *Straton*, 1772, 3 Pat. 666.

345. Lease — Termination — Irritancy — Right to Sown Crop.—A tenant in October sowed wheat, and on 16th January the landlord got decree of removal on an irritancy, and on the 21st a creditor of the tenant poinded the wheat. *Held* that the wheat belonged to the landlord, subject to a claim by the tenant for the value of the seed and labour. *Dun* v. *Johnstone*, 1818, Hume 451.

346. Lease — Termination — Lease to Clergyman of Parish for "Space of his Incumbency"—Appointment of Assistant and Successor.—A lease to a clergyman "for the full time and space of his incumbency" in a certain parish, *held* not to terminate by

the appointment of an assistant and successor, and an arrangement by which the clergyman ceased to reside in the parish, or perform clerical functions. *Pringle* v. *M'Lagan*, 1802, Hume 808.

347. Lease — Termination — Misconduct of Tenant.—It was agreed between a landlord and tenant, that in case of personal misconduct by the tenant, of which the landlord should be the sole judge, he should be entitled to cancel the lease. *Held* that the landlord had validly exercised his right to cancel, by a letter which did not contain specification of the alleged misconduct. *Stewart* v. *Rutherford*, 1863, 35 J. 307.

348. Lease — Termination — Notice — Verbal Lease — Singular Successor. — A stipulation qualifying a verbal lease of a house, that six months' notice should be given before removal, *held* not binding on a purchaser. *Trotter* v. *Lanceman*, 1804, Hume 814.

349. Lease—Termination—Oral Proof of Duration—Competency.—A landlord gave a missive of lease to a man, "on condition that you enlist with me as a private soldier," but without specifying the duration; and the man enlisted and served for six years, and after he had possessed for some years the landlord raised an action of removing. *Held* competent to prove by parole that the duration was to be nineteen years. *M'Leod* v. *Urquhart*, 1808, Hume 840.

350. Lease — Termination — Orchard — Fruit of Last Year.—A tenant under a nineteen years' lease of a farm and orchard, with an ish at Whitsunday, *found* entitled to the fruit of the orchard for the last year, so as to have in all the fruits of nineteen years. *Forrester* v. *Thomson*, 1830, 4 W. & S. 136. Affg. 6 S. 875.

351. Lease — Termination — Possession after Term of Expiry—Custom.—Although a tenant of an arable farm in Skye was bound to remove at Whitsunday, yet *held* that he was entitled, according to the practice of the district, to retain possession of the barns during part of the winter, for the drying and disposal of his waygoing crop. *M'Leod* v. *Bruce*, 1809, Hume 842.

352. Lease — Termination — Possession after Term of Expiry — Arable Farm — Houses.—A tenant of an arable farm, whose term of entry and removal was Michaelmas, *held* not entitled to possession of any part of the houses after that term. *Anderson & Duncan* v. *Tod*, 1809, Hume 842.

353. Lease — Termination — Possession after Term of Expiry—Threshing—Accommodation for Horses.—By a minute of agreement between a landlord and an outgoing tenant, it was stipulated that, after the removal of the tenant, he should "have the privilege of accommodation for thrashing the last crop, up to the 1st day of May" ensuing, on condition that the landlord or incoming tenant's servants and horses should be allowed accommodation by him during the time they were working the fallow-break. *Held* that the stipulated accommodation included only the use of the thrashing-mill, and that the outgoing tenant was not entitled to accommodation for horses for the purpose of conveyance of the crop to and from the mill. *M. of Tweeddale* v. *Hume*, 1848, 10 D. 1053.

354. Lease — Termination — Right to Barns till Crop Threshed.—A tenant who was bound to remove from the houses and grass at Whitsunday, and from the arable lands at the separation of the crop, having claimed right to retain possession of the barns until the crop should be threshed out and disposed of, a bill of suspension as to possession after Martinmas was refused. *M'Ewan* v. *Paterson*, 19 Nov. 1803, F. C.; Hume 571; M. 13891.

355. Lease — Termination — Use of Threshing-Mill, Barn, and Stackyard for Waygoing Crop.—*Held* that the tenant of a farm under a lease expiring at Whitsunday as to houses and grass, and at the separation of the waygoing crop as to the arable land, is not at common law entitled to retain a threshing-mill in the farm-steading after Whitsunday in order to thresh the waygoing crop, nor to the use of a barn and stackyard for the purpose of storing the same. *Gatherer* v. *Cumming's Exrs.*, 1870, 8 M. 379; 42 J. 175.

356. Lease — Termination — Sublease — Construction of Lease.—A landlord granted a lease to a father and his three sons *nominatim* and *seriatim* for three nineteen years, "and, after the expiration of the third nineteen years, for the lifetime of the person then in possession," without mention of assignees or subtenants. One of the sons granted a subtack to a party, who became bound to implement all the prestations of the lease, which he did; and the third nineteen years expired during the life of that son. *Held*, on his death, that he was the party in the civil possession on expiration of the third nineteen years; that the lease did not continue during the lifetime of the subtenant, although he was "the person then in possession"; and therefore the lease terminated by the death of the son, granter of the subtack. *Ronaldson*, 18 Dec. 1812, F. C.

357. Lease—Termination—Tacit Relocation.—The proprietor of grain-lofts let to a tenant on a bargain for a year, sequestrated the grain in security of the rent, and, pending a litigation which ensued, the sequestration was recalled, on condition of the tenant finding caution. The tenant not having found caution, and having allowed the grain to remain under sequestration in the premises until after the term, *held* to be bound as tenant for another year. *Robertson* v. *Drysdale*, 1834, 12 S. 477.

358. Lease—Termination—Tacit Relocation—Insufficient Notice.—Intimation by a tenant of his intention to leave his farm at the expiry of his lease being made to a factor (appointed by trustees), who at the time

warned the tenant that he had no power to receive such intimation, and that it must be made to the trustees themselves, not sufficient to free him from tacit relocation. *M'Intyre* v. *M'Nab's Trs.*, 1831, 5 W. & S. 299. Affg. 8 S. 237.

359. Lease—Termination—Tacit Relocation — Verbal Lease — Verbal Notice.— Verbal notice to remove, given upon the premises to the wife of the tenant, in a verbal lease, but which was not proved to have been communicated to the tenant in due time, does not prevent tacit relocation. *Lambert* v. *Smith*, 1864, 3 M. 43; 37 J. 20.

360. Lease—Termination—Tacit Relocation — Notice. — Special circumstances in which it was *held*, in reference to a piece of ground let for one year, that there was no room for the doctrine of tacit relocation; and that forty days' warning before Whitsunday was unnecessary, and a few days' notice sufficient. *Forsyth* v. *Bruce*, 1827, 6 S. 101.

361. Lease—Termination—Tacit Relocation — Death of Tenant.—A tenant died about twelve months before the expiry of a lease; his eldest son did not enter into possession, nor did he intimate before the term of expiry that he intended to take up the lease. *Held* that an action of removing was well directed against two younger sons who had been in possession, and with whom the landlord had dealt after their father's death; that they were not entitled to plead that they derived their right from the heir; and that there was no room for tacit relocation between the landlord and the heir. *Wilson* v. *Stewart*, 1853, 16 D. 106; 26 J. 61.

362. Lease — Termination — Tenant for Life—Removal.—Where the covenant by the tenant for removal from a farm under a life-rent lease fixes the removal at a period subsequent to the death of the tenant for life, that does not *per se* entitle the representative of the tenant to cultivate the farm during the period between the death and the term for removal in the absence of anything else to give a title of possession after the death of the tenant for life. *Tweeddale* v. *Murray*, 1847, 6 Bell 125; 19 J. 572. Revg. 8 D. 411; 18 J. 187.

363. Lease — Termination — Waygoing Crop.—Circumstances in which *held* that a tenant was not entitled to a waygoing crop. *Scott* v. *Brodie*, 1802, 4 Pat. 311.

364. Lease — Termination — Waygoing Crop.—A tenant whose entry was at Whitsunday 1783, having bound himself to remove "at the expiration of this tack, which will be at the term of Whitsunday 1802," *held* not entitled to an awaygoing crop, and prohibited from ploughing any part of the farm after the separation of the crop 1801 from the ground. *Scott* v. *Brodie*, 2 Mar. 1803, F. C.; M. "Tack" App. No. 8.

365. Lease — Termination — Waygoing Crop.—Under a lease for a lifetime, and three nineteen years thereafter, with entry and removal at Whitsunday, *held* that as under the lease the liferent tenant was not entitled to the crop of the year of entry, his successor in the lease was entitled to a waygoing crop in the year of removal. *Harvey* v. *King's College of Aberdeen*, 1845, 8 D. 151; 18 J. 90.

366. Lease — Termination — Waygoing Crop.—A lease for nineteen years from Whitsunday was granted of a mansionhouse and adjacent grass enclosures; and the tenant having, during the currency, made use of them as arable land, proceeded, in the spring of the nineteenth year, to plough and sow them. *Held* that he was bound to remove at Whitsunday, and had no right to the crop of that year, but only to the expense of seed and labour. *Gray* v. *Goldie*, 1800, Hume 804.

367. Lease — Termination — Waygoing Crop.—At the expiration of a lease to which the entry was at Whitsunday, and where the tenant did not get the first year's crop, he is entitled to an awaygoing crop. *Fullarton* v. *Crawfurd*, 4 Mar. 1814, F. C.

368. Lease — Termination — Waygoing Crop.—A tenant entered to a farm at Whitsunday under a lease, by which it was provided that, if the landlord sold the farm, the purchaser should have an option to remove the tenant after the lapse of seven years from the commencement of the lease, on intimating to the tenant at least one year previously, and allowing him one year's rent for defraying the expense of sowing out the lands that year in tillage, with grass seeds and clover, and of leaving the whole in grass, and removing at a term of Whitsunday. A purchaser gave notice on 1st April 1800; and the tenant proceeded to plough the lands for crop 1801, on the footing that he was entitled to a waygoing crop. *Held* that he was not entitled to such a crop. *M'Michan* v. *Hutcheson*, 1801, 4 Pat. 170.

369. Lease — Termination — Waygoing Crop.—A tenant of a piece of ground in natural pasture at entry (the term of removal from which was stipulated to be Whitsunday) having, under a permission in his lease, brought it into cultivation during the currency, and acquiesced in the refusal of a bill of suspension of a decree of removing as at Whitsunday, *held* that, under the lease, he had no right to a waygoing crop, that the refusal of a bill of suspension formed *res judicata* as to his claim so far as founded on the lease, and that he could not support his claim by a decree-arbitral, on which he had omitted to found on his bill of suspension. *Blair* v. *Lyall*, 1826, 4 S. 365.

370. Lease — Termination — Waygoing Crop—Valuation—Construction of Lease.— A tenant was bound by his lease "to make over to the landlord or incoming tenant the whole corn and fodder of the last year's crop, as well as the turnips and potatoes on the farm the last year of this lease." . . . "The value of the fodder, turnips, and potatoes shall be

determined by arbiters." At the expiry of the lease, *held* that the landlord was not entitled to insist on a clause being inserted in the submission, to the effect "that the fodder, turnips, and potatoes shall be valued at their value for consumption on the farm." *Lindsay* v. *Bell*, 1862, 1 M. 39 ; 35 J. 24.

371. Lease — Termination — Waygoing Crop — Turnips — Custom. — *Held*, in conformity with a local usage in East Lothian, that a tenant of a farm there is entitled to dispose for his own use of a turnip crop raised during the last year of his lease. *Hamilton* v. *Reid's Trs.*, 1824, 2 S. 611.

372. Lease — Termination — Waygoing Crop—Renewed Lease.—*Observed*, where during the currency of a lease a new lease is entered into, the condition of the farm in the first year of the new lease affords no presumption as to the waygoing crop which the tenant is entitled to at the end of the renewed lease. *Hunter* v. *Miller*, 1862, 24 D. 1011 ; 34 J. 505.

373. Lease — Termination — Waygoing Crop — Intimation of Sale. — An outgoing tenant was bound by his lease to sell the one-half or the whole of the outgoing crop to the landlord or incoming tenant, on intimation being made to the outgoing tenant at least six months before expiry of the lease. *Held* that such intimation need not be in writing, but might be made verbally, and be proved by parole. *Duke, etc.* v. *Ferguson*, 1862, 24 D. 547 ; 34 J. 282.

374. Lease — Termination — Waygoing Crop — Construction of Agreement. — *Question* as to whether a tenant was entitled to a waygoing crop from a plot of ground under a special agreement. *Blair* v. *Lyall*, 1824, 3 S. 87.

375. Lease — Termination — Waygoing Crop—Death of Liferent Tenant—Right of Executors to Reap Crop.—*Held* that the executors of a liferent tenant who died in June 1815 were not entitled to reap a crop of hay 1815 arising from seed sown along with the seed for the corn crop 1814, nor to use the pasture arising from such seed after the death of the tenant. *M. of Tweeddale* v. *Somner*, 19 Nov. 1816, F. C.

376. Lease — Termination — Waygoing Crop—"Last Crop."—A lease was granted for thirty years and a lifetime, with entry to the houses and grass at the first Whitsunday after its date, and to the arable land at the separation of the crop thereafter. It contained a provision that, on the tenant's death, after expiry of the thirty years, his representatives might possess and crop the farm one year more, on condition that they should not plough up the grass-lands, or sow more than seven or eight acres of wheat. The thirty years expired, and the tenant thereafter died on 2d September 1844, part of the white crop having been reaped, and sixteen acres of wheat sown previous to his death. In a question with his representatives, whether the crop and year 1845, or the crop and year 1846 were the last in the lease, and which of these years was to be regulated by the condition in the lease applicable to the last year's possession, *held* that they were only entitled to possess the farm for crop and year 1845, and that they were bound to crop and possess it under the condition of the lease applicable to the last year thereof. *M. of Tweeddale* v. *Somner's Trs.*, 1845, 17 J. 198.

377. Lease—Termination—"Last Crop" — "Waygoing Crop" — Construction of Lease.—A tenant bound himself, in a lease for nineteen years, not to remove or dispose of any straw, fodder, or turnips, the dung and fodder of the "last crop" excepted. At the end of the fifth year he renounced his lease on account of his bankrupt circumstances. *Held* that the words "last crop" were to be construed as equivalent to "waygoing crop," and that he was therefore entitled to remove the straw and fodder of the fifth year. *Drysdale* v. *Wemyss*, 1849, 6 Bell 455 ; 21 J. 395. Affg. 10 D. 467 ; 20 J. 140.

378. Lease—Termination—Valuation of Houses—Custom.—*Held* that where it was the uniform custom of a barony at the entry of the tenants to have the houses valued, to ascertain the heritors' interest therein, and at the tenants' removal to take a new valuation, and the increased value, if any, to be paid to him, the landlord and incoming tenants were liable for the same. *Officer* v. *Nicolson*, 1807, Hume 827.

379. Lease — Terms of — Improbative Missive — Parole Proof. — Where a tenant possesses under an improbative missive, every condition not contained in the missive is not necessarily excluded ; and where the document bears that the "other conditions" of the lease would be such as those to be granted to other tenants in a barony on a renewal of their tacks, —parole proof, as well as subsequent documents between the landlord and tenant, are admissible to supplement the conditions of set, and establish the tenant's knowledge of and acquiescence in these other conditions. *E. of Mansfield* v. *Henderson*, 1856, 18 D. 989 ; 28 J. 448.

380. Lease — Terms of — Previous Missives.—*Held* that a lease agreed upon in letters passing between landlord and tenant should not contain a clause as to removing of erections, which was not stipulated for in the letters. *Campbell* v. *Campbell*, 1842, 4 D. 1310 ; 14 J. 424.

381. Lease — Terms of — Proof of by Notarial Copy.—A notarial copy of a missive of lease, delivered by the landlord's factor to the tenant, was *held* sufficient proof of the terms thereof, in a question with the landlord's representative, in regard to a claim for meliorations. *Williamson* v. *Fraser*, 1834, 12 S. 466.

382. Lease—Title to Grant—Ejection of Tenant — Damages. — Where a tenant is deprived of his farm in consequence of want of power in his landlord to grant the lease, he

is entitled to a sum as tenant's profit. *Dalziel* v. *D. of Queensberry's Exrs.*, 1826, 4 Mur. 18.

383. Lease—Title to Grant—Factor.—An allegation that a factor had, in absence of the proprietor, let a farm for nineteen years to a tenant, of which there was no written evidence, or of the power of the factor, *repelled*. *Sharp* v. *Napier*, 1822, 1 S. 477.

384. Lease—Title to Grant—Granter of ex facie Absolute Disposition with Back-Letter, Left in Possession.—*Held* that a proprietor who had granted an *ex facie* absolute disposition with a back-letter, but who had been left in possession of the estate, had a title to grant a lease. *Observations* on the right of a trustee for creditors in bankruptcy to challenge deeds valid as against the bankrupt. *Abbott* v. *Mitchell*, 1870, 8 M. 791; 42 J. 455.

385. Lease—Title to Grant—Married Woman.—A husband, by a deed of separation, renounced "his *jus mariti* and all other right or title he has or can claim to the rents of the subjects liferented by his wife." *Held* that a lease of those subjects granted by her without her husband's consent was valid. *Keggie* v. *Christie*, 25 May 1815, F. C.

386. Lease—Title to Grant—Risk Taken by Tenant.—Tenants *held* to have taken their chance as to whether a piece of disputed ground belonged to their landlord or not, but the landlord bound to allow them the use of his name to vindicate the property. *Kinloch* v. *Fraser*, 1829, 7 S. 819.

387. Lease—Validity—Granted on Deathbed—Entail.—*Held* that a nineteen years' lease of lands granted by a father on deathbed to younger children, for an adequate rent, was effectual, though the current lease had not expired when it was granted. *Semple* v. *Semple*, 1 June 1813, F. C.

388. Lease—Verbal Lease—Qualification—Proof of—Removing—Warning.—*Question*, whether a verbal lease for a year could be qualified by a stipulation that six months' warning should be given before removal; and if so, whether the qualification could be proved by witnesses. *Trotter* v. *Lanceman*, 1804, Hume 814.

389. Lease—Verbal Agreement Prior to—Proof of.—*Held* that a verbal agreement alleged to have been entered into between landlord and tenant prior to the lease, with reference to part of the subjects let, could only be proved by the oath of the landlord, or by his writ of date subsequent to that of the lease. *Stewart* v. *Clark*, 1871, 9 M. 616; 43 J. 412.

390. Poinding by Creditor of Landlord—Interdict by Tenant.—In a petition by the tenant of a farm, for interdict of a sale under a poinding by a creditor of the landlord, the petitioner averred that the poinded goods were "his sole and exclusive property"; but in his revised condescendence he averred that another party, not the proprietor, had an interest in them. *Held* that this averment was not so subversive of and inconsistent with the original statement in the petition, as to justify the sheriff in dismissing the petition *de plano*. *Macdonald* v. *Urquhart*, 1852, 15 D. 191; 25 J. 131.

391. Poinding—Sale—Interdict by Landlord.—A creditor of a tenant who had succeeded to his father's lease poinded the stock. *Held* that the landlord, in a process of interdict of the sale under the poinding, could not prove that there were rents due not covered by his hypothec, and that the effects poinded were the property of the father. *Thompson* v. *Christie*, 1858, 20 D. 1256.

392. Possession—Right to—Payment of Rent.—It was stipulated in a minute of tack that the tenant should pay his rent in advance before getting possession. The entry was at Martinmas. The tenant offered his rent on the 23d of November, and demanded entry; but possession was refused, as having failed to enter and pay on the term-day. *Held* that the tender was made *debito tempore*, and that the landlord was bound to give possession, or pay damages for failure. *Smith* v. *Robertson*, 1831, 9 S. 751; 6 Fac. 488; 10 S. 829 and 807.

393. Possession—Right to—Bankruptcy before Term of Entry.—*Question* as to the right of a tenant to possession, he having become bankrupt before the term of entry. *Gillespie* v. *Clark*, 1821, 1 S. 160.

394. Possession—Right to.—*Held* that a tenant of a sheep farm, who had given up to the landlord a part of it intended for winter pasture, was entitled to keep possession of another farm for that purpose, of which he had obtained possession as a subtenant of a party who was removed. *Cameron* v. *Macdonell*, 1827, 2 W. & S. 592. Affg. 3 S. 340.

395. Possession—Failure to Enter into.—Damages awarded to the landlord of a shop for failure on the part of the tenant to enter to possession. *Dickson* v. *Hill*, 1828, 6 S. 504.

396. Removing—Advocation—Caution—Violent Profits.—In an advocation *ob contingentiam* of a process of removing, the advocators ordained to find caution for violent profits before disposing of the question of contingency or conjunction. *Fleming* v. *Morrison*, 1835, 13 S. 859; 10 Fac. 629.

397. Removing—Advocation—Petition and Complaint—Removing after Sist.—A petition and complaint, on the ground of a removing executed after a sist on a bill of advocation, was refused. *Wight* v. *Sutherland*, 1823, 2 S. 462.

398. Removing—Arrears of Rent.—It is sufficient to warrant a removing, if the amount of a year's rent be due, whether of one year, or arrears of several. *Urquhart* v. *M'Kenzie*, 1824, 3 S. 84.

399. Removing—Arrears of Rent—A. S. 1756.—Decree of removing, under A. S. 14 Dec. 1756, in respect of arrear of rent. *Reddie* v. *Baillie*, 1823, 2 S. 467.

400. Removing—Arrears of Rent—Bankruptcy of Tenant.—A landlord is entitled to insist in a removing of his tenant where he has incurred an arrear of two years' rent, although the tenant's estate has been sequestrated under the Bankrupt Act, and the trustee cannot take the benefit of the lease without purging the irritancy, although thereby the landlord obtains a preference for these arrears over the other creditors. *Nisbet & Co.'s Trs.*, 10 Dec. 1802, F. C.; M. 15268.

401. Removing—Arrears of Rent—Caution—A. S. 1756.—A landlord raised an action on the A. S. 14 Dec. 1756, alleging that a half-year's rent was due, that another would be due at the ensuing term, and that the tenant had deserted possession by being imprisoned for revenue penalties. He thereafter accepted of a partial payment, and got a decree in absence, ordaining the tenant to find caution for the five following crops. *Held*, in passing a bill of suspension, that the landlord was not entitled to such caution. *Jamieson* v. *Sir J. Gordon*, 1828, 6 S. 788.

402. Removing—Arrears of Rent—Copartnery—Interdict.—The estates of a party possessing under a lease excluding "subtenants, assignees, and creditors," were sequestrated during its currency, at which time he owed arrears of rent, for which his machinery was hypothecated. *Held* that although the landlord allowed him to remain in possession, and he assumed a partner, and the arrears and subsequent rents were paid by the copartnery to the landlord's factor, who granted receipts to the company during nearly two years after the date of the sequestration, the landlord was entitled to an interdict to prevent the further occupation by the copartnery, on the ground that the copartnery possessed merely on tolerance. *Borrows & Co.* v. *Colquhoun*, 1852, 24 J. 443; 1 Stuart 733.

403. Removing—Arrears of Rent—Competency—Verbal Lease—A. S. 1756.—An action of removing, founded on the irritancy of the A. S. 14 Dec. 1756, as to being in arrear of two years' rent, is competent against a tenant possessing under a verbal lease from year to year. *Munro* v. *Brown*, 1827, 5 S. 807.

404. Removing—Arrears of Rent—Conclusion for Payment of, instead of Caution for Arrears—Advocation.—A summons of removing, concluding to have the tenant ordained to make payment of instead of "to find caution for the arrears due," *held* to fall under the A. S. 14 Dec. 1756, and not liable to be advocated without caution, but, in the special circumstances, allowed on juratory caution. *M'Allister* v. *Sprot*, 1825, 4 S. 353; 1 Fac. 217.

405. Removing — Arrears of Rent — Counter Claims—Suspension of Decree.—A landlord, by a lease of a farm in 1832, bound himself to put the houses into tenantable, and the fences into fencible, condition, before Whitsunday 1833; and in 1838 the tenant raised an action of damages against him for failure to do so, and got a verdict for £500 on 30th July 1840; but a new trial was granted; and the landlord, in January 1841, raised an action of removing in respect of an arrear of one year's rent (£234), and, pending this action, the tenant again got a verdict for £500, but it was also set aside, and thereafter decree of removing was pronounced; but before execution, the tenant got a final verdict and decree for £500. *Held* that as the landlord had not put the subjects into the stipulated condition, this formed a good ground of suspension of the decree of removing, although it was prior to the final decree of damages, seeing that the damages were due prior to the decree of removing, and of such an amount that the tenant truly did not owe a year's rent. *Graham* v. *Gordon*, 1843, 5 D. 1207.

406. Removing — Arrears of Rent — Counter Claims.—Bill of suspension of a decree of removing, under the A. S. 14 Dec. 1756, as being two years in arrear, on the vague allegation of counter claims, *refused*. *Shanks* v. *Grant*, 1829, 7 S. 573; 4 Fac. 814.

407. Removing — Arrears of Rent — Counter Claim.—In an action of irritancy and removing, under the Act of Sederunt, against a subtenant for arrears of rent, a counter claim against the pursuer, in respect of stipulations in the lease, is a competent defence. *Glen* v. *M'Kenzie*, 1824, 2 S. 763.

408. Removing — Arrears of Rent — Cottars—A. S. 1756.—A party obtained a lease of a farm on which were some outhouses, the rents of which he agreed to pay, and to recover them from the cottars. *Held* that he was entitled to insist in a removing under A. S. 14 Dec. 1756 against one of the cottars. *Logie* v. *Corsie*, 1847, 9 D. 1164; 19 J. 508.

409. Removing — Arrears of Rent — Inhibition—A. S. 1756. — A tenant used inhibition upon an action of damages against his landlord. The inhibition was recalled on caution for a limited sum, in addition to certain rents retained by the tenant, but the landlord did not avail himself of this recal. *Held*, in an action of removing under A. S. 1756, founded on the tenant being more than one year's rent in arrear, that the rents retained by him might be taken into consideration, so as to bring the case under the Act of Sederunt. *Hamilton* v. *Cuthil*, 1831, 9 S. 926.

410. Removing — Arrears of Rent — Purging Irritancy—A. S. 1756.—A landlord brought an action of irritancy and removing founding on A. S. 1756, in respect of two years' arrears of rent being due. The sheriff found the irritancy proved, and decerned in the removing. In a suspension of a charge upon the decree, two questions arose: (1) whether certain bills drawn upon the tenant for rent were to be held as having been paid; (2) whether payments of rent in a process of sequestration were sufficient to purge the irritancy. Note *passed* to try the questions. *Sutherland* v. *Mackenzie*, 1854, 26 J. 466.

411. Removing—Arrears of Rent—Suspension of Decree.—Bill of suspension of a decree of removing *passed* on caution; the tenant alleging that he was not a year's rent in arrear. *M'Intosh* v. *Watt*, 1821, 1 S. 194.

412. Removing—Arrears of Rent—Subsequent Payment of Rent—Reponing.—After decree in absence of forfeiture of a lease under the A. S. 1756, for non-payment of rent and not finding caution, the landlord recovered by diligence a great part of the rent. *Held* that although the tenant alleged that he had tendered payment of the balance, he was not entitled to be reponed. *Marshall* v. *Reid*, 1803, Hume 569.

413. Removing—Arrears of Rent—Subsequent Possession and Payment of Rent by Tenant.—A landlord who obtained in 1811 a decree of removing against a tenant on the A. S. 1756, which was extracted, allowed the tenant to remain in possession, and received payment of the arrears of rent, and also a term's rent not included in the decree. *Held* that by the final decree the tenant's lease, which otherwise had several years to run, was at an end, and that the landlord was entitled in 1812 to enforce it, notwithstanding the payments and subsequent possession. *Grierson*, 17 Nov. 1812, F. C.

414. Removing—Assignee—Relevancy.—A summons concluded for declarator that the tenant of an urban tenement had no right to assign the lease or to sublet the subjects, and also for decree of removing against the occupant as assignee to the lease, or as tenant or subtenant, holding and possessing under the authority of the tenant. In the condescendence it was not directly averred that either a sublease or an assignation had been granted, but only that the tenant had removed his own goods, and allowed a person in a different trade to occupy the shop; that the shop was really in possession of the latter; and that the tenant's averment that the occupant was his shopkeeper was a transparent device to defeat the condition of the lease, excluding subtenants. The action *held* relevant against the tenant, by whose lease assignees and subtenants were excluded, and against the occupant. *Hatton* v. *Clay & M'Luckie*, 1865, 4 M. 263; 38 J. 142.

415. Removing—Caution—Insufficiency of Stock—A. S. 1756.—*Held*, on passing a bill of suspension, that where a tenant was not in arrear of one year's rent, and had not deserted his farm, but the allegation was that it was not sufficiently stocked, the A. S. 1756 did not apply so as to require caution for five years. *Abercromby* v. *Finlay*, 1816, Hume 587.

416. Removing — Caution — Violent Profits—A. S. 1756.—In an action by a landlord for caution, failing which, for removing, under the A. S. 1756, on the ground of the tenant having deserted the farm, the tenant is not entitled to give in defences (other than a defence excluding the action, instantly verified) unless he comes prepared with a cautioner for violent profits; and if no such caution be offered, the sheriff may decern in terms of the libel without a closed record, though defences may have been lodged. *Cossar* v. *Home*, 1847, 9 D. 617; 19 J. 228.

417. Removing — Caution for Violent Profits—A. S. 10 July 1839, s. 34.—*Held* that an action by a landlord, under s. 5 of A. S. 14 Dec. 1756, on the allegation that the tenant had deserted a farm, and concluding for caution for the next five years' rents, and failing caution for removing, was not an action of removing to which the provision of s. 34 of A. S. 10 July 1839, requiring caution for violent profits, applied. *Oliver* v. *Weir's Trs.*, 1870, 8 M. 786; 42 J. 444.

418. Removing — Caution — Violent Profits.—A tenant, after his landlord's death, raised an action of damages in the Court of Session for non-implement of a stipulation regarding improvements against the heir, who alleged that as he was an heir of entail, he did not represent his predecessor. Thereafter the heir raised an action against the tenant in the sheriff court, to compel him to find caution for arrears of rent, and future rents for the five following crops, failing which, to remove. The sheriff ordered the tenant to find caution, whereupon the tenant advocated the process *ob contingentiam* of his action. *Held* that it was not imperative on the tenant to find caution before the grounds of his defence were examined. *Cossar* v. *Home* (No. 416), distinguished. *Mackenzie* v. *Sir K. Mackenzie*, 1848, 10 D. 1009; 20 J. 369.

419. Removing — Caution — Violent Profits.—A motion for caution for violent profits, made before the Inner House in an action of removing, *refused* on the ground chiefly that the motion had been made before the sheriff and withdrawn, and that no explanation was offered of its withdrawal. *King* v. *Wieland*, 1858, 20 D. 960; 30 J. 574.

420. Removing—Citation.—*Held* that one of four brothers, joint tenants in a farm, was effectually cited in an action of removing at the farmhouse where his co-tenants resided, although he himself lived and taught a school in another place some miles distant. *Macdonald* v. *Sinclair*, 1843, 5 D. 1253; 15 J. 511.

421. Removing—Competency.—It is incompetent by chalking the door, and a summons of removing before the sheriff, or magistrates of a burgh, to get one of two conjunct clerks removed from part of the accommodation in the town-house which he had been in use to occupy. *Mags. of Dundee* v. *Kerr*, 1833, 12 S. 173; 9 Fac. 124.

422. Removing—Competency—Irritancy of Lease.—A clause in a lease, though expressed in the form of an irritancy, may, if truly forming a reasonable condition of the contract, support an action of removing before the sheriff. *Hall* v. *Lady Grant*, 1831, 9 S. 612; 6 Fac. 410.

423. Removing — Competency — Precarious Possessor.—An action of removing

under the A. S. 1756, is not a competent form of removing a precarious possessor. *Campbell* v. *D. of Argyll*, 1836, 14 S. 798 ; 11 Fac. 672.

424. Removing — Competency — Subtenant—Reduction of Sublease.—A summary removing is competent against a subtacksman, who derives right from a party prohibited to sublet, without any reduction of his title. *E. of Elgin's Trs.* v. *Walls*, 1833, 11 S. 585.

425. Removing — Competency — Insolvency.—It is incompetent to pursue a summary removal, on the ground of a conventional penal irritancy having been incurred by insolvency,—an action of declarator being necessary. *Hog* v. *Morton*, 1825, 3 S. 617.

426. Removing—Competency—Heritable Creditor.—An heritable creditor, with a clause in his bond authorising him to output and input tenants, is entitled, without a maills and duties, to obtain decree of removing against a tenant-at-will. *Blair* v. *Galloway*, 1853, 16 D. 291 ; 26 J. 136.

427. Removing — Competency — Exclusion of Subtenants, Assignees, etc.—Assumption of Partner.—*Held* that a tenant under missives of lease, excluding subtenants, assignees, and creditors, who, after becoming bankrupt, assumed a partner, had, along with his partner, such a title of possession as rendered their summary removal incompetent ; and that the application was not rendered competent by the trustee for the tenant's creditors joining with the landlord as a petitioner. *Borrows & Co.* v. *Colquhoun*, 1854, 17 D. (H. L.) 31 ; 1 Macq. 691 ; 26 J. 641.

428. Removing—Competency—Summary Ejection — Subtenant — Suspension — Offer to Refer to Oath—Consent of Landlord.—A summary process of ejection was brought against a party holding a sublease from a tenant, who was prohibited from assigning or subletting without a written consent from the landlord, and who subsequently renounced the principal tack. The sheriff decerned in the removing, on the ground of the subtenant having produced no title to resist it ; and the subtenant presented a bill of suspension, and thereafter offered to refer to the oath of the landlord's factor that he had agreed to receive him as principal tenant. The court *refused* the bill. *Cromer* v. *D. of Gordon*, 1830, 8 S. 353 ; 5 Fac. 299.

429. Removing—Competency—Summary Complaint.—A summary complaint for removing is competent if it describe the nature of the tenancy with accuracy, although not in the precise terms of the schedule annexed to the stats. 1 and 2 Vict. c. 119. *Shotts Iron Co.* v. *Paton*, 1857, 19 D. 755 ; 29 J. 349.

430. Removing — Competency — Tacit Relocation—Suspension—Juratory Caution —A. S. 14 Dec. 1756.—In a suspension of a decree of removing, *held* (1) that a summons of removing under the A. S. 1756 did not require to libel a written title of possession, and was competently directed against a party possessing on tacit relocation or by mere sufferance ; and (2) in the circumstances, the complainer could not be allowed to suspend on juratory caution. *Mien* v. *Mien's Trs.*, 1867, 4 S. L. R. 73.

431. Removing—Competency—Personal Bar.—Circumstances under which a tenant *held* barred from objecting that an action of removing, founded on an irritancy in his lease, was not competent before the inferior court. *Scott* v. *Wotherspoon*, 1829, 7 S. 481.

432. Removing — Competency — Tenant Ordained to Make "Payment" and on Failure to Remove.—In an action of removing for non-payment of rent under the A. S., it is incompetent to ordain a tenant to make "payment," and, on failure, to remove. *Urquhart* v. *M'Kenzie*, 1824, 3 S. 84.

433. Removing — Decree — Death of Tenant before Extract—Effect on Heir.—*Held* that where decree of removing is obtained against a tenant, but he dies before it is extracted, his heir may be charged on the extracted decree without a transference ; and *observed*, that in the Court of Session a transference after final decree is not required in any case. *E. of Kintore* v. *Watt & Fowler*, 9 Dec. 1809, F. C.

434. Removing — Decree of — Interim Execution.—Although a landlord obtains a decree of removing against his tenant, the court will not award interim execution pending appeal. *E. of Mansfield* v. *Henderson*, 2 Mar. 1815, F. C.

435. Removing — Decree — Possession under Assignation in Security.—Decree of removing against a party claiming possession under a bond and assignation in security, but which was extinguished. *Alison* v. *Craig*, 1825, 3 S. 492.

436. Removing — Decree — Purging of Irritancy. — *Question*, whether an irritancy must be declared before decerning in a removing ; and whether it be competent to purge after extract. *M'Christie* v. *Kea*, 1825, 4 S. 11.

437. Removing—Decree of, under A. S. 1756—Purging Irritancy.—After a decree of removing under the A. S. 1756 has been extracted, the tenant cannot purge the irritancy by finding caution in a suspension of the decree. *Hunter* v. *Badenoch*, 18 Nov. 1800, F. C. ; M. "Removing" App. No. 1. *Duncan* v. *Welsh*, 1805, Hume 575. *E. of Hopetoun* v. *Law*, 1806, Hume 577. *Kennedy* v. *Alison*, 1807, Hume 578. *Kinloch* v. *Maccomie*, 16 June 1812, F. C.

438. Removing—Decree—Reduction.—A landlord obtained separate decrees of removing on desertion, and a stipulated irritancy against a tenant, and thereafter another for non-payment of rent. *Held* that the latter decree did not form a title to exclude the tenant from insisting in a reduction of the two prior decrees. *M'Kenzie* v. *M'Kenzie*, 1823, 2 S. 149.

439. Removing — Decree — Reduction — Sheriff Court Practice. — In an action of removing raised in the sheriff court of Fife, the sheriff "appointed the defender against the 10th March current to give in a condescendence, etc." (that being a court day); and no condescendence being lodged, decree was on that day pronounced as by default. *Held* (after an inquiry into the practice of sheriff courts, which was not uniform) that no default was incurred, and could not be so until after the expiry of the 10th, and therefore that the decree must be reduced, although pronounced according to the practice of the sheriff court of Fife. *Hog* v. *Hog*, 1837, 15 S. 532; 12 Fac. 503.

440. Removing — Decree — Reduction — Subtenant.—A tenant of a farm having been removed by a decree of removing, the subtenant of a mill upon the farm was thereafter ejected by decree of the sheriff. In a reduction brought by the subtenant, *held* that the decree ejecting him was not reducible. *Wilson* v. *Campbell*, 1839, 2 D. 232.

441. Removing — Decree — Suspension — Counter Claims—Juratory Caution.—Suspension of a decree of removing *passed* on juratory caution, where a tenant had counter claims against the landlord pending in an action of damages, at the tenant's instance, for non-fulfilment by the landlord of certain stipulations of the lease. *Scott* v. *Christie*, 1856, 18 D. 859; 28 J. 390.

442. Removing — Decree — Suspension — Conventional Irritancy.—A decree of removing, pronounced by a sheriff under an action which was founded on a conventional irritancy, was suspended. *Rae* v. *Henderson*, 1837, 15 S. 653; 12 Fac. 616.

443. Removing — Decree — Suspension — Violent Profits—Caution.—In an action of removing, the defender having failed to find caution for violent profits, the sheriff "decerned against the defender in the removing, in terms of the conclusions of the summons." *Held* competent to present a bill of suspension, without caution or consignation, though the reclaiming days against the sheriff's judgment were not expired. *Ross* v. *Webster*, 1833, 12 S. 200; 9 Fac. 135.

444. Removing — Decree — Suspension — Competency.— The Lord Ordinary, in an advocation of a process of removing, in respect of the advocators' failure to find caution for violent profits and non-appearance, decerned against them in terms of the conclusions of the summons in the inferior court. The advocators having been charged on this decree, presented a note of suspension, offering caution for violent profits and expenses. *Held* that the suspension was incompetent. *Macpherson* v. *Graham*, 1863, 1 M. 973; 35 J. 568.

445. Removing — Decree — Suspension — Caution—Violent Profits.—A creditor infeft under a bond and disposition in security, raised a process of removing of the debtor from a part of the subjects occupied by himself, in respect that an arrear of interest was due; and, in default of caution for violent profits, decree of removing was pronounced. Bill of suspension *passed* without caution. *M'Neil* v. *Blair*, 1834, 13 S. 37; 10 Fac. 25.

446. Removing — Decree — Suspension — Juratory Caution.—Circumstances in which the court *passed* a note of suspension of a decree of removing on juratory caution. *Logan* v. *Weir*, 1870, 8 M. 1009; 42 J. 616.

447. Removing — Decree — Suspension — Caution—Prior Action.—A landlord raised an action of removing in the sheriff court against a tenant, under the A. S. 14 Dec. 1756, on the ground that the tenant was upwards of a year's rent in arrear, against which the tenant pleaded that the question, whether or not he was in arrear, was *sub judice* in a previous process of sequestration which had been advocated to the Court of Session. The sheriff having decerned in the removing, the tenant presented a note of suspension, and offered juratory caution, which the court, in the special circumstances, *passed* on that caution. *Marshall* v. *Gartshore*, 1850, 12 D. 946; 22 J. 415.

448. Removing — Decree — Suspension — Caution — Juratory Caution. — Special circumstances in which the court passed a note of suspension of a decree of removing under the A. S. 14 Dec. 1756, on juratory caution. One of the suspenders being a minor and abroad, the court, of consent of the respondent, remitted to take the oaths of the other suspender, and of one of the curators of the minor. *Andrew & Others* v. *Colquhoun*, 1852, 15 D. 164; 25 J. 118; 2 Stuart 82.

449. Removing — Decree — Suspension —Renunciation Signed in Error.—A tenant under an agricultural lease fell into arrear of rent. His stock and implements were sold, and he executed a renunciation of the lease. Being charged to remove, he suspended, on the ground of alleged irregularity in the judicial procedure, and that he did not understand the English language, and had signed the renunciation under essential error as to its import and effect. Note *refused*. *Munro* v. *Baillie*, 1856, 19 D. 127.

450. Removing — Decree — Waived by Landlord — Proof of — Parole Evidence. — Proof by parole that a landlord had departed from a decree of removal of a tenant, *refused* as incompetent,—a reference to oath being, in the absence of writ, the competent mode of probation. *Hunter* v. *Dun*, 1809, Hume 584.

451. Removing—Displenishing—Plenishing Order — Title to Sue — Factor. — It is competent for the factor of a landlord abroad to apply (as the landlord might have done) for an order against a tenant, who had taken his lease from the factor, to put furniture into his house, under pain of summary ejectment. *Thomson* v. *Handyside*, 1833, 12 S. 557.

452. Removing — Displenishing. — Two out of three joint proprietors of a house

executed a poinding and sale of their tenant's whole effects, under a bill past due about five years, and said to be included under a discharge granted by them subsequently to its date; and out of the proceeds, as in the character of intromitters with the tenant's effects, satisfied the rent to fall due to themselves and their co-proprietor at the next term. *Held* entitled, along with their co-proprietor, to have the tenant removed at that term, in respect of his house being displenished, unless he could bring new furniture into it, or find security for the next year's rent. *Adam* v. *M'Dougall*, 1830, 8 S. 457.

453. Removing—Ejection.—*Opinions*, that an ejection cannot lawfully be carried out at night. *M'Gregor* v. *Viscount Strathallan*, 1864, 2 M. 1339; 36 J. 674.

454. Removing—Ejection—Advocation—Interdict. — Interim interdict *granted* against a landlord ejecting a tenant against whom he had got a decree of removing, but which was under advocation. *Cameron* v. *Macdonnell*, 1822, 2 S. 103.

455. Removing—Ejection—Bankruptcy of Tenant—Renunciation by Trustees—Suspension.—A tenant under a lease secluding assignees, having obtained a cessio, executed a disposition, for behoof of his creditors, to trustees, who having renounced the lease, the landlord immediately brought a summary process before the sheriff, to have the tenant ejected between terms. The sheriff having granted warrant, the tenant presented a note of suspension, which the court *refused*, in respect that the tenant had no further title to possess, seeing that the trustees were entitled to renounce it. *Williamson* v. *Johnstone*, 1848, 11 D. 332; 21 J. 77.

456. Removing—Ejection—Competency.—A petition for summary ejection, which contained no allegation of vitious or precarious possession without title, *held* incompetent. *Hally* v. *Lang*, 1867, 5 M. 951; 39 J. 530.

457. Removing—Ejection—Informalities in Process.—Bill of suspension of a warrant of ejection from an urban tenement, on the ground of informality in the process of removing, *refused*, the suspender offering neither caution nor consignation. *Stenhouse* v. *Adamson*, 1836, 14 S. 987.

458. Removing—Ejection—Notice—Suspension—Juratory Caution—Stat. 1555, c. 39—Sheriff Court Act, 1853, ss. 30 and 31.—Where the landlord's notice to remove did not proceed upon any legal warrant, *held* that a subtenant was entitled to have a note of suspension and interdict passed on juratory caution against a threatened ejectment by the landlord. *Logan* v. *Brown*, 1871, 8 S. L. R. 556.

459. Removing — Ejection — Subtenant — Verbal Lease — Notice. — A party was ejected from a piece of ground which he alleged he held under a verbal sublease subject to conditions as to notice of removal agreed to by the landlord. Issue of damages for wrongous ejectment *allowed*. *Irvine* v. *Field*, 1871, 8 S. L. R. 381.

460. Removing—Ejection of Subtenant.—A lease prohibited subletting generally, but allowed the tenant to sublet a particular part of the subject, he being liable in the whole rents notwithstanding. The tenant sublet, but no rent was paid by the subtenant either to his principal or to the landlord. The tenant failed. *Held* that, under a decree of removing against the tenant, the landlord was entitled to eject the subtenant. *Grant* v. *E. of Morton*, 1789, 3 Pat. 145.

461. Removing — Ejection — Title to Eject. — A landlord obtained decree of removing against a tenant, but before execution the landlord died. His heir-at-law, during apparency, enforced the decree and ejected the tenant. *Held* that there being no writ to connect the heir with the decree obtained by his ancestor, the ejection was illegal. *Mackenzie* v. *Gillanders*, 1853, 16 D. 158; 26 J. 74.

462. Removing—Ejection—Title to Sue.—Warrant of ejection granted by the sheriff reduced, in respect that the petitioners at whose instance it was granted were neither proprietors nor lessees of the subject. *Question*: Can tenants under a verbal lease pursue a summary removing? *Cameron* v. *Robertson & Others*, 1867, 39 J. 256; 3 S. L. R. 266.

463. Removing—Failure to Furnish.—*Question* as to the removing of a tenant from an urban tenement, in respect of failure to furnish, or find caution for a year's rent. *Adam* v. *M'Dougall*, 1828, 6 S. 978.

464. Removing—Grass Parks.—A tenant under a lease for seven years from Whitsunday 1855 occupied land as grass parks, and paid the rent annually at Martinmas. *Held* that the landlord was not entitled to remove the tenant from the lands at Martinmas 1861, in order to prepare the land by tillage for the next year's crop. *Addie* v. *Young*, 1862, 24 D. 799; 34 J. 405.

465. Removing—Improvements by Tenant—A. S. 1756.—A landlord is bound, in a removing under A. S. 14 Dec. 1756, to give credit to the tenant for improvements executed by the tenant under a stipulation in the lease, without his having constituted the claim by a regular action. *Urquhart* v. *M'Kenzie*, 1824, 3 S. 84.

466. Removing — Invalid Lease — Liability of Landlord.—A tenant, under a lease with warrandice, removed from his farm when all the leases in similar circumstances on the estate were set aside (one having been selected in which to try the question of their validity). *Held* that, although no decree of removal had been pronounced against him (in consequence of the summons having been erroneously directed against his uncle), he was entitled to damages as for eviction. *Menzies* v. *D. of Queensberry's Exrs.*, 1832, 11 S. 18.

467. Removing—Joint Tenants.—*Held*, in passing a bill of suspension of a decree of removing against one of two joint tenants, that both should have been called. *M'Donald* v. *M'Donald*, 1807, Hume 580.

468. Removing—Non-Stocking of Farm.—Removing for not stocking a farm may proceed on a summary application to the sheriff. *Tait* v. *Gordon*, 1828, 6 S. 1055.

469. Removing—Obligation to Remove—Construction of Lease.—A tenant under a nineteen years' lease, at a rent of £140, bound himself to remove at the expiration of it, "wherein, if he fail, he hereby binds and obliges himself and his foresaids to keep possession of the foresaid lands for the space of seven years thereafter, and to make payment of the sum of £300 sterling in name of tack-duty yearly for the said seven years, and that at the terms, and under the penalties, and bearing interest as before specified." *Held* that the landlord was entitled to insist on removal at the end of the nineteen years, although the tenant offered to pay the increased rent. *Cross* v. *Muirhead*, 1813, Hume 860. *Campbell* v. *M'Laurin*, 1814, Hume 864.

470. Removing—Reduction of Lease—Entailed Estate.—A lease having been reduced on 8th March 1820, as in violation of an entail, the tenant was ordained to remove at Whitsunday as to the houses and grass and at the separation of the crop from the arable land. *E. of Wemyss* v. *Murray*, 2 Feb. 1821, F. C.

471. Removing—Resumption of Land—Construction of Lease—Singular Successor.—A lease was granted to a tenant for eleven years of houses and garden ground, with a reserved power to the proprietrix, if so inclined, "to take possession of the subjects hereby let at any time during the currency of the tack, personally and by herself only," on giving a certain premonition. *Held* that this reserved power was not personal to her, but was transmissible to a purchaser. *Murray* v. *Brodie*, 1806, Hume 825.

472. Removing—Retention of Keys by Tenant.—A tenant is not liable in damages for retaining the keys of the houses, after tendering them on condition that the landlord should concur in getting the value of houses ascertained, in terms of the lease. *Fraser* v. *Maitland*, 1824, 2 Shaw's App. 37.

473. Removing—Subtenant—Possession.—In a removing as against a subtenant, proof allowed, whether houses possessed by the defender were excluded from the pursuer's lease. *Ritchie* v. *Dickson*, 1857, 19 D. 949; 29 J. 438.

474. Removing—Subtenant.—An allegation by a subtenant, that he holds under a sublease by the principal tenant, is not a relevant defence to a petition for summary ejection by the landlord against both the tenant and subtenant. *Robb* v. *Menzies*, 1859, 21 D. 277; 31 J. 155.

475. Removing—Subtenant.—*Held* that a subtenant who was accustomed to pay his rent directly to the landlord, may be removed at the expiry of the lease without calling the principal tenant. *D. of Queensberry* v. *Barker*, 7 July 1810, F. C.

476. Removing—Subtenant.—A principal tenant granted a sublease, and his power so to do being doubtful, the landlord brought separate processes of removing against him and the subtenant. *Held* that one process would have been sufficient. *Davidson* v. *Girvan*, 1838, 16 S. 1125.

477. Removing—Summary Ejection—Where no Duration Specified.—Parties entered into a lease of agricultural subjects, complete in other respects, but omitting to specify the duration of the lease. The tenant was allowed by the landlord to possess the subjects for six months and to cultivate them. *Held* that the landlord was not entitled to remove the tenant summarily during the currency of the year. *Question*, whether the omission of a clause specifying the period of endurance would render a lease entirely null and void. *Orr* v. *Rannie*, 1872, 9 S. L. R. 337.

478. Removing—Sequestration for Rent—Liability of Landlord.—Circumstances in which it was *held* that a landlord was not liable in damages to a tenant for ejecting him and his family at a time when it was alleged he had also the tenant's effects attached by sequestration. *Tait* v. *Paton*, 1825, 4 S. 208.

479. Removing—Terms of Removal.—Under a lease, the terms of removal in which were Whitsunday as to the grass, and the separation of the crop as to the arable land, *held* (1) that the tenant was not bound to remove at Whitsunday from arable land which had been natural pasture at the commencement of the lease, but brought in by him in the course of it; (2) that he was bound to remove at that term from all grass, whether growing on arable or pasture land; but under "grass" could not be included the crop of hay arising from seed sown with the penult crop, and yielding the first crop in the year of removal; and (3) that where the landlord has the stipulated quantity of grass left on the whole lands let, he cannot object to the want of a relative proportion on the particular farms into which the lands had been subset. *Sir A. Keith* v. *Logie's Heirs*, 1825, 4 S. 267; 1 Fac. 77.

480. Removing—Time Allowed for—Farm.—A party who had been ordained to remove from a farm within three weeks, allowed a reasonable period and accommodation to thrash out his grain and dispose of his cattle. *Finlayson* v. *Pedie*, 1829, 7 S. 617.

481. Removing—Title to Defend.—In an action of removing by a principal against a subtenant, a party claiming the property, and alleging that the principal tenant's right flowed *a non habente potestatem*, *held* not entitled to oppose the removing. *Shirlaw* v. *Wilson*, 1823, 2 S. 561.

482. Removing—Title to Defend—Life-renter.—A husband and wife being infeft in lands in conjunct fee and liferent for his liferent use allenarly, and to his heirs and assignees in fee, *held*, in a question with a party to whom he had granted a disposition *omnium bonorum*, that she had no right to oppose a decree of removing during her husband's lifetime, but without prejudice to her liferent right in the event of her survivance. *Gordon* v. *Baddon*, 1848, 10 D. 1385 ; 20 J. 503.

483. Removing—Title to Sue.—A party, on behalf of herself and her sister, granted a lease, and the sister having died, an objection taken, in a process of removing by the tenant, to the title of the granter of the lease to insist *quoad* her sister's share, *repelled*. *Paxton* v. *Stark*, 1803, Hume 568.

484. Removing—Title to Sue.—It is not competent, in an action of removing, for a tenant to object to the title of a party from whom he had derived right, and who, although not feudally vested, had the substantial right to the subject. *Penman* v. *Martin*, 1822, 1 S. 485.

485. Removing—Title to Sue.—A tenant who, previous to the death of a landlord, possessed under a lease, made an offer for a new lease to the tutor of the landlord's heir, and a special agreement with them, under which he possessed his farm. *Held* not entitled to object to their title to pursue a removing against him. *M'Nair* v. *Lord Blantyre's Tutors*, 1833, 11 S. 935.

486. Removing—Title to Sue—Bankrupt.—The purchaser of a house and grounds, under a missive of contract of ground-annual, became bankrupt, and, while unretrocessed, granted a lease of the subjects for six months. At the expiry of the lease, the bankrupt brought an action of removing against the tenant. His trustee declined to make up a title, or interfere with the subjects or process in any way. *Held* (1) that the bankrupt had a good title to sue ; and (2) that a defence that the defender had acquired *pendente processu* a right of property superior to that of the bankrupt, could not be entertained in the removing. *King* v. *Wieland*, 1858, 20 D. 960 ; 30 J. 574.

487. Removing—Title to Sue—Defect in Titles.—An objection by a tenant to the title of a purchaser to insist in a process of removing, that his seisin was granted by the seller whose titles were inaccurate in deducing his propinquity, *repelled*. *Stewart* v. *Burns*, 1802, Hume 568.

488. Removing—Title to Sue—Enforcement of Decree.—Decree of removing against a subtenant was obtained at the instance of the principal tenant and the landlord, and the landlord died. *Held* that the tenant was entitled to enforce the decree without the concurrence of the landlord's representatives. *Fraser* v. *Fraser*, 1833, 11 S. 565.

489. Removing—Title to Sue—Heritable Creditor—Unstamped Missives.—An heritable creditor infeft on a bond and disposition in security, containing power to output and input tenants, had obtained decree in an action of maills and duties, and had levied the rents under it. *Held* that he was entitled to pursue a summary process of removing. A defence to an action of removing, founded on unstamped and improbative missives of lease, *held* not to be instantly verified. *Forsyth* v. *Aird*, 1853, 16 D. 197 ; 26 J. 97.

490. Removing—Title to Sue—Infeftment.—In an action of declarator of a conventional irritancy and for removing, *held* that trustees of the landlord were *in titulo* to insist in it, though they had not been infeft till after it was in court. *Tennent* v. *Macdonald*, 1836, 14 S. 976 ; 11 Fac. 818.

491. Removing—Title to Sue—Pursuer not Infeft — Subsequent Infeftment. — A party who is not the setter of the tack, and not infeft, is not entitled to decree in an action of removing on the A. S. 1756, nor is a decree validated by his being subsequently infeft. *Scott* v. *Fisher*, 1832, 10 S. 284 ; 7 Fac. 226.

492. Removing—Title to Sue—Infeftment.—An action of removing was brought against a tenant by a proprietor, who was served heir to his ancestor, but not infeft. When the summons was called, decree in absence was taken. Against this decree the tenant was reponed, but the proprietor had in the meantime completed his title by infeftment. *Held* that the heir's sasine drew back to the date of the service, and constituted an unobjectionable title to sue. *Mackintosh* v. *Munro*, 1854, 17 D. 99 ; 27 J. 23.

493. Removing—Title to Sue—Infeftment.—A purchaser not infeft let a piece of ground to a tenant, and having sold it, the new purchaser, also uninfeft, raised an action of removing against the tenant. *Held* that as the tenant could not have objected that his own author was not infeft, and the new purchaser was now in his right, no such objection could be made to his title to pursue. *Milne* v. *Petrie*, 23 Nov. 1807, F. C.

494. Removing—Title to Sue—Action by Heir not Infeft.—An heir in possession of lands raised in February 1800 an action of removing of a tenant from a farm let by his father, as at Martinmas 1800 and Whitsunday 1801, and he was not infeft till July 1801. *Held*, nevertheless, that he was entitled to decree. *Brown* v. *Lang*, 10 Feb. 1802, F. C. ; Hume 565 ; M. "Removing" App. No. 5.

495. Removing—Title to Sue—Infeftment.—Infeftment at the date of calling a summons of removing is a sufficient title to insist on the removing. *Campbell* v. *M'Kellar & Others*, 2 Mar. 1808, F. C. ; M. "Removing" App. No. 5. *Johnstone* v. *Martin*, 3 Mar. 1810, F. C.

496. Removing — Title to Sue—Infeftment.—A landlord who had granted a lease having sold the property, *held* that an action of removing at the instance of his factor,

having power to remove tenants and that of the disponee, although the latter was not infeft, was competent. *Ferguson* v. *Morison*, 24 June 1802, F. C.; M. 13806.

497. Removing—Title to Sue—Action by Trustees not Infeft — Warning. — A proprietor granted a lease of his lands to his son during the lifetime of the proprietor, who died leaving a disposition of his property to trustees, and they, without being infeft, and without giving the son forty days' warning before Whitsunday, attempted to remove him. *Held* (1) that not being infeft, they had no title to do so; and (2) that the son was entitled to warning; and *observed*, that although the right of a liferent tenant comes to an end by his death, yet that of a tenant for the lifetime of the granter does not do so without warning. *Johnstone's Trs.*, 2 July 1803, F. C.; M. 15207.

498. Removing—Title to Sue—No Infeftment. — A proprietor obtained decree of removing against tenants, but allowed them to remain another year. He sold the estate, and the purchaser raised a summons of removing against the tenants. Objection to his title to sue on the ground that his infeftment had not been taken on the lands, *repelled*, seeing that the objectors had possessed the lands by the toleration of the purchaser and could not therefore question his title. *Innes* v. *Finlayson*, 1803, 4 Pat. 443.

499. Removing — Title to Sue — Joint Proprietors.—*Held* that where two parties were proprietors of an island, the one could not insist in a process of removing a tenant without the concurrence of the other, although he had only 1-71st part of the whole. *Bruce* v. *Hunter*, 16 Nov. 1808, F. C.

500. Removing — Title to Sue — Joint Proprietors.—*Held* that two of three joint proprietors had no title to sue a removing, without the authority of the third. *Grozier* v. *Downie*, 1871, 9 M. 826; 43 J. 456.

501. Removing — Title to Sue — Liferenter.—An estate was conveyed in fee to one party, subject to a liferent of certain parks in favour of another, under a declaration that if the parks were under lease at the time of the granter's death, the fiar should pay the liferenter an annuity until the liferenter obtained the natural possession, and that the rents in the meanwhile should fall to the fiar. *Held* that although the fiar could not remove a tenant in possession without concurrence of the liferenter, he was entitled, without such concurrence, to pursue a sequestration for payment of the rent. *Yuill* v. *Buchanan*, 1833, 11 S. 682.

502. Removing—Title to Sue—Liferent—Kindly Tenant.—A landlord granted a writing, which bore that he "received and rentalled his niece as 'a kindly tenant for all the days of her life,'" reserving to two tenants their rights under their leases, but assigning their rents to his niece, who was bound, besides paying rent, to erect certain buildings. *Held* that the niece was not properly a kindly tenant, but only the holder of a liferent lease; that the tenants whose rights were reserved were not her subtenants; and that the landlord, being undivested proprietor, had a title to remove them at the end of their leases, without concurrence of the liferent tenant. *Opinion*, that a liferent tenant has a title to sue a removing. *Wilson* v. *Wilson*, 1859, 21 D. 309; 31 J. 164.

503. Removing — Title to Sue — Liferentrix—Lease Granted by Fiar and Liferentrix Jointly. — *Question*, whether it is competent for a liferentrix to pursue a removing under an irritancy, where the lease was granted by her and the fiar jointly. *M'Christie* v. *Kea*, 1825, 4 S. 11.

504. Removing — Title to Sue — Fiar—Concurrence of Liferenter.—A fiar is not entitled to remove a tenant without concurrence of the liferenter. *Buchanan* v. *Yuill*, 1831, 9 S. 843; 6 Fac. 576.

505. Removing — Title to Sue — Reduction of Leases.—A party who was infeft on a charter of resignation obtained from a subject superior on a procuratory by his ancestor, who was erroneously infeft on a Crown charter, *held* to have a sufficient title to insist in a process of reduction of leases and of removing. *Chisholm* v. *Macdonald*, 27 Feb. 1800, F. C.; M. "Taillie" App. No. 6.

506. Removing — Title to Sue — Reduction of Decree. — A party obtained and enforced, as principal tacksman, a decree of removing against a tenant of a house; and it appeared that he was neither tacksman nor proprietor, but factor for another who was not alleged to have authorised the proceedings. The court *reduced* the decree. *Johnston* v. *Dickson*, 1831, 9 S. 452.

507. Removing—Title to Sue—Sublease. —A tenant who was prohibited from subsetting, having, with consent of the landlord, subset his farm, *held* entitled to pursue a removing without the concurrence of the landlord. *M'Ilreavie* v. *Smith*, 1810, Hume 851.

508. Removing — Title to Sue — Verbal Tenancy—Heir.—A tenant under a lease of twenty-one years assigned it to A without mention of heirs; and A having given a verbal lease of part of it, and died, *held* that his heir was entitled to insist in a removing against the verbal tenant. *Tailfer* v. *M'Dougal*, 1811, Hume 857.

509. Removing—Trustees—Reduction of Trust Deed—Personal Bar. — A party having, by his deed of settlement, conveyed his estate to trustees, they let part of his heritage on a ten years' lease, under a reservation, that if the trust deed should be reduced *ex capite lecti*, the lease should be at an end so far as incumbent on the trustees. One of the trustees, by the predecease of a nearer heir, afterwards became nearest heir of the truster, and reduced the trust deed *ex capite lecti*. *Held* (1) that he was entitled immediately to remove the

trustees from possession; and (2) that he was not barred *personali exceptione* from insisting in a removing against the tenant, in respect of the reservation in the lease. *MacNeven* v. *Murray*, 1847, 9 D. 1138; 19 J. 482.

510. Removing — Unstamped Missive — Violent Profits — Caution.—In an action of removing, founded on an unstamped missive, the tenant was ordered to find caution for violent profits, as a condition of giving in defences. He presented a bill of suspension, and the Court of Session remitted to the sheriff to proceed according to the Act of Sederunt. *Ross* v. *Webster*, 1834, 12 S. 308.

511. Removing—Unstamped Missive.—A party in possession of a farm under an unstamped missive of lease was, during the currency of it, charged under a decree to remove, for not finding caution in terms of the Act of Sederunt, and he objected that the missive was not stamped. The court, in a suspension, after the missive was stamped, remitted to the sheriff to proceed in terms of the Act of Sederunt. *M'Naught* v. *Graham*, 1834, 12 S. 619.

512. Removing—Voluntary—Ejection of Prior Tenant—Liability of Landlord.—A tenant having voluntarily quitted possession of a subject, upon intimation to him of a warrant of ejection obtained against the immediately previous possessor, at the instance of a party claiming upon a title preferable to that of his author, *held* not entitled to damages against his author. *Anderson* v. *Abel*, 1854, 16 D. 796; 2 J. 373.

513. Removing—Warning.—A tenant of a pasture or store farm on which there was a house, but who resided with his family on an adjacent farm, *held* to have been duly warned to remove by a copy of a baron's precept being left at the house with the wife of his servant or herd. *Sir J. S. Stewart* v. *Kerr*, 1805, Hume 571.

514. Removing—Warning.—Where the copy of a precept of warning to remove, served on a tenant, was not conform to the precept as to the terms of removal, *held* that the warning was ineffectual. *Ross* v. *Ross*, 1805, Hume 573.

515. Removing — Warning. — *Question*, whether warning be necessary in the case of a one year's tack of an arable farm. *M'Nair* v. *Lord Blantyre's Tutors*, 1833, 11 S. 935.

516. Removing—Warning.—*Held* that a formal warning, in terms of the stat. 1555, c. 39, or A. S. 1756, was not necessary in removing a tenant possessing two small houses and a garden of less than a quarter of an acre in extent, under a verbal lease, at a rent of £5, and who was not a servant of the landlord. *Chirnside* v. *Park*, 1843, 5 D. 864; 15 J. 360.

517. Removing — Warning.—A landlord who had right to put an end to a lease by giving notice, gave notice, but did not follow it up by a removing. *Held* that this had not exhausted his power, so as to prevent him some years afterwards from giving notice and removing the tenant before the ish in the lease. *Granger* v. *Geils*, 1857, 19 D. 1010; 29 J. 405.

518. Removing—Warning.—Objections to a precept of warning not appearing *ex facie*, and which was followed by decree of removing, *repelled* as irrelevant. *Dunn* v. *Craig*, 11 Mar. 1824, F. C.; 2 S. 797.

519. Removing — Warning — Entailed Estate.—Although an heir of entail in possession be prohibited from granting leases beyond his lifetime, yet *held* that a tenant under such a lease could not, on the heir's death, be summarily removed, but was entitled like other tenants to warning. *Udney* v. *Brown*, 1802, Hume 566.

520. Removing—Warning—Execution of —Ejection—Competency.—*Held* in suspensions of two decrees by a burgh court (1) that an execution of warning within burgh was sufficiently attested by one witness; (2) that an execution bearing that a party had been "lawfully charged and warned away," and that the officer had "chalked 'V. R. 1858' at and upon the most patent door" of the premises, being within burgh, was sufficient, more especially when taken along with the party's own deposition; (3) that an allegation by a subtenant of a sublease by a principal tenant was irrelevant against the landlord in a petition for ejection against the principal tenant and subtenant, and had not been instructed; (4) that a summary petition for ejection, after due warning, is competent in a burgh court. *Opinion*, that such a petition cannot be defended without finding caution for violent profits, unless on a defence which can be instantly verified. *Robb* v. *Menzies*, 1859, 21 D. 277; 31 J. 155.

521. Removing—Warning—Equivalents.—Although a landlord held a communing with his tenant in the course of the last year of his lease as to a new lease at an additional rent, and the farm was advertised to be let, and it was let to another person, which was intimated to the tenant, and he showed the lands to that person, sold off a large part of his stock, and dismissed a number of his servants, yet found that these circumstances were not equivalent to warning. *Gordon* v. *Bryden*, 13 Jan. 1803, F. C.; M. 13854.

522. Removing — Warning — Summary Petition—A. S. 1756.—A summary petition of removing, served more than forty days before Whitsunday, is a competent warning under the A. S. 1756. *Hoy*, 2 June 1810, F. C.

523. Removing — Warning — Glebe. — A clergyman is entitled, on his induction, to remove a tenant of part of his glebe without regular warning, although it is not adjacent to the manse, and was in use to be let by the incumbent, and although he did not intend to occupy it personally. *M'Callum* v. *Grant*, 1826, 4 S. 527; 1 Fac. 465.

524. Removing—Warning—Grass Parks.—Where grass parks were let for a year, *held*

that the tenant was bound to remove at the end of the year without warning. *Macharg*, 9 Mar. 1805, F. C.; M. "Removing" App. No. 4.

525. Removing — Warning — Obligation to Remove without Warning.—An inn with offices, and three fields, partly arable and partly pasturage, were let verbally for one year, with entry to the arable ground at Candlemas, and to the inn, etc., at Whitsunday; and in June the parties subscribed a lease in these terms, and by which the tenant bound himself to remove at the ensuing Candlemas and Whitsunday without warning. *Held* not entitled to warning. *Paxton* v. *Stark*, 1803, Hume 568.

526. Removing — Warning — Obligation to Remove without Warning—Failure to Charge—A. S. 1756.—Although a tenant was bound by his lease to remove at Martinmas without warning, and it was alleged that he was in the knowledge that the farm had been let to another tenant, yet *held* that as he had not been charged forty days before Whitsunday to remove, in terms of the A. S. 1756, he was not liable to be removed. *Lockhart* v. *Twaddle*, 1800, Hume 564.

527. Removing — Warning — Obligation to Remove without Warning.—A consent to remove without warning, if given within the time when warning might easily have been executed, is effectual against the tenant; and such consent does not require to be written on stamped paper. *M'Laren* v. *M. of Breadalbane*, 1831, 10 S. 163; 7 Fac. 136.

528. Removing — Warning — Obligation to Remove without Warning.—Terms of a letter by a tenant relative to a one year's possession of a farm, which were held to import an obligation to remove at the end of the year without warning, and therefore no warning necessary. *M'Nair* v. *Lord Blantyre's Tutors*, 1833, 11 S. 935.

529. Removing — Warning — Obligation to Remove without Warning.—A tenant who, immediately prior to the expiration of a long lease, got a renewal for another year, and bound himself to remove without warning or process of removal, *held* not entitled to warning. *Brown* v. *Peacock*, 1822, 1 S. 359.

530. Removing — Warning — Obligation to Remove without Warning.—A tenant, who was bound by his lease to remove without warning, having been allowed, under a special agreement, and not by tacit relocation, to continue in possession for a year after expiration of the lease, *held* not entitled to a formal warning. *Blair* v. *Ferguson*, 1840, 2 D. 546; 15 Fac. 575.

531. Removing — Warning — Obligation to Remove without Warning.—A tenant who, towards the termination of his lease, bound himself to remove without warning, not allowed to object that warning had not been given. *Heron* v. *Rollo*, 1825, 4 S. 118.

532. Removing — Warning — Obligation to Remove without Warning—Tacit Relocation—Violent Profits—Caution.—A tenant who had come under an obligation to remove from his farm without any warning, stated, as defences to an action of removing, that he had received no warning, and that he possessed by tacit relocation. *Held* that these were not defences excluding the action, capable of being instantly verified, so as to exempt him from finding caution for violent profits under the A. S. 1839, c. 7, s. 34; and juratory caution *refused*. *Johnstone* v. *Maxwell's Trs.*, 1845, 7 D. 1066; 17 J. 566.

533. Removing—Warning—A. S. 1756—Obligation to Remove without Warning.—A tenant bound himself to remove at specified terms in 1821 and 1822, "without any warning or process of removing to be used for that effect," and a summons of removing, which did not libel on the A. S. 14 Dec. 1756, was executed and called in the sheriff court more than forty days before Whitsunday 1821. *Held* that as the obligation was effectual at common law, it was not necessary to libel on the Act of Sederunt; but *observed*, that it does not dispense with executing and calling the summons forty days prior to Whitsunday. *Stevensons* v. *Baird*, 23 June 1821, F. C.; 1 S. 84.

534. Removing — Warning — Port-Customs.—Formal warning is not necessary to remove a tenant of port-customs. *E. of Elgin* v. *M. of Tweeddale*, 1831, 9 S. 901.

535. Removing—Warning—Proof of.—It is competent to support by parole the execution of a verbal warning to remove within burgh, in which execution the term, as contained in a printed form, was delete, and another term inserted. *Scott* v. *Boyd*, 1829, 7 S. 592.

536. Removing—Warning—Resumption by Landlord of Part of Lands Let.—It being stipulated in a lease that the landlord should be entitled to resume possession of part of the lands, *held* that no warning in terms of law was requisite in the exercise of such a power. *Sharp* v. *Clark*, 1807, Hume 577.

537. Removing — Warning — Sublease—Subjects Let as Accessory to Customs.—A house within burgh, let as accessory to certain burgh customs, but not used for the purpose of collection, having been subset, as was alleged, with part of the customs, *held* competent to remove the subtenants from the house as a separate tenement, and according to the forms of warning in use as to other houses within burgh. *Scott* v. *Boyd*, 1829, 7 S. 592.

538. Removing — Warning — Subtenant.—A principal tenant granted a sublease, but the subtenant was not recognised by the landlord, who held the principal liable to him. *Held* that a warning to the subtenant was not sufficient to warrant a removal of the principal. *Thomson* v. *Harvie*, 13 Dec. 1823, F. C.; 2 S. 581.

539. Removing—Warning—Servants of Proprietor.—*Held* that journeymen calico

printers, engaged as such at a printfield, and who received monthly wages, under deduction of rents payable for houses possessed by them, and who had been dismissed, were not entitled to warning, as in the case of proper tenants. *Young, Ross, Richardson, & Co.* v. *Paton*, 1808, Hume 582.

540. Removing—Warning—Tacit Relocation.—The heir of a tenant who possessed on tacit relocation, and died on 19th April without being warned to remove, *held* entitled to continue in possession for the ensuing year. *Hume* v. *M'Leod*, 1808, Hume 583.

541. Removing—Warning—Two Terms.—*Observed* that where there are two terms, it is sufficient if one warning be given within a year of the first term. *Maule* v. *Holiday*, 1820, Hume 589.

542. Removing — Warning — Verbal Notice.—Where the wife of a tenant of a dwelling-house under a verbal lease was the party who had made the contract, paid the rent, and carried on all transactions with the landlord, *held* that verbal notice to remove given to her was sufficient warning. *Slowey* v. *Robertson & Moir*, 1865, 4 M. 1 ; 38 J. 10.

543. Removing — Warning — Intimation by Tenant of Intention to Remove.—Intimation by a tenant of intention to remove, must, like warning by the landlord, be given forty days before the Whitsunday preceding the ish. *M'Intyre* v. *M'Nab's Trs.*, 1831, 5 W. & S. 299. Affg. 8 S. 237.

544. Removing — Warning — Written Notice of Intention to Remove—Act 16 and 17 Vict. c. 80—A. S. 1756.—*Held* (1) that in an action of removing it is not necessary to libel specially on the Act 16 and 17 Vict. c. 80 ; and (2) that although the A. S. 14 Dec. 1756 was libelled on, the provisions of s. 29 of the above Act of Parliament were not excluded as to the execution of a summons forty days before Martinmas. *Question*, whether written notice of intention to remove be equivalent to warning. *Granger* v. *Geils*, 1857, 19 D. 1010 ; 29 J. 405.

545. Removing — Warning — Verbal Intimation of Intention to Remove.—*Held*, on the construction of a tenant's oath of reference, that he had not given verbal intimation of his intention to remove from the farm without warning. *Heddle* v. *Baikie*, 1843, 15 J. 559.

546. Removing — Warning — Verbal Lease—Intimation by Tenant of Intention to Remove.—A tenant possessing without a written lease, who has more than forty days before Whitsunday intimated his intention to leave the farm, may be removed without a warning. *Heddle* v. *Baikie*, 1841, 3 D. 370 ; 16 Fac. 336.

547. Removing—Warning—Verbal Renunciation—Possession by Landlord.—A verbal renunciation of a verbal lease, followed by possession by the landlord, *held* binding on the tenant without warning. *Jameson* v. *Thomson*, 1802, Hume 807.

548. Removing—Wrongous Removing—Liability of Landlord.—A landlord found not liable in damages for having raised an action of removing against the tenant, on the allegation that he had no lease, although the tenant was assoilzied in respect of a missive which was in the landlord's own possession ; and he alleged that in consequence of the action he had suspended his farming operations. *Cree* v. *Collier*, 1821, 1 S. 170.

549. Rent—Abatement—Bankruptcy of Landlord—Effect on Trustee.—A landlord granted a letter to his factor, empowering him to discharge the tenants on the estate, by giving them a deduction of rent of 20 per cent., and to inform the tenants that he was to continue that deduction during the currency of their several leases ; and this was done. Five years thereafter the landlord's estates were sequestrated. *Held* that the trustee was bound by the letter. *Lindsay* v. *Webster*, 1841, 4 D. 231 ; 14 J. 89.

550. Rent — Abatement — Fishings — Introduction of Close-Time.—A party took a salmon-fishing on a lease for five years or seasons, during the currency of which an Act was passed introducing a uniform period of close-time, under circumstances which he alleged rendered its operation more injurious to his than to most other fisheries, and deprived him of about one-third of the produce of his fishing. *Held* that no warrandice had been incurred, and that he was not entitled to an abatement of his rent. *Holliday* v. *Scott*, 1830, 8 S. 831 ; 5 Fac. 668.

551. Rent—Abatement—Proof of Agreement.—Circumstances not sufficient to warrant a presumption in law that a landlord had agreed to an abatement of rent below that contained in a written contract of lease. *Gibb* v. *Winning*, 1829, 7 S. 677 ; 4 Fac. 944.

552. Rent—Abatement—Proof of Agreement—Parole Evidence.—An alleged verbal agreement to allow an abatement of rent under a written lease is not competent to be proved by parole. *Law* v. *Gibsone*, 1835, 13 S. 396 ; 10 Fac. 220.

553. Rent—Abatement—Singular Successor.—*Held*, in a question with a singular successor, that although a tenant exhibited a series of receipts by the former proprietor giving an abatement from the rent stipulated in the lease, they did not operate as a permanent deduction binding on the singular successor. *Riddick* v. *Wightman; Grant* v. *Watt*, 1802, Hume 777.

554. Rent—Action for Payment—Prescription—Reference to Oath.—A landlord pursued a tenant for a balance of rent, and the tenant having pleaded prescription, he referred the resting-owing to the oath of the tenant, who deponed that he had not paid the sum, but that the landlord had sequestrated, and paid himself. The landlord, without

having shown the tenant the sequestration process, questioned him with the view of bringing out that a balance remained due. *Held* that the oath was negative of the reference; and *observed*, that to entitle the landlord to refer to the sequestration process, he ought to have shown it to the tenant, and examined him in regard to it, and thus made it part of his oath. *Heddle* v. *Baikie*, 1847, 9 D. 1254; 19 J. 540.

555. Rent—Action for Payment—Relevancy.—A summons for rent *held* irrelevant, in respect it did not set forth the pursuer's title to sue, nor in what character the rent was due by the defender. *Hutchison* v. *Ferrier*, 1846, 8 D. 1228; 18 J. 587.

556. Rent — Amount — Fiars Prices. — Rent was made payable according to the price of cheese per stone, according to the fiars of the county. *Held* that this stipulation was capable of construction, and meant a local stone, which was a multiple of a pound: therefore that the bargain could not be set aside as *pactum illicitum*, nor could the imperial stone be insisted on. *Miller* v. *Mair*, 1860, 22 D. 660; 32 J. 243.

557. Rent — Amount not Fixed — Quantum valeat.—When there is a contract of location admitted, on which possession has followed, but the rent is either not fixed or cannot be ascertained, the *quantum valeat* must rule the rights of parties. *Ogilvie* v. *Boath*, 1868, 5 S. L. R. 231.

558. Rent—Arrears—Liability of Assignee.—Circumstances in which the assignee to a lease was *held* not liable for arrears of rent during a period when he had acquired right, but before he had taken possession. *Drysdale* v. *Wood*, 1832, 10 S. 198.

559. Rent — Arrears — Conclusion for Rent of Subsequent Term—Competency.—It is competent for a landlord, on suing his tenant for arrears of rent, to conclude for the rent of a subsequent term, the same being first come and bygone. *Woodward* v. *Wilson*, 1829, 7 S. 566.

560. Rent—Arrears—Counter Claims—Consignation.—While mutual actions were depending between a landlord and tenant, the one for payment of rent and the other for damages, three half-years' rent fell into arrear. The court ordained the tenant to consign these in the meantime, although he alleged that his action of damages was ready to be sent to the jury roll. *Carruthers* v. *Thomson*, 1836, 14 S. 691.

561. Rent—Arrears—Counter Claim by Tenant—Sist of Process.—In an action for arrears of rent, in which the defender pleaded payment of at least a great part of the sum sued for, the court *refused* to allow the process to be sisted to enable the defender to establish a counter claim of damages, which he was in the course of doing by a separate action. *Thomson* v. *Paxton*, 1849, 11 D. 1113; 21 J. 426.

562. Rent — Arrears — Consignation — Counter Claim by Tenant.—A tenant two years in arrear, ordered to consign the rents, although he had an action against the landlord for repetition of £1000. *Fraser* v. *Kinloch*, 1828, 6 S. 1117.

563. Rent—Arrears—Sale of Tenant's Effects—Counter Claim by Tenants—Suspension.—Bill of suspension of a sale of the goods of a tenant for arrears of rent, on the allegation that he had counter claims for repairs, *refused*, as it appeared he had got a deduction from the rent, which he agreed to receive in full of all repairs. *Johnstone* v. *Cleghorn*, 1824, 2 S. 688.

564. Rent—Arrears—Discharges for Five Consecutive Years—Presumed Payment of Arrears.—Discharges of rent by a landlord to a tenant for five years consecutively, presume payment of all arrears, and a settlement of their mutual claims under the lease. *Hunter* v. *Lord Kinnaird's Trs.*, 1829, 7 S. 548; 4 Fac. 794.

565. Rent—Arrears—Preference.—Where a tenant is bound at the end of his lease to give his stock to the landlord at a valuation, the landlord is not entitled to claim any preference thereon for arrears of rent. *M'Gregor* (*M'Lean's Tr.*) v. *Hunter* (*M'Lean's Tr.*), 1850, 13 D. 90; 23 J. 22.

566. Rent—Arrears—Sale of Machinery by Landlord to New Tenant—Poinding by Creditor of Old Tenant.—A tenant got largely into arrear, and his landlord obtained declarator of irritancy and decree of removing. On his removal, the landlord obtained possession of a thrashing-mill, then on the farm, along with other effects, which had belonged to the tenant, and alleged that he retained these by agreement with the tenant, in satisfaction of the arrears. The landlord sold the mill to the succeeding tenant, who used it for five years without challenge, and repaired it at considerable expense; and a creditor of the first tenant afterwards poinded it. *Held* that the presumption of ownership in favour of the second tenant not being removed by any proof or presumption adduced on the part of the poinder in favour of the first tenant, the poinder was not entitled to proceed with his diligence. *Sharpe* v. *Smyth*, 1832, 11 S. 38.

567. Rent—Arrears—Valuation of Hay—Compensation.—A lease contained a stipulation that the landlord should take the hay of the last year at a valuation; and the tenant incurred arrears of rent for several years; and in the last year a creditor poinded the hay in stacks, and part of the corn crop. *Held* that the landlord was not entitled to compensate the arrears with the value of the hay; but if claimed by him, he must pay the value to the poinder. *Stewart* v. *Rose*, 1816, Hume 229.

568. Rent — Charge for — Suspension — Compensation — Retention — Caution.—Bill of suspension by a tenant of a charge by an

assignee of the landlord for payment of rent refused to be passed without caution, notwithstanding the tenant had raised a multiplepoinding as to the rent, in respect that he intended to resist an order to consign, on the ground of claims of retention and compensation against his landlord. *Stewart* v. *Cameron*, 1827, 5 S. 557.

569. Rent — Charge for — Suspension — Charge on Articles of Roup.—Bill of suspension *passed* of a charge for payment of arrears of rent, where the diligence was founded on articles of roup binding the highest offerer merely to enter into a regular tack. *Brown* v. *Birtwhistle*, 1823, 2 S. 469.

570. Rent — Charge for — Suspension — Injury to Fishings by Operation on River.—Suspension of a charge for rent of fishings on the ground of injury by improvements on the river by statutory commissioners, *refused*, it being stipulated in the lease that this should not be a ground for claiming damages. *Dunsmore* v. *Oswald*, 1821, 1 S. 170.

571. Rent — Charge for — Suspension — Illiquid Counter Claim.—Suspension *refused* of a charge for rent on compensation founded on alleged illiquid and disputed claims for improvements. *Fraser* v. *Lord Lovat*, 1839, 2 D. 247.

572. Rent — Charge for — Suspension — Failure to Supply Water.—A bill of suspension of a charge for rent of a mill, in respect of a failure by the landlord to supply water, *refused*, except on consignation. *Clark* v. *Findlay*, 1223, 2 S. 480.

573. Rent — Charge for — Suspension — Failure of Landlord to Discharge Obligations —Caution.—A bill of suspension of a charge for rent, on the allegation that the rent stipulated was on condition of certian meliorations being made by the landlord, which had not yet been executed, *refused*, except on caution. *Gray* v. *Sword*, 1824, 3 S. 82.

574. Rent—Charge for—Compensation—Sums Due to Tenant. — *Question*, whether claims on the part of a tenant arising out of the lease are pleadable by way of compensation against a charge for rent. *Heriot* v. *Halket*, 1825, 3 S. 479.

575. Rent — Charge for — Suspension. — Suspension of a charge for rent *passed*, where the tenant was insisting in an action of damages against the landlord for injury to the premises, and which it was alleged he was unduly attempting to delay. *Hamilton* v. *Tenant*, 1839, 14 Fac. 1261.

576. Rent — Charge for — Suspension — Caution.—The tenant of a mill, who alleged that he had suffered damage by the act of a third party claiming right to and taking possession of the mill-dam, was charged by the landlord for payment of rent. The court *refused* to pass a bill of suspension without caution or consignation, except to the extent of damage, of which he produced *prima facie* evidence. *Houstoun* v. *Harvey*, 1831, 9 S. 560.

577. Rent — Charge for — Suspension — Customs Let not Exigible.—A party who had taken a lease of customs from the magistrates of a burgh, *held* not entitled to have a note of suspension of a charge for rent passed without caution or consignation, on the ground of a part of the customs let to him having been found not to be exigible, and damages having been incurred. *M'Rae* v. *Smith*, 1841, 3 D. 994.

578. Rent — Charge for — Suspension. — Circumstances in which *held* that there were not sufficient grounds stated by a tenant to entitle him to have a bill of suspension passed of a charge for bygone rents under a registered tack. *Scott* v. *Ironside*, 1829, 8 S. 77.

579. Rent — Deduction — Conditional Agreement.—The landlord of an inn, under lease for ten years from Whitsunday 1826, agreed, in 1831, with the tenant (now a bankrupt) and with his trustee to give a deduction of £30 from the rent, from Whitsunday 1831 to Whitsunday 1832, if the tenant kept up the establishment, and carried on the business till Whitsunday 1832. The stock of the tenant was sold off by the trustee, and the business suspended for a few days in February 1832, after which a subtenant, with the consent of the landlord, entered to the inn, and carried on the business till Whitsunday. *Held* that the tenant was entitled to the deduction of £30. *Thomas* v. *Dumbreck*, 1834, 12 S. 285.

580. Rent—Deductions—Counter Claims —Decreet-Arbitral.—An arbiter made up accounts between a landlord and tenant, on the assumption of the rent of the farm being £70, and decerned for a balance against the landlord, subject to deduction should the landlord be able to instruct that the rent was £100; and the landlord established this. *Held* that the difference between the £70 and £100 and interest thereon was not to be deducted from the balance, but that the £100 was to be substituted in place of the £70 at the terms when the rent fell due, and the account made up accordingly. *Lord Duffus* v. *Petrie*, 1833, 12 S. 205.

581. Rent—Deduction—Cession to Landlord of Part of Subjects Let—Claim not Reserved.—A tenant under a lease for nineteen years having ceded possession of a house and piece of ground, without reserving any claim for pecuniary compensation against his landlord, and it being proved that the tenant had admitted that he had received adequate value at the time, and no demand being made by him for fifteen years thereafter, when the last year of his lease had arrived, *held* that the landlord was not liable to pay or deduct from the rent any allowance for the house and ground. *Belshes* v. *Fraser*, 1839, 1 D. 1071.

582. Rent—Deduction—Loss of Possession.—A landlord who gave part of a farm to road trustees for the purpose of making a road, *held* not entitled to payment from the tenant of the rent of that ground, leaving the tenant to obtain indemnification from the trustees, but bound to allow him a deduction of rent

effeiring to the ground so conveyed. *Brown* v. *Brown*, 1826, 4 S. 489.

583. Rent—Deduction—Loss of Possession. — A tenant paid rent, without any reservation, for several years, after a piece of ground had been taken from his farm to form a road. *Held* not entitled to plead a claim of deduction therefor in an action for payment of a year's rent, which he had previously promised to pay in full, without any allusion to such a claim. *Butters* v. *Loch*, 1830, 8 S. 408.

584. Rent—Deductions—Loss of Possession—Insufficient Buildings, etc.—Circumstances in which a tenant *held* entitled (1) to deductions from his rent on account of ground taken for making public drains; (2) to a seat in the parish church for himself, family, and servants; but (3) not to deductions for ground taken to make public roads; nor (4) for the insufficiency of buildings and steading blown down by the wind. *Kinnard* v. *Mathewson*, 1802, 4 Pat. 429.

585. Rent—Deduction—Wages as Ground-Officer—Obligation on Singular Successor. —A stipulation in a lease that the tenant was to be allowed a yearly deduction from the rent of £5 for acting as ground-officer, *held* not binding upon a singular successor, who removed the tenant from the situation of ground-officer. *Ross* v. *Duchess of Sutherland*, 1838, 16 S. 1179; 13 Fac. 794.

586. Rent—Duplicand—Construction of Lease.—The tenant in a "feu-tack" for 999 years bound himself, "that his heirs, the first year of their entry to the said possession, shall pay one real year's rent of the subjects in the same way as is used in feu-holdings." *Held* that, on the entry of an heir, the landlord was entitled only to a duplicand of the tack-duty. *Buchanan's Trs.* v. *Pagan*, 1868, 7 M. 1; 41 J. 4.

587. Rent—Grain Rent—Selling Prices. —Circumstances in which the general rule *held* not to apply, that a tenant failing to offer, within due time, payment of grain rent, becomes liable at the selling prices. *E. of Elgin* v. *Wellwood*, 1825, 3 S. 422.

588. Rent — Grain — Commutation.—By a written lease of a farm, the rent payable was a specified quantity of grain, convertible into money according to the fiars prices. The tenant entered into possession, and paid rent in terms of the lease for some years. *Held* that, by actings and transactions between the landlord and tenant, the original grain rent was changed into a fixed money rent, and that this conversion was to endure to the end of the lease. *Baillie* v. *Fraser*, 1853, 15 D. 747; 25 J. 449.

589. Rent — Liability of Assignee of Tenant—Exclusion of Assignees and Subtenants — Recognition of Occupier as Tenant.—*Held* that the assignee of a tenant under a lease, excluding assignees and subtenants, who had been recognised as tenant by the landlord, was bound to pay the rent. *Wood* v. *Nelmes & Co.*, 1881, 18 S. L. R. 500.

590. Rent — Liability for—Bankruptcy of Tenant—Construction of Agreement.— The tenant of a farm, under a lease which expired at Whitsunday 1839, having become insolvent, his trustees reaped the crop of 1839, and occupied the farm till February 1840, when it was let to another tenant. They sold to the incoming tenant the stock on the farm under an agreement by which they undertook to relieve him "of all rents due for the said farm at and prior to Whitsunday last" (1839), he freeing them "of all rents subsequent to that term, his entry being as at said term." The rent for crop 1839 was not payable till Martinmas 1839 and Whitsunday 1840. *Held* that the sound construction of the agreement was, that the incoming tenant was liable only for the rents subsequent to Whitsunday 1839 effeiring to the possession which he had and the crops which he reaped; and that therefore the trustees must pay the rent for crop 1839, though due and payable subsequent to Whitsunday 1839. *Shand's Trs.* v. *Mackie*, 1850, 12 D. 739; 22 J. 257.

591. Rent—Liability for—Bankruptcy of Tenant — Trustee in Sequestration. — A warehouse was let to a party on a verbal lease for five years from 1836. He paid the rent for the first two years, viz. 1837 and 1838, and afterwards, without any written sublease, ceded possession to a firm, who occupied the warehouse for a year, and then became bankrupt, and were sequestrated. The rent of the two succeeding years, 1839 and 1840, was paid directly to the landlord by their trustee. During part of 1841, the trustee had yarns in the warehouse, and, after the close of 1842 when an action had been raised for payment of the last two years' rent, was still in possession of the keys of the warehouse. *Held* that the trustee was liable for the rents of the years 1841 and 1842. *Duff* v. *Laing*, 1845, 17 J. 272.

592. Rent—Liability for—Bankruptcy of Tenant — Liability of Trustee. — Circumstances in which a trustee on a bankrupt estate *held* not liable for the rent of a distillery of which the bankrupt had a lease. *Richardson* v. *Spiers' Trs.*, 1835, 13 S. 972.

593. Rent — Liability for — Trustee.— Circumstances in which a party admitting himself to be merely a trustee, and having no beneficial interest in lands possessed by him, *held* not entitled to plead *bona fides* in answer to a demand to account for the rents. *White* v. *Ballantyne*, 1825, 3 S. 451.

594. Rent—Liability for—Trustees for Creditors. — Trustees for creditors taking possession of a farm held by the bankrupt, *held* liable for the rents during their possession. *Sir W. C. Fairlie* v. *Neilson*, 1821, 1 S. 222.

595. Rent — Liability for — Bona fide Payment by Tenant.—A father authorised a party, by his settlement, to act in the absence of his son and heir, who was abroad, and his place of residence unknown; and the party, on the death of the father and in absence of

the son, let a farm, and *unico contextu* took a bill for the rent payable at Martinmas thereafter, which, being discounted, the tenant paid when due. *Held* that although the son returned before Martinmas, and the party's authority then ceased, the tenant was not bound to pay the rent to the son a second time. *Haggart* v. *Miller*, 1838, 16 S. 1058; 13 Fac. 723.

596. Rent — Liability for — Tenant.—Circumstances in which *held* that, where a landlord's factor had granted receipts for rent, and had also addressed a letter to A, as tenant of a house, the landlord had failed to prove, by the parole evidence of the factor and his wife, that B was the true tenant. *Cowan* v. *Brownlee*, 1833, 12 S. 65.

597. Rent—Liability for—Possession.—The sellers of a cotton-mill were authorised by the purchaser to let it for such rent as could be got. On failure to get a tenant, they entered to possession, and worked the mill themselves. *Held* that they were liable in rent for the time it was occupied by them. *Wilson* v. *Pollock & Co.*, 1827, 6 S. 3.

598. Rent—Liability for—Possession.—Circumstances in which a claim for the rent of a house by a husband of an heir-portioner against the representatives of his wife's mother, who had occupied the house for several years without paying rent, was *held* to be not well founded. *Halbert* v. *Dickson*, 1851, 13 D. 667; 23 J. 297.

599. Rent—Liability for—Payment to Wrong Party.—Payment of rent *bona fide* to the sisters of an apparent proprietor was sustained in a question with the true proprietor. *Sommerville* v. *Smith*, 1823, 2 S. 509.

600. Rent — Liability for — Subtenant.—*Question*, whether a landlord has a direct action against a subtenant for rent. *Laing* v. *Duff*, 1845, 7 D. 556; 17 J. 272.

601. Rent — Liability for — Subtenant —Liability of Principal Tenant.—A landlord sequestrated the effects of a subtenant for rent, and thereafter authorised him to sell part of the sequestrated crop to the value of £70, and to take a bill for the amount (which was to be indorsed to the landlord); and to that extent removed the sequestration, writing at the same time to the purchaser to grant the bill, as "I will take my chance of the subtenant indorsing it to me." *Held* not entitled, some years thereafter, to claim the £70 from the principal tenant, as arrears of rent still due, on the allegation that the subtenant had discounted the bill for his own behoof, and had applied none of the proceeds to the landlord's use. *Williamson* v. *Forbes*, 1830, 8 S. 405; 5 Fac. 335.

602. Rent—Liability for—Statements to Heritable Creditor.—A father who was the tenant of premises belonging to his son, concurred with him in stating, on occasion of the son borrowing on security of the premises a sum of money, that his rent was £20. *Held* liable to the heritable creditor for a rent of that amount, although he alleged that the premises were worth less, and had been let to him for £8. *M'Niven* v. *Hunter*, 1836, 14 S. 685.

603. Rent — Liability for — Purchase of Stock.—The purchaser of a cow belonging to a tenant sold under an execution of poinding, but not within due time, decerned in payment of rent to the landlord in a sequestration subsequently raised. *M'Ghie* v. *Mather*, 1824, 3 S. 337.

604. Rent — Liability for — New Agreement—Scroll.—The scroll of a lease by a minor in favour of a tenant possessing under a lease, but on which scroll no possession had been taken, does not afford a defence to the tenant against payment of the rent due under his former lease. *Pentland* v. *Scott*, 1831, 5 W. & S. 28. Affg. 7 S. 502.

605. Rent — Liability for — Intromitter.—A tenant subset a grass park for the season to a butcher, who there grazed his cattle, and, after paying the subrent, removed the cattle at Martinmas; and in June thereafter the landlord raised an action against him for payment of the rent as an intromitter with the produce. *Held* that as he had not been interpelled from paying to the tenant, and more than three months had expired, he was not liable. *Ross* v. *Williamson*, 1817, Hume 232.

606. Rent — Liability for — Purchase of Estate. — A party purchased an estate, of which 700 acres were grass, and 100 acres arable, with entry at Whitsunday 1807, and right "to the crop and year 1807," and it was under lease to a tenant whose entry to the grass was at Whitsunday 1803, and to the arable land at the separation of the crop of that year, the rent being payable at Candlemas and Martinmas thereafter; and the tenant having paid the rent due at Candlemas and Lammas 1807 to the seller, *held* that he had paid rightly, and was therefore not liable to the purchaser in second payment, nor to the seller in repetition. *Shephard* v. *Watherston*, 1817, 5 Dow 278.

607. "Rent"—Meaning of.—*Observations* as to the meaning of the term "rent." *Brown* v. *Scott*, 1859, 22 D. 273; 32 J. 110.

608. Rent—Pactional Rent—Discharges without Reservation. — A pactional rent for miscropping is not exigible, unless it be reserved in discharges of the regular rent, and implies only one payment per acre of land to which contraventions apply. *Hunter* v. *Broadwood*, 1854, 16 D. 441; 26 J. 295.

609. Rent — Payment — Consignation — Resting-Owing.—A tenant in a process of sequestration having consigned the rent, and pleaded compensation on a prescribed bill, the landlord (who was held to have waived any objection to the admissibility of the plea) ordered to produce extracts from his books to prove resting-owing. *Blair* v. *Robson*, 1822, 1 S. 470.

610. Rent — Payment — Proof of — Receipts Objected to by Landlord. — A party who had become liable for arrears of rent due by a tenant, having, in answer to a demand for a certain half-year's rent as in arrear, produced a receipt by the landlord for that rent, and a series of consecutive receipts for each term for the thirteen succeeding years, during which time no intimation had been made to him by the landlord that this portion of the rent remained unpaid, — *held* that the landlord was not entitled to object to his own receipt, and to prove that the rent claimed had been paid by a bank draft which had been dishonoured, and that it was still resting-owing. *D. of Buccleuch* v. *M'Turk*, 1845, 7 D. 927 ; 17 J. 483.

611. Rent — Payment — Proof of — Poinding of Ground — Reference to Oath of Proprietor.—Execution of a poinding of the ground is a legal intimation to the tenant of the assignation of rents contained in an heritable security, and renders it incompetent for the tenant to prove, by reference to the oath of the proprietor, that rents due before the poinding had been paid. *Lang* v. *Hyslop*, 1854, 16 D. 908 ; 26 J. 475.

612. Rent—Payment—Proof of—Parole Evidence. — *Held* that a state of rents due by the tenant, rendered by the factor to the landlord, and retained by him, was competent evidence in favour of the tenant; and that the landlord having failed to produce it, on being required, parole evidence of its contents was competent. *Opinion*, that parole evidence of the payment of rent by sales under a transaction, whereby the landlord was allowed to sell and draw the price of certain sequestrated stock and crop, was competent. *Mitchell* v. *Berwick*, 1845, 7 D. 382 ; 17 J. 189.

613. Rent — Payment — Retention of Goods — Construction of Agreement. — Terms of an agreement between a party and his creditors, under which *held* that the depositary of his effects was entitled to retain them until he received payment of the current rent of a shop of which he was landlord, and of which the depositor was the tenant. *Wilson* v. *Browning*, 1843, 5 D. 1042.

614. Rent — Payment before Due — Sequestration of Landlord — Liability of Tenant. — The tenant of an urban tenement under a verbal agreement prepaid the rent due at Martinmas on the 29th October, in *bona fide*, and in the belief that the landlord was solvent. The landlord's estates were sequestrated two days before Martinmas. *Held* that the trustee on the sequestrated estate was not entitled to insist for second payment of the rent. *Observed*, that the trustee had no higher right than the bankrupt would have had. *Davidson* v. *Boyd*, 1868, 7 M. 77 ; 41 J. 13.

615. Rent — Retention — Landlord and Tenant.—A landlord sequestrated the crop 1815 for the rent of that year, and the tenant made use of part of it as seed for crop 1816. *Held*, in a question with creditors, that the landlord was not entitled to be preferred to such a part of crop 1816 as was equal in quantity to that used as seed in payment *pro tanto* of the rent for crop 1815. *Observations* on doctrine as to the right of retention. *E. of Cassillis* v. *Ramsay*, 1816, Hume 230.

616. Rent—Retention — Agreement.—A landlord and his trustee agreed to allow a tenant to retain a proportion of his rent in liquidation of a debt. *Held*, in a question with a judicial factor appointed under a sequestration of the estate, that the tenant was entitled to retain, as agreed upon, from the term's rent fallen due prior to the sequestration. *Thomson* v. *Jameson*, 1830, 9 S. 168 ; 6 Fac. 107.

617. Rent—Retention — Counter Claim by Tenant.—A tenant in a lease became a creditor of the landlord. Part of the debt was secured over the subject of the lease, and the tenant was entitled to retain the rent in payment *pro tanto* of principal, interest, and expenses. The other part of the debts was secured by adjudication. On the failure of the landlord, *held* that the tenant was entitled to retain and impute the rents first towards payment of interest on the whole debts, and then towards payment of the principal of such of those debts as were preferable to the debts of other creditors. *Campbell* v. *Welsh, etc.*, 1785, 3 Pat. 32.

618. Rent — Retention — Damage by Road Trustees. — Where road trustees are allowed to alter the line of a road, subject to a claim of damages by owners or occupiers, a tenant thereby injured cannot, on that account, withhold payment of his rent from his landlord. *Brown* v. *Gardiner*, 1823, 2 S. 319.

619. Rent—Retention—Failure of Landlord to Give Possession.—A tenant who had raised an action of damages against his landlord for not giving him entire possession of his farm, *held* not entitled to retain rents due and payable; reserving his right to retain future rents in the event of damages being awarded. *Brown* v. *Duncan*, 1807, Hume 839.

620. Rent—Retention—Failure of Landlord to Discharge Obligations.—Circumstances under which a tenant was not allowed to withhold payment of his rent, on the ground that he had not got a road specially stipulated in the lease. *Burns* v. *Stewart*, 1831, 5 W. & S. 356. Affg. 8 S. 641.

621. Rent—Retention—Failure of Landlord to Implement Obligations—Consignation Ordered.—After defences to an action for rent had been lodged, admitting that the rent was payable, but resisting payment on the ground that the landlord had refused to implement his obligations to make repairs, the court, before a record had been made up, ordered £100 to be consigned by the defender. *Cumming* v. *Williamson*, 1842, 4 D. 1304 ; 14 J. 419.

622. Rent—Retention—Failure of Landlord to Implement Obligations.—It is not relevant to suspend payment of rent, that a landlord had failed to implement an obligation to deliver the fences on the farm to an incoming tenant in proper condition, which obligation it was alleged existed at common law and was implied from the lease, but was not specially recited. *Thomson* v. *Coventry*, 1833, 11 S. 725.

A tenant not allowed to retain rents past due, on the ground of alleged non-implement by the landlord of obligation to build dykes undertaken by him in the lease. *Dods* v. *Fortune*, 1854, 16 D. 478; 26 J. 213.

623. Rent—Retention—Failure of Landlord to Implement Obligations—Threatened Sequestration—Interdict.—A tenant having retained his rent, on the ground that the landlord had not implemented his obligation to put the subjects in sufficient repair, the landlord threatened sequestration. A note of suspension and interdict *passed*. *Gray* v. *Renton*, 1840, 3 D. 203.

624. Rent—Retention—Failure of Landlord to Implement Obligations—Accessory of Subjects Withheld.—A gas company let to a tenant a piece of ground adjoining their works, with right to the whole ammoniacal liquor and tar produced at their gaswork at a rent of £130. *Held* that an averment by the tenant that the company had not implemented their contract by supplying the whole tar, etc., was a relevant defence in a petition for sequestration for the stipulated rent. *Kilmarnock Gas Light Co.* v. *Smith*, 1872, 11 M. 58; 45 J. 43.

625. Rent—Retention—Failure of Landlord to Implement Obligations—Assignees.—*Held* that assignees had right to retention or deduction of rent for non-erection of a steading. *M'Guffog* v. *Agnew*, 1822, 1 S. 342.

626. Rent—Retention—Illiquid Counter Claims.—*Held* that a tenant was not entitled, pending the lease, to retain his rents for illiquid claims of damages against his landlord, in respect of alleged failure to perform certain obligations in the lease, to repair the farmhouse, to furnish proper offices, to give clear possession, and to construct dykes, drains, etc. *M'Rae (M'Barnet's Tr.)* v. *M'Pherson*, 1843, 6 D. 302; 16 J. 169.

627. Rent—Retention—Illiquid Claims.—A tenant is not entitled to retain rents during the currency of the lease, in compensation of illiquid claims of damages. *Dun* v. *Craig*, 1824, 3 S. 274.

628. Rent—Retention—Illiquid Claims.—Claims of a waygoing tenant for fallow and dung being illiquid and unascertained, cannot be pleaded against the landlord's claim for past due rent, there being no doubt of the landlord's solvency. *Dickson* v. *Porteous*, 1852, 15 D. 1; 25 J. 9; 2 Stuart 1.

629. Rent — Retention — Maills and Duties.—A tenant possessing lands, under a verbal arrangement that the rents were to be retained in liquidation of a debt, *held* entitled, in a question with an heritable creditor suing an action of maills and duties, to retain those which fell due prior to citation. *Elmslie* v. *Grant*, 1830, 9 S. 200.

630. Rent—Retention—Meliorations by Tenant—Renewal of Lease.—A lease, under which the tenant was entitled to meliorations at its expiry, was, during its currency, superseded by a new lease at a much increased rent, and by which it was stipulated that at its expiry the tenant should be allowed the value of the meliorations made under both leases. *Held* that the tenant was entitled to retain the latter rents of the new leases in extinction of the sum due for meliorations under both leases, though a ranking and sale of the estate was proceeding for heritable debts contracted during the currency of the new lease, and a judicial factor, under an incidental sequestration, was in possession. *Stewart* v. *Campbell*, 1834, 13 S. 7; 10 Fac. 5.

631. Rent—Retention—Meliorations by Tenant.—A proprietor stipulated in a lease that the tenant should be repaid his meliorations at the expiry of the lease, and this stipulation was made *bona fide* in the fair administration of the estate. *Held* that the tenant was entitled to retain the rents due at the end of the lease in extinction of the sum due for meliorations, though the proprietor, during the currency of the lease, contracted heritable debt to an amount exceeding the value of the estate, and a ranking and sale was instituted, and a judicial factor was in possession. *Stuart* v. *M'Ra & Campbell*, 1834, 13 S. 1, 4, 7; 10 Fac. 1, 5.

632. Rent—Retention—Meliorations by Tenant.—A landlord, during the currency of a lease, granted a letter to a tenant agreeing to allow a sum at the end of the lease, in consideration of meliorations made, and to be made, by the tenant. *Held* that the tenant had no right of retention of rent, or of preference in a question with either the heritable or personal creditors of the landlord. *Turner* v. *Nicolson*, 1835, 13 S. 633.

633. Rent — Retention — Sublease — Reduction of Principal Lease.—*Held* that a subtenant was not entitled to retain the rent due by him to the principal tenant, on the ground that an action of reduction of the principal lease had been raised. *Sprots* v. *Morrison*, 1853, 15 D. 376; 25 J. 87; 2 Stuart 60.

634. Rent—Retention—Surplus Rents.—A tenant renounced one of two farms to his landlord, on condition of being paid the surplus rents to be got on the new lease. He assigned these surplus rents to trustees, who paid to the landlord arrears of rent for the farm, and intimated the assignation to him. *Held* that he could not retain the surplus rents in payment of arrears due on account of the other farm. *Stephenson's Trs.* v. *M. of Tweeddale*, 1823, 2 S. 191.

635. Rent—Sale of Estate—Rents "from and after" Whitsunday—Construction.—It was agreed that a purchaser of lands should have right to the rents "from and after" Whitsunday and Martinmas 1823. *Held* (1) that he was not entitled to the rent of that year's crop, though the term of payment was postponed; and (2) that having obtained payment thereof, and kept the money without challenge for eight years, he could not plead *bona fide* perception and consumption, but was bound to make repetition, with interest from the time of challenge. *Sir J. G. Sinclair* v. *Sinclair*, 1847, 10 D. 190; 20 J. 49.

636. Rent—To whom Payable—Succession — Back-Land Rents. — The separate heritable estate of a wife, between whom and the husband there was no nuptial contract, was let on leases, under which the farms were all back-rented. Thus the rents of the arable farms for crop 1833 were payable, the first half at Martinmas 1834, and the second half at Whitsunday 1835; and those of grass farms at Whitsunday and Martinmas 1834. The husband predeceased in the month of March 1834. At that time no part of the rents of crop 1833 had been paid. *Held*, in a competition between his representatives and the widow for the rents of crop 1833, that the former were entitled to them,—the principle being, that though the husband did not survive the conventional term of payment, the *jus exigendi* of drawing the rents otherwise competent to the wife, was carried to, and vested in the husband *jure mariti* by surviving the legal term, and therefore transmitted to his own representatives. *Breadalbane* v. *Breadalbane*, 1843, 15 J. 389.

637. Rent—To whom Payable—Reduction of Title — Bona fide Possession.—The rights of defenders to an estate in a reduction were set aside; and, pending a question as to their *bona fide* possession, a judicial factor was of consent appointed, who collected from the tenants rents due both prior to and at and subsequent to Martinmas 1822. It was ultimately decided that the pursuer was entitled to the rents due at and after that term, and that, prior to this date, the defenders were *bona fide* possessors; and the funds collected by the factor were insufficient to satisfy the claims of all parties. *Held* that the pursuer was entitled to payment *primo loco* of the rent due at and after Martinmas, leaving the deficiency to fall on the prior rents. *Gracie* v. *E. of Stair's Trs.*, 1831, 9 S. 393.

638. Rent—To whom Payable—Sale of Estate—Entry of Purchaser.—An estate consisting of grass farms, of which the entry was at Whitsunday, and the rents were payable at Martinmas and Whitsunday following, was sold judicially in January 1799, under a declaration that the purchaser's entry should be at Martinmas "last" (1798), that he should have right to the rents for crop 1799, and pay interest from the said terms. *Held* (1) that the rents payable at Whitsunday 1799 did not belong to the purchaser; and (2) that he was liable in interest from Martinmas 1798. *Campbell* v. *Campbell*, 16 Jan. 1800, F. C.

639. Rent—Sequestration for—Abandonment — Second Application. — *Held* that where a party had lodged a minute abandoning a process of sequestration for rent, and consigned a sum of money to meet the expenses of the opposite party (which were ultimately found to be less than the sum consigned), a second application for sequestration was competent, though made prior to the consignation in the first. *Lawson* v. *Low*, 1845, 7 D. 960; 17 J. 492.

640. Rent—Sequestration for—Application to have Stock Brought Back.—Circumstances in which a sequestration, and an application to have stocking brought back to a farm, by a landlord against his tenant, who was not in arrear of rent, and with whom he had entered into a submission of all disputes relative to their mutual rights, were *held* to be unjustifiable. *Finlayson* v. *Kirkwood*, 1846, 18 J. 194.

641. Rent—Sequestration for—Heritable Creditor—Competency. — Sequestration (as under the landlord's hypothec) by an heritable creditor of moveables situated on the subject of his security, is an inept mode of securing a preference over the same, and not equivalent to a poinding of the ground. *Hood* v. *Martin's Crs.*, 1835, 13 S. 923; 10 Fac. 687.

642. Rent—Sequestration for—Breach of Sequestration.—A pottery, a mill, and a farm were included in one lease, and a sequestration was used of certain horses and stacks of oats, in security of the current rents of them all. *Held* that it was no breach of sequestration to consume two of the stacks of oats in feeding the horses, though it was alleged that the horses were employed for the pottery, and not for the farm. *Gordon* v. *Suttie*, 1836, 14 S. 954; 11 Fac. 793.

643. Rent—Sequestration for—Breach of Sequestration.—A tenant made an application to the sheriff for recall of a sequestration of his furniture in security of current rent. While the discussion was pending, and before the sheriff had pronounced any judgment, he, without intimation to the landlord, found caution for the rent and expenses in the hands of the clerk of court, and obtained from him (in conformity, it was averred, with practice) a certificate that caution had been found "in common form, loosing the within sequestration, and the same is hereby declared to be loosed accordingly." The tenant having thereafter removed his furniture, the landlord presented a petition praying for his imprisonment until the effects were restored. The court, in the peculiar circumstances of the case, considering that there was no intention on the part of the tenant to commit a criminal breach of sequestration, *dismissed* the petition, finding neither party entitled to expenses. *Kippen* v. *Oppenheim*, 1846, 5 D. 957; 18 J. 489.

644. Rent—Sequestration for—Breach of Sequestration — Imprisonment. — A sheriff may, in a process of sequestration by a landlord against his tenant, summarily imprison the latter for contempt, by breach of sequestration, till he restore the effects carried off, or find caution for the rent. *Love* v. *Foster*, 1833, 11 S. 280.

645. Rent — Sequestration for — Breach of.—Horses and oats were sequestrated, and the tenant thrashed six bolls of the oats, and gave them to the horses, without applying for judicial authority. *Held* that no breach of sequestration was committed. *Miller* v. *Paterson*, 1831, 9 S. 792 ; 6 Fac. 507.

646. Rent—Sequestration for—Consignation— Sale of Tenant's Effects — Suspension.—Bill of suspension and interdict of a sale of a tenant's effects by poinding creditors, *passed* at the instance of a party who had consigned the rent in a process of sequestration, and which had been uplifted by the landlord. *M'Arthur* v. *Forbes & Co.*, 1822, 2 S. 91.

647. Rent—Sequestration for—Caution. —Caution in a sequestration for rent covers the expenses of process. *Clark* v. *Duncan*, 1833, 12 S. 158.

648. Rent—Sequestration for—Crop—Subjects Partly Arable and Partly Pastoral. —A pastoral farm, which contained a few arable acres, was let for nineteen years, and the first rent was payable six and twelve months after the tenant's entry. The first year's rent was paid ; but the second not having been paid, the landlord sequestrated the whole stock and crop—this crop being, although the growth of the second year after the tenant's entry, the first reaped by him. *Held* that as the farm must be regarded as entirely pastoral, the sequestration was not objectionable on the ground of its including the crop of the arable portion, although happening to be the first crop reaped after the tenant's entry. *M'Clymonts* v. *Cathcart*, 1848, 10 D. 1489 ; 20 J. 557.

649. Rent—Sequestration for—Crop—Insufficiency of Growing Crop to Pay Rent—Liability of Purchaser of Remainder.—By sequestration of a growing crop, the custody and possession is not transferred from the tenant to the landlord, nor does the latter become liable for deficiency caused by embezzlement or otherwise ; and therefore, where part of a growing crop was sequestrated, which on being thrashed proved insufficient, *held* that the title of a purchaser of the remainder yielded to a further sequestration. *Brims* v. *Ferrier*, 31 May 1815, F. C.

650. Rent—Sequestration for—Crop—Previous Year's Rent—Competency.—It is incompetent for a landlord to sequestrate the crop of one year for the rent of a previous crop and year. *Horn* v. *M'Lean*, 1830, 8 S. 454 ; 5 Fac. 374.

651. Rent—Sequestration for—Crop—Bona fide Purchase.—Parties purchasing hay from a tenant whose crop had been sequestrated, assoilzied in an action for rent at the instance of the landlord, the hay not being contained in the inventory of sequestration. *Horsburgh* v. *Morton*, 1825, 3 S. 596.

652. Rent—Sequestration for—Competition by Heritable Creditor.—The proprietor of a nursery garden granted heritable bonds over it, containing the usual clauses assigning the rents, and the creditors were infeft. Thereafter the first creditor sold the lands under his power of sale, and they were bought by the second creditor. Prior to the sale the proprietor had obtained for arrears of rent a sequestration of the shrubs, plants, roots, etc., in the garden, but he did not follow it up with a sale for nearly twelve months afterwards. *Held*, in a competition for the proceeds between his gratuitous *mortis causa* trustee and the second heritable creditor, to whom part of his debt was still due, that the latter was entitled to be preferred to the extent of the balance due on his debt. *Begbie* v. *Boyd*, 1837, 16 S. 232.

653. Rent—Sequestration for—Heritable Creditor—Title to Sue.—*Held* that an heritable creditor infeft is not entitled to apply for sequestration of effects as liable to hypothec for rent. *Railton* v. *Muirhead*, 1834, 12 S. 757 ; 9 Fac. 401.

654. Rent—Sequestration for—Poinding—Lands Partly Entailed and Partly Unentailed.—Lands partly entailed and partly unentailed, but belonging to the same proprietor, were let as one farm for a rent (the proportions of which effeiring to the entailed and unentailed parts were specially set forth). The proprietor's right to the different parts was attached by separate creditors, and separate sequestrations as to each part used by the creditors, with concurrence of the landlord, and the whole effects on the farm were included in the inventories in each sequestration. *Held*, in a question with a poinding creditor, that although the whole effects sequestrated had been at the execution of the sequestration situated on the entailed portion of the farm, they were effectually attached, not merely for the rent of that portion, but for the rent of the whole farm. *Meek* v. *Smith*, 1832, 10 S. 652 ; 7 Fac. 505.

655. Rent — Sequestration for — Form of Petition — Competency. — A landlord petitioned for sequestration for arrears of rent, public burdens, "and other stipulations, to be afterwards specially condescended on and proved in the course of this process, all in terms of the foresaid missive of lease." *Held* competent, on lodging replies, to restrict the petition to the money rent, and that it was then unobjectionable in form. *Bennie* v. *Mack*, 1832, 10 S. 255.

656. Rent—Sequestration for—Hired Furniture.—*Held* that furniture hired to and possessed by a tenant is liable to be sequestrated and sold for payment of the rent. *Wauchope* v. *Gall*, 1805, Hume 227.

657. Rent — Sequestration for — Furniture.—*Question*, whether the furniture of an

urban tenant can be sequestrated *currente termino* even when he is *vergens ad inopiam*. *Wells* v. *Proudfoot*, 1800, Hume 225.

658. Rent — Sequestration for — Effects Belonging to Trustees.—Trustees who have been found liable to the landlord for rents are entitled to credit for the value of effects procured or purchased by them and sequestrated by the landlord, although by the lease he is entitled to all the effects on the premises at its expiration, and it has expired. *Fairlie* v. *Neilson*, 1823, 2 S. 214.

659. Rent — Sequestration for — Sequestration of Goods not Belonging to Tenant —Remedy.—When a sequestration for rent has attached goods in the custody of a tenant which are not his property, the owner's remedy is to appear before the sheriff and claim to have them withdrawn from the sequestration; and he is not entitled to interdict against the landlord proceeding to sell such goods in the sequestration. *Lindsay* v. *E. of Wemyss*, 1872, 10 M. 708; 44 J. 389.

660. Rent — Sequestration for — Farm — Household Furniture.—*Question*, whether the household furniture of an agricultural tenant can be sequestrated for the rent of his farm. *M'Clymonts* v. *Sir J. A. Cathcart*, 1848, 10 D. 1489; 20 J. 557.

661. Rent — Sequestration for — Horse Taken away by Poinding Creditor.—A poinding creditor of a tenant having *currente termino* carried a horse and mule from a stable, *held* bound, on an application by the landlord, to restore them, in order to be sequestrated for payment of the rent. *Philips* v. *Easson*, 1807, Hume 228.

662. Rent — Sequestration for — Effects Attached—Bona fide Delivery of Waggons by Tenant.—A tenant having delivered four waggons to a creditor, to be retained till payment of his debt, and this being done *bona fide*, and not with the view of disappointing the hypothec, and sequestration not being used for four weeks thereafter,—*held* that the landlord could not revindicate the waggons, and sequestrate them. *Tennent* v. *M'Brayne*, 1833, 11 S. 471.

663. Rent — Sequestration for — Report by Auctioneer—Effect of.—A report by an auctioneer, to whom warrant was granted to sell sequestrated effects, that he found none within the premises, is to be received as equivalent to an execution by an officer of court, he being to be considered an officer *quoad hoc*. *Love* v. *Foster*, 1833, 11 S. 280.

664. Rent—Sequestration for—Interdict against Sale by Tenant.—Horses, cattle, and farm implements belonging to a tenant, having been poinded by a creditor in the month of April, and a public sale of them advertised, the landlord applied for interdict against the sale, on the ground that he had a hypothec over them for the half-year's rent due at the ensuing Whitsunday, and also for the rent of the current year due at Martinmas and Whitsunday following. The creditor having admitted the claim to the extent of the half-year's rent due at the ensuing Whitsunday, and offered payment of that amount, the court *refused* the note. *Hunter* v. *North of England Bank*, 1849, 12 D. 65.

665. Rent—Sequestration for—Interdict against Tenant Selling Growing Crop.—Although a tenant was not *vergens ad inopiam*, *held* that a landlord, under his right of hypothec, was entitled to interdict the sale and removal of the growing crop from a farm, until the tenant found caution for the current year's rent. *Preston* v. *Gregor*, 1845, 7 D. 942; 17 J. 486.

666. Rent — Sequestration for — Illiquid Claims by Tenant.—Illiquid claims of damages *refused* as grounds of compensation, in a process of sequestration for rents during the currency of the lease. *Mowat* v. *Denham*, 1828, 7 S. 88.

667. Rent—Sequestration for—Rent not Due—Recal.—A sequestration was awarded in security and payment of a half-year's rent as already past due, but the rent was not then due. Sequestration *recalled*. *Miller* v. *Paterson*, 1831, 9 S. 792; 6 Fac. 507.

668. Rent — Sequestration for — Sequestration Standing Dismissed for Non-Procedure.—In a petition for sequestration for rent *currente termino*, for warrant of sale in the event of non-payment, and for decree for any balance, after sequestration had been granted, no proceeding was taken for more than six months. *Held* that the process stood dismissed in terms of the 15th section of the Sheriff Court Act, 1853, and subsequent proceedings *reduced*. *Paterson* v. *Monro*, 1868, 6 M. 434; 40 J. 225.

669. Rent — Sequestration for — Bill by Third Party—Subsequent Rents.—A landlord sequestrated the furniture of his tenant for the Whitsunday rent, and a party granted his bill for the amount, on condition of the sequestration being delayed. The bill was not paid, and the furniture was sold under the sequestration, and the proceeds consigned, and thereafter the bill was paid. *Held* that the landlord could not claim these proceeds for payment of the subsequent Martinmas rent, but that they belonged to the tenant and granter of the bill. *Stevenson* v. *M'Culloch*, 1821, 1 S. 30.

670. Rent — Sequestration for — Sequestration under Bankrupt Act — Bar. — A sequestration under the Bankrupt Act does not deprive a landlord of his right to sequestrate, and have a judicial manager of the crop and farm named in execution of his hypothec. *E. of Wemyss* v. *Hewat*, 1818, Hume 233.

671. Rent — Sequestration for — Subtenant.—A tenant of an urban subject sequestrated the effects of a subtenant to whom the landlord set the subject for the next year. *Held* that although the tenant had not paid the rent to the landlord, yet he was entitled

in opposition to him, to sell the effects of the subtenant, on finding caution for the rent due by himself. *Stevenson* v. *Cooper*, 1822, 1 S. 312.

672. Rent — Sequestration for — Pro indiviso Proprietor — Title to Sue.—*Opinion*, that sequestration of the whole crop, stocking, etc., of a farm was competent, at the instance of a *pro indiviso* proprietor, to the extent of two-thirds, with concurrence of a party who, by decree of maills and duties, had acquired right to the remaining third of the rents. *Stewart* v. *Wand*, 1842, 4 D. 622 ; 14 J. 245.

673. Rent—Sequestration for—Title of Landlord.—It is no objection to a decree in a sequestration for rent that the landlord had not produced his title in the inferior court, the title being sufficient. *Zuill* v. *Buchanan*, 1833, 11 S. 682.

674. Rent—Sequestration for—Warrant —Validity.—A warrant for sequestration for rent *held* not to be invalidated because it was signed by one holding a commission as sheriff-substitute from the sheriff without reference in the warrant to this commission. *Henderson* v. *Dunbar*, 1845, 17 J. 271.

675. Rent—Sequestration for—Warrant of Sale — Irregularity. — A sheriff-clerk granted a certificate that no answers had been lodged to a petition for sequestration of the crop and stocking of a tenant for arrears of rent. Thereafter, upon the application of the landlord, the sheriff-clerk, who held a commission to act as sheriff-substitute in the absence of the usual sheriff-substitute, by an interlocutor, proceeding upon a narrative of the certificate, granted warrant of sale of the sequestrated effects. A note of suspension at the tenant's instance was *passed*, in order to try the question, whether such warrant of sale was irregular and inept. *Ross* v. *Mitchell*, 1847, 10 D. 153 ; 20 J. 42.

676. Rent — Sequestration for — Sale — Suspension.—A note of suspension and interdict of a sale of a tenant's whole stock, crop, and effects (including work-horses and implements of husbandry on his farm), under a sequestration for rent, *refused*, except as to the implements of husbandry ; as to which, passed on caution, and interdict granted. *Observed*, that where there were other effects sufficient to satisfy the landlord's hypothec, the court might interfere to prevent the sale of work-horses. *Henderson* v. *Dunbar*, 1845, 17 J. 271.

677. Rent — Sequestration for — Sale — Surplus — Previous Arrears — Illiquid Counter Claims.—A landlord under a warrant of sale, taken of consent, in a process of sequestration against his tenant, sold greatly beyond the amount authorised by the warrant, and without the notification thereby required. *Held* that, in a count and reckoning as to the surplus proceeds, he was entitled to a deduction of discount on the whole proceeds, on the ground of the sales being made at three months' credit, both as to purchases by others and by himself ; that he was entitled to credit for a commission payable to the sequestrator, under regulations of the sheriff court, both on the amount authorised to be sold by warrant and on the surplus ; that he was entitled to set off against the claim for the surplus, previous arrears for which he held decree, while the tenant was not entitled to recompensate by counter claims, for which he had raised action, but had not obtained decree. *Cargill* v. *Baxter*, 1829, 7 S. 662 ; 8 S. 665.

678. Rent — Sequestration for — Sale — Nimious and Illegal Conduct.—Nimious and illegal conduct in carrying through sequestration in security, although it may found a claim of damages, is no necessary bar to warrant of sale being granted under the original petition. *Duffy* v. *Gray*, 1858, 20 D. 580 ; 30 J. 290.

679. Rent — Sequestration for — Sale — Expense.—Though a sale under a sequestration exceeds by a trifle the exact amount of arrears of rent due, the landlord is entitled to the expense of the sale. *Galloway* v. *M'Pherson*, 1830, 8 S. 539.

680. Rent—Sequestration for—Sale.—If a landlord execute a sequestration of household effects within three months from the term, and there is no undue delay, he is not excluded from selling by expiration of the three months. *M'Leod* v. *Thomson*, 1805, Hume 226.

681. Rent — Sequestration for — Sequestration in Security—Nature of.—*Opinion*, that a process of sequestration for rent after the term is past, containing also a prayer for a warrant of sale, is essentially different from a process of sequestration for rent *currente termino* ; and the one is not convertible into the other. *Miller* v. *Paterson*, 1831, 9 S. 792 ; 6 Fac. 507.

682. Rent — Sequestration for — Sequestration in Security.—Circumstances in which sequestration of tenant's effects in security of the current rent was sustained, though caution was offered for payment thereof by tenant. *Dods* v. *Fortune*, 1854, 16 D. 478 ; 26 J. 213

683. Rent — Sequestration for — Sequestration in Security—Construction of Petition.—The prayer of a summary petition to the sheriff, presented "for the reasons set forth in the annexed statements of facts," is to be construed with reference to the condescendence and pleas. Terms of a petition so construed, which held to import a prayer for sequestration in security of rent *currente termino*, and for sale after the term of payment should be come and bygone. *Duffy* v. *Gray*, 1858, 20 D. 581 ; 30 J. 290.

684. Rent — Sequestration for — Sequestration in Security—Arrears.—A landlord to whom arrears of rent were due for crops 1828 and 1829, obtained a sequestration in security of the current rent for crop 1830 ; and the tenant, in order to supersede further proceedings, authorised him to sell the crop, "and apply the proceeds in payment of rents due by me, without obtaining a warrant from

the sheriff." The landlord, under this authority, sold the crop to an amount exceeding the rent for crop 1830; and a creditor of the tenant arrested in the hands of the purchasers before they had paid or granted bills to the landlord for the price. *Held*, in a question with the arrester, that the landlord was not entitled to apply the proceeds of the sale, except to the rents of crop 1830; and that *quoad ultra*, as the sale was made by the landlord as mandatory of the tenant, the surplus was arrestable by the creditor. *Young* v. *Welsh*, 1833, 12 S. 233; 9 Fac. 151.

685. Spuilzie—Charge—Suspension.—A charge being given, on a judgment of an inferior court, against a party as guilty of a spuilzie in removing fruit and potatoes from a piece of garden ground in October 1828, and the party having been in peaceful possession of the ground as at that date, and also from the preceding term of Martinmas, and having dressed the fruit trees, and planted and cultivated the potatoes, letters suspended *simpliciter*. *Sloan* v. *Cuthbertson*, 1832, 10 S. 716.

686. Subjects Let — Commonty — Encroachment by Third Parties — Liability of Landlord.—A tenant *held* to have no claim against his landlord for damages alleged to have been sustained by him, in consequence of a common which was let along with his farm having been encroached upon by third parties, or for decree to maintain him in possession in future, in respect there had been no eviction from any defect of right on the part of the landlord, and any encroachment had arisen from remissness on the tenant's part to defend himself. *Stewart* v. *Wand*, 1838, 16 S. 408.

687. Subjects Let—Commonty—Custom.—A tenant had by his lease right to pasture on a commonty, along with others, and the relative rights of the parties were measured by use and wont. The tenant complained that he was prevented from using the privilege, in consequence of others sending more than their proper number of cattle to pasture. He accordingly, under the clause of his lease binding the landlord in implement, brought an action against him, concluding for indemnification. *Held* that it was incumbent on the tenant to protect himself in possession. *Stewart* v. *Howden*, 1838, 10 J. 249.

688. Subjects Let—Deer Forest—Misrepresentation — Reduction of Lease. — In support of a reduction of a lease at the instance of the tenant of lands advertised and let as a deer forest, it was averred that the forest was never during the shooting season frequented by stags, but only by hinds. *Held* that the pursuer, although he had sent a gamekeeper to inspect the ground before entering upon the lease, was entitled to an issue to try whether what was let was a deer forest, and whether he had entered into the lease under essential error as to the subject of the contract. *E. of Wemyss* v. *Campbell*, 1858, 20 D. 1090; 30 J. 537.

689. Subjects Let—Excambion—Singular Successor.—Circumstances in which *held* that sufficient real evidence existed of a contract of excambion between a landlord and tenant relative to a very inconsiderable portion of certain subjects, which were held under a lease for ninety-nine years, so that the tenant enjoyed a right of lease in the portion acquired by the excambion, which was good against a purchaser of the landlord's estate. *Kennedy* v. *Carlyle*, 1836, 15 S. 102.

690. Subjects Let—Extent—Advertisement — Misrepresentation — Reduction of Lease.—A tenant in the last year of a lease of nine years' duration of a sheep-farm, which was described as possessed by the preceding tenant, without any specification of quantity of acres, and for which a slump rent was payable, and who, during its currency, declined to give it up, although frequently in arrear of rent, of which he was occasionally relieved, *held* not entitled to have it reduced on the allegation that in the advertisement it was represented as containing 6000 acres, whereas it contained only 4000, and to insist for count and reckoning and damages—there being no charge of fraudulent misrepresentation. *Oliver* v. *Suttie*, 1840, 2 D. 514; 15 Fac. 554.

691. Subjects Let—Extent—"All not now Let."—A tenant made an offer, by a missive, for a farm, at so much per acre "for all not now let," and this was accepted without specification of extent. *Held* that although several acres of the farm were in possession of another, the tenant was not entitled to set aside the missives of lease. *Fraser* v. *Matheson*, 1824, 2 S. 734.

692. Subjects Let — Extent — Disputed Boundary.—In a dispute as to the boundaries of two adjoining hill farms held under the same landlord, *opinion*, that the tenant who first entered would be entitled to interdict on showing that the disputed land had been let to him, although it has been subsequently let to the other tenant. *Anderson* v. *M'Callum*, 1857, 20 D. 2; 30 J. 2.

693. Subjects Let—Extent—Discrepancy between Boundaries and Measurement.—A lease bore that a farm contained certain fields specified by name, and extended to a certain measurement, "or thereby," that it was let, as it should be delivered to the tenant at his entry, and the measurement was declared not to be warranted, the "lands being let in slump." The tenant having possessed the lands as delivered to him for several years without objection, *held* that he was not entitled to claim in addition, as part of the subjects let, a small enclosure at the end of one of the fields, which he alleged to be necessary to complete the measurement of the whole farm, and also the measurement of that field as laid down in the plan referred to in the advertisement of the farm, and furnished to him before he took the farm. *Hardie* v. *Kinloch*, 1842, 5 D. 64; 15 J. 1.

694. Subjects Let — Extent — Measurement Descriptive not Taxative.—A missive of lease described the subject let as five acres or thereby of newly trenched ground. Possession followed for upwards of sixteen years to the extent of upwards of six acres imperial. *Held* that the measurement was descriptive and not taxative, and that the landlord was not entitled to limit the tenant's possession to five acres. *Menmuir* v. *Aird*, 1863, 1 M. 929; 35 J. 550.

695. Subjects Let — Extent — Parole Evidence—Verbal Lease—Acquiescence.—A toll was let by verbal lease. A dispute having arisen in regard to the subject matter of the lease, *held* that parole evidence was competent, and that allegations of acquiescence were relevant. *Anderson* v. *Tuach & Oswald*, 1870, 7 S. L. R. 319.

696. Subjects Let—Extent—Plantation.—*Question*, whether the pasture of two belts of planting was included in a lease. *M'Leod* v. *Dudgeon*, 1832, 10 S. 674.

697. Subjects Let — Extent — Singular Successor.—A new road was made through a tenant's farm, without any deduction of rent being given to him; but the tenant, without any regular agreement, was allowed as a compensation, to take possession of the *solum* of the old road which bounded his farm. The farm was afterwards bought by a purchaser who was in the knowledge of this arrangement, and in whose titles the farm was described as presently possessed by the tenant. *Held* that he was not entitled to disturb this arrangement, nor eject the tenant from the *solum* of the old road. *Moon* v. *Roger*, 1828, 6 S. 1118.

698. Subjects Let — Farm — Ground Taken off — Claim by Tenant. — Special circumstances in reference to a claim by a tenant for the value of ground taken off his farm, in which *held*, that although there was strong reason for supposing that his claim had been ratified, yet, as there was no legal evidence of this, it must be *sustained*. *Lord Hallyburton* v. *Blair*, 1837, 15 S. 750; 12 Fac. 700.

699. Subjects Let—Loch—Water Supply—Warrandice.—The proprietor in part of a loch let his share to a tenant who held a lease of the other part, and who erected on the stream issuing therefrom an embankment and sluice for the collection and regulation of the water to supply works. The proprietor thereafter set a portion of his lands, past which the stream flowed, for the purposes of bleaching, etc., but without mention of any right to the loch or of the stream (the use of which, however, was necessarily enjoyed when the tenant of the loch opened the sluice). At the expiry of this lease, he again let the bleachfield, "as possessed" by the former tenant; and, on the termination of the lease of the loch, he ejected the tenant, in consequence of which the sluice was removed, and the water allowed to run in its natural course. *Held*, in an action at the instance of the tenant in the bleachfield, that the lease did not imply a warrandice of the artificial supply. *M'Donald & Co.* v. *Hamilton*, 1831, 9 S. 402.

700. Subjects Let — New Buildings—"Built in lieu of."—Description of new buildings on a farm, which *held* to have been "built in lieu of" others previously on the farm, and for which the tenant was entitled to remuneration, as being so built. *Jolly* v. *Graham*, 1835, 2 S. & M'L. 24. Affg. 12 S. 789.

701. Subjects Let — Purpose for which Let—Shop Used as Show-Room.—The using a shop in a good situation in a town, formerly occupied by a silk mercer as a show-room, for exhibiting wax figures, is an inversion which the landlord is entitled at common law to prevent. *Leechman* v. *Sievwright*, 1826, 4 S. 683.

702. Subjects Let—Purpose for which Let—Conversion of Paper-Mill to Flour-Mill by Tenant—Right of Landlord to Object—Personal Bar.—A landlord let a mill described as a paper-mill, which was made use of, with his knowledge, for six years as an oil-mill; and the lease was thereafter assigned to another party, who employed it as a flour-mill. *Held* barred from insisting that it should be reconverted into a paper-mill. *Young, Ross, & Co.* v. *Ramsay*, 1825, 1 W. & S. 560. Affg. 2 S. 793.

703. Subjects Let — Tenement — Access.—A landlord had let an upper floor of a house to one tenant as a shop, by a plan, from which it appeared that the landlord was to have a shop in the floor below, with a front door to the street, but which he was prevented from making, by an interdict at the instance of another tenant in the area floor. *Held* entitled to make a door in the passage leading to the upper floor. *Thomson* v. *Brown*, 1822, 1 S. 475.

704. Subjects Let — Tenement — Access.—The proprietor of an urban tenement let to a tenant the second flat of the house for writing chambers, the access to which was by a door from the street, through a passage, and up a common stair. After the tenant had entered, the landlord made an opening for a door at the end of the passage, so as to give access from the street to a printing establishment erected in a meuse lane behind. *Held* that the tenant was entitled to an interdict against the use so proposed to be made of the passage. *Alexander* v. *Cowper*, 1840, 3 D. 249; 16 Fac. 193.

705. Summary Petition—Competency.—A tenant, upon leaving his farm, applied to the sheriff by summary petition, for a remit to skilled persons to inspect the farm and ascertain the condition of a variety of things connected with stipulations in his lease, in regard to which he alleged that he had claims against his landlord. Some of the matters in question were, by the terms of the lease, to be ascertained "at sight of men"; in regard to

others, there was no such contract, and most of them were of a nature only to be investigated by proof; and in regard to some of the latter, he prayed for a remit to skilled persons, not merely to inspect and report, but to take evidence. *Held* that the matters involved in the petition could not be resolved in the manner prayed for, and petition *dismissed*. *Waddell* v. *Bell*, 1857, 29 J. 186.

706. Tenant — Bankruptcy of — Construction of Lease.—In an agricultural lease for nineteen years there was a stipulation that, in the event of the tenant's bankruptcy, he should have no power to continue the possession for behoof of his creditors. The tenant became bankrupt in the third year after; and although the landlord was desirous that the creditors should continue the possession till the expiry of the lease, they gave it up, whereupon the landlord of new let the farm at a reduced rent, and claimed damages against the estate for the loss arising on the years to run of the original lease. *Held* that the stipulation was in favour of the landlord, who might avail himself of it or not at his option, and that he was entitled to damages. *Kinloch* v. *Rennie's Trs.*, 1836, 14 S. 905; 11 Fac. 741.

707. Tenant—Bankruptcy of—Delectus personæ.—Under a stipulation in a lease, that the lease should terminate on the bankruptcy of the tenant, but that his creditors should get the benefit of any surplus rent that should be obtained from a new tenant, *held* that the delectus of the landlord was not fettered, and that he had not acted unfairly in preferring a tenant who had offered a grassum of £100, to one who offered £180. *Anderson* v. *Barclay*, 1843, 15 J. 534.

708. Tenant—Bankruptcy of—Ejection.—A lease stipulated that if a tenant became bankrupt or executed a trust for creditors, the landlord should be entitled to resume possession and eject the tenant by summary diligence. *Question*, whether on the tenant's bankruptcy the ejection could take place between terms and whether "summary diligence" meant horning a process before the sheriff. *Williamson* v. *Johnstone*, 1848, 11 D. 332; 21 J. 77.

709. Tenant—Bankruptcy of—Interdict.—It is incompetent to interdict a tenant from making use of the subjects let to him, on the allegation that he is notour bankrupt; and an action of removing raised against him. *Wauchope* v. *Stephens*, 1826, 4 S. 766.

710. Tenant—Bankruptcy of—Exclusion of Assignees—Right of Trustee in Sequestration.—*Held* that the crops on a farm occupied by a bankrupt were carried to his trustee in his sequestration, although the lease excluded "assignees and subtenants." *Thom* v. *Jack*, 1834, 12 S. 612.

711. Tenant — Bankruptcy of — Before Entry—Right to Possess.—*Question* as to the right of a tenant to possession, he having become bankrupt before the term of entry. *Gillespie* v. *Clark*, 1821, 1 S. 160.

712. Tenant—Death of—Heir Abroad—Relet by Landlord.—A tenant having died three years before the expiry of the lease, and his heir being abroad, the landlord, three months after the tenant's death, relet the farm for nineteen years at an advanced rent. The heir, on his return, after the expiry of the original lease, having claimed the surplus rent thus realised by the landlord, *held* not entitled to it. *Watt* v. *Duff*, 1852, 14 D. 879; 24 J. 533; 1 Stuart 862.

713. Tenant—Death of—New Tenant—Acquiescence of Landlord—Personal Bar.—A landlord *held* barred by acquiescence from objecting to a second son being constituted tenant under a lease in favour of a father for a period of years, and his lifetime if alive at the end of the lease, or, if not, for the lifetime of his heir. *Darroch* v. *Rennie*, footnote to Cunningham *v.* Greive, 8 Mar. 1803, F. C.; M. 15298, and "Tack" App. No. 9.

714. Tenant—Joint Tenants—Proof of Ownership of Stock and Crop.—*Held* that although a lease was in the joint names of two individuals, this did not preclude proof that the crop and stocking belonged exclusively to one of them. *Kilpatrick* v. *Kilpatrick*, 1841, 4 D. 109; 14 J. 46.

715. Tenant — Joint Tenant — Eldest Daughter—Error in Name.—A party granted a lease to another, and to his eldest daughter Sarah; Sarah predeceased her father, but Jean, who was truly the eldest daughter, survived him. *Held* that Jean was entitled to the farm. *Moore* v. *Boddan*, 1823, 2 S. 583.

716. Tenant — Joint Tenancy — Trust—Proof of.—In a question between two parties (father and son) named as joint tenants in a missive of lease, *held* that an averment by one of them, that the lease had been taken for his exclusive behoof, could only be proved by the writ or oath of the other. *M'Vean* v. *M'Vean*, 1864, 2 M. 1150; 36 J. 577.

717. Tenant—Joint Tenancy—Name of One Tenant not in Lease.—*Held* that a party, whose name appeared in a written lease, was not sole but only joint tenant with another, whose name did not appear, but who lived on the farm, and, on the death of the former, an application sustained by his next-of-kin to ascertain the value of the stock on the farm, and to preserve the rights of parties in the meantime, till the question of right should be determined. *Sinclair* v. *Sinclair*, 1843, 15 J. 638.

718. Tenant — Meliorations — Bill — Suspension of Charge.—A bill of suspension by the acceptor of a bill on alleged counter claims for meliorations under a lease alleged to have been granted by the charger to the acceptor, *refused*. *Monro* v. *Monro*, 1823, 2 S. 300.

719. Tenant — Meliorations — Sale of Estate—Liability of Singular Successor.—Where an estate was sold in a ranking and sale on 5th March 1834, and the purchaser,

whose entry was at Whitsunday 1834, became bound to pay the meliorations due to tenants under their current leases, at the expiry of their leases, which in several was Whitsunday 1834, *held* that the purchaser was liable for the meliorations due under those leases, because they were current when he undertook the obligation, and that the outgoing tenant was entitled to retain possession of the arable part of the farm till the crop was reaped. *Stewart* v. *E. of Dunmore's Trs.*, 1837, 15 S. 1059; 12 Fac. 974.

720. Tenant — Liability — Penalty. — A clause in a lease truly importing a reasonable condition, *held* to be such, and not a penalty. *Hall* v. *Lady Grant*, 1831, 9 S. 612; 6 Fac. 410.

721. Tenant — Liability — Penalty for not Renouncing Lease. — Although it was stipulated in a lease that the tenant should renounce the lease six months prior to its expiration, under the penalty of paying thereafter double rent, yet *held* that as the landlord during the currency of the six months entered into a communing with the tenant for a renewal of the lease, without asking for the renunciation or apprising the tenant, that if he continued to possess, the penalty would be exacted, it was not due for three years' subsequent possession. *Johnstone* v. *Thom*, 1810, Hume 585.

722. Tenant — Liability — Penalty for Destruction of Trees.—In an action for the penalties on the Act, 1698, c. 16, against a tenant for destroying trees or not taking sufficient care to protect them, and it appearing that the injury had been caused by his children cutting or pulling off their tops, the court modified the penalty to the actual damage. *Cooper* v. *Campbell*, 18 Jan. 1805, F. C.; M. "Planting" App. No. 1.

723. Tenant—Obligations — Breach of — Harrowing Grass Seeds. — An outgoing tenant failed, in terms of his lease, to harrow grass seed furnished by the incoming tenant, and sown with the waygoing crop. There was a failure of grass crop. *Held* that, in the absence of any other cause, the failure of crop was to be attributed to the neglect to harrow, and damages awarded against the outgoing tenant. *Graham* v. *Lindsay*, 1861, 23 D. 440; 33 J. 222.

724. Tenant — Obligations—Cultivation of Fallow—Custom.—In an action by a landlord against an incoming tenant, for the expense of cultivating the summer fallow left upon the farm by the outgoing tenant, and which had been paid by the landlord to him, *held* (1) that as the incoming tenant had not undertaken any obligation to pay for the fallow, the landlord was not entitled to recover the expense; and (2) that proof as to the practice of that part of the country was not competent evidence to support the claim. *Alexander* v. *Gillon*, 1847, 9 D. 524; 19 J. 214.

725. Tenant — Obligations — Cultivation —Construction of Lease.—A tenant in an agricultural lease, which permitted, but did not require, a six-shift rotation, and which contained an obligation to observe the rules of good husbandry practised in the country, followed a four or a five-shift rotation till the last year of the lease. *Held* that he was entitled in the last year of the lease to adopt the six-shift rotation, to the effect of taking a waygoing crop, which, as regards a portion of the lands, the mode of cultivation he had previously pursued would not have given him, —it having been established, on the report of a man of skill, that the proposed waygoing crop was not contrary to the rules of good husbandry as established in the district. *Hunter* v. *Miller*, 1863, 1 M. (H. L.) 49; 35 J. 605; 4 Macq. 560.

726. Tenant — Obligations — Cultivation — Parks in Grass. — An outgoing tenant agreed to leave to the incoming tenant certain specified parks in grass, and about twenty-three acres of another "park, consisting altogether of about ninety-seven acres"; and it was afterwards found that the parks contained only eighty-five acres. *Held* that the outgoing tenant, although not in perfect *bona fide* as to the extent of the parks, was entitled to take into account the whole grass left on the farm, but that allowance was to be made for the inferiority of any grass not in the parks, and that natural grass not in use to be ploughed was not to be included. *Simpson* v. *Creighton*, 1823, 2 S. 405.

727. Tenant—Obligations—Miscropping. —A tenant for a year is bound to crop a farm according to the rules of good husbandry. When the trustee on the estate of a bankrupt farmer sold the "privilege of this year's crop of the farm," *held* that rules as to cropping incumbent on the trustee were obligatory also on the party to whom he sold. *Fleming* v. *Macdonald*, 1860, 22 D. 1025; 32 J. 445.

728. Tenant—Obligations—Miscropping. —A tenant under a long lease, without stipulations as to cropping, being held liable in damages for miscropping, these were calculated on the assumption of a six break shift being the proper course of management. *Thomson's Reps.* v. *Oliphant*, 1824, 3 S. 275.

729. Tenant—Obligations—Miscropping. —*Held* that a tenant, having followed the course of cultivation pointed out in his lease, was not liable in damages for an alleged deterioration of the lands, arising from the rules of good husbandry not having been observed. *Stark* v. *Edmonstone*, 1826, 5 S. 45.

730. Tenant—Obligations—Miscropping—Option—Construction of Lease—Interdict. —A clause in a tack, binding a tenant to a certain mode of management, or to pay an additional rent, does not give the tenant an option to violate the stipulated condition at pleasure; and the landlord may obtain an interdict against such violation. *M'Kenzie* v. *Craigie*, 1815, 6 Pat. 117. Affg. 18 June 1811, F. C.

731. Tenant—Obligations—Miscropping—Acquiescence.—The representatives of a landlord, who as well as his factor resided in the neighbourhood of a farm, *held* not entitled, at the end of thirteen years, to claim damages from a tenant for not labouring the farm according to the stipulations in the lease, in respect of presumed acquiescence by the landlord in the mode of cultivation. *Murray's Trs.* v. *Gordon*, 26 Feb. 1806, F. C.; Hume 823.

732. Tenant—Obligations—Miscropping—Joint Tenancy.—A farm was let to two joint tenants for one year, one of the joint tenants having been sole tenant for seven years previously. In an action of damages at the instance of the landlord, *held* that the joint tenants were bound to adhere to the rotation of crops in operation on the farm; and therefore that they were bound to leave the whole young grass (hained) for a hay crop, and not merely the same acreage of young grass as they had received hained at their entry. *M'Culloch* v. *Grierson*, 1862, 1 M. 53; 35 J. 34.

733. Tenant—Obligations—Miscropping.—In an action of damages by a landlord against a tenant for miscropping a field, in violation of his lease, he averred deterioration of the farm. The defence was, that the stipulation as to cropping in the lease did not apply to the field in question, and that it had been cropped according to the rules of good husbandry. *Held* that the pursuer was not bound to put in issue deterioration, but only violation of the lease. *Mackenzie* v. *Monro*, 1860, 23 D. 144; 33 J. 54.

734. Tenant—Obligations—Miscropping—Construction of Lease.—Terms of a lease under which the court *held* that a tenant was liable in damages for not having left twenty acres of one-year-old grass on an arable farm at the Whitsunday of his removal, there not being any two-year-old grass upon the farm; and *question*, whether a tenant is entitled to the crop of hay from seeds sown with his penult crop as a waygoing crop. *Lyall* v. *Cooper*, 1832, 11 S. 96; 8 Fac. 1.

735. Tenant—Obligations—Miscropping, etc.—Acquiescence of Former Proprietor.—A party purchased an estate with entry at Whitsunday 1837, and allowed a tenant, whose lease of nineteen years then expired, to continue in possession of his farm for two years thereafter, by tacit relocation. *Held* (1) competent for the landlord, on the termination of the last year of possession, to present a petition, founded on the lease, to the sheriff to appoint inspectors to report on an alleged miscropping, as to the state of the houses and fences, and the sums necessary to put them in good condition and repair, and to decern against the tenant for payment; (2) that he was entitled to damages for miscropping, and was not barred by the acquiescence of the former proprietor in former deviations by the tenant from the lease; and (3) that he was entitled to implement of the lease as to the houses, fences, etc., and was not debarred by having taken payment of the rent, or by the expiry of the lease. *Hall* v. *M'Gill*, 1847, 9 D. 1557; 19 J. 650.

736. Tenant—Obligations—Miscropping—Acquiescence.—A landlord is not entitled, at the termination of a lease, to claim damages from the tenant for mislabouring, where, during the currency of the lease, he has made no objection, and where there have been no rules laid down in the lease as to cultivation. *Fraser* v. *Maitland*, 1824, 2 Shaw's App. 37.

737. Tenant—Obligations—Miscropping—Practice of District.—A tenant in an agricultural lease obliged himself to cultivate in a "husbandlike manner, and not to run out the lands," and also to leave one-fourth of the farm in pasturage at the end of the lease. *Held* that he was bound to crop according to the rotation in practice in the district, if suitable to his lands. *Carron Co.* v. *Donaldson*, 1858, 20 D. 681; 30 J. 347.

738. Tenant—Obligations—Miscropping—Rotation—Impossible Conditions.—When the conditions of a lease as to rotation of crops are impossible, the court will not enforce a penalty in the lease for failure to observe the conditions. *Colvin* v. *Dunbar*, 1870, 8 S. L. R. 149.

739. Tenant—Obligations—Miscropping.—On the entry of a tenant to a farm, the greater part of the arable land was in old pasture. The lease was for fifteen years from Whitsunday 1846, and therefore expired at Whitsunday, and separation of the crop 1861. In March of that year, the tenant, for the first time, took a crop off a field of old pasture. In an action by the landlord against the tenant for payment of this crop, and alternatively for damages for miscropping, *held* (1) that the crop belonged to the tenant, although he had already had fifteen crops of grass off the field; and (2) that the statements were not relevant to support the conclusion for damages. *Bairds* v. *Harper*, 1865, 3 M. 543; 37 J. 272.

740. Tenant—Obligations—Miscropping—Petition by Landlord.—A landlord presented a petition to the sheriff in the middle of April, setting forth that the tenant of his farm had made no preparation for laying down the crop, whereby the stipulated rotation would be rendered impracticable, and praying the sheriff to remit to persons of skill to examine the farm, and to authorise the proprietor to cultivate it according to their recommendation. *Held* competent for the sheriff to do so. *Brock* v. *Buchanan*, 1851, 13 D. 1069; 23 J. 496.

741. Tenant—Obligations—Miscropping—Liability to Purchaser of Farm.—A tenant of a farm, held under a lease of nineteen years, which prescribed a five-shift course of cropping, except by permission of the landlord, soon after his entry commenced a system of improvement by which he increased the arable land from 400 acres to 800, and in consequence departed from the prescribed course of cropping.

His system of management was known to and approved of by his landlord. The farm was sold in three portions. *Held* that the tenant was not liable in damages for miscropping to a purchaser, in respect (1) that the latter had visited the farm before purchase, and might have seen that it was not managed on a five-shift course; (2) that the alleged contravention was a necessary consequence of the previous alteration in cropping which had taken place before the date of the sale, under a system of management approved of by the then landlord. *Carnegie* v. *Guthrie*, 1866, 5 M. 253; 39 J. 112.

742. Tenant—Obligations—Miscropping—Pactional Rent.—By a stipulation in a lease, a tenant bound himself "never to take two white crops from any part of the said lands without a green crop intervening"; and he bound himself, in case he should "contravene the said regulations, or any part of them, by taking more than one white crop from any part of the said lands without a green crop intervening," to pay £4 sterling of covenanted additional rent for each acre of ground "which he should labour in violation thereof, over and above the tack-duty, and to pay the said additional rent for each during the possession after the respective contraventions." *Held* not relevant to elide the effect of these stipulations to allege that the contravention was the result of no spontaneous purpose to contravene, but of an accidental failure in cultivation, and that the court was bound to enforce the contract of parties without modification. *Fraser* v. *Ewart*, 25 Feb. 1813, F. C.

743. Tenant—Obligations—Miscropping—Pactional Rent.—A stipulation that a tenant should, in case of deviating from a prescribed system of rotation, pay an additional rent of £10 yearly, *sustained*. *Lawson* v. *Ogilvy*, 1834, 7 W. & S. 397. Affg. 10 S. 531; 7 Fac. 403.

744. Tenant—Obligations—Miscropping—Pactional Rent.—A lease was granted of a farm of seventy-five acres, containing specific rules as to cultivation, and a stipulation that the tenant should pay an additional rent of £3 for each acre not so cultivated. *Held* that although, by an agreement, the tenant during the currency of the lease gave up twenty-five acres of the farm on getting a diminution of his rent, the rules applied to the remainder, and he was liable in the additional rent for the non-observance of them. *Hunter* v. *Clark*, 1810, Hume 852.

745. Tenant—Obligations—Miscropping—Pactional Rent.—Under a stipulation in a lease, that the tenant should observe a certain course of labouring the lands, "under a penalty of £3 for each acre laboured otherwise than as above, to which the damages are hereby estimated, without power to any judge to modify them on any pretence whatever,"—*held* that, in case of deviation, the landlord was entitled to exact the conventional penalty to the full extent. *Henderson* v. *Maxwell*, 24 Feb. 1802, F. C.

746. Tenant—Obligations—Miscropping—Pactional Rent.—A tenant entered to possession of a farm, on a missive of lease for nineteen years, prescribing a certain course of cultivation for the first sixteen years, and another during the last three years, under the penalty of paying an additional rent for these last years; and he did not comply with the rules so prescribed. *Held* that he was liable in the additional rent, and that it was not a valid defence that he had adopted the same course as the other tenants on the estate, and as was prescribed by their leases, or that he had done so with the knowledge of the landlord. *Miller* v. *Lord Gwyder*, 1826, 2 W. & S. 52. Affg. 3 S. 65.

747. Tenant—Obligations—Miscropping—Pactional Rent.—A stipulation that, in the event of deviating from a particular mode of culture, the tenant should pay £5 per acre of additional rent, which should not be considered penal, but pactional, *enforced*. *Morison* v. *Sir D. H. Blair*, 1823, 2 S. 241.

748. Tenant—Obligations—Miscropping—Pactional Rent.—A landlord granted a lease, on the condition *inter alia* that the tenant, at removal, should leave sixty acres in five years' old sown grass; but in case he should think it more for his advantage not to have the land in grass during these years, he was to "pay to the landlord the sum of £5 sterling of additional rent for each acre deficient," at the terms and in the manner stipulated as to the principal rent. The tenant, after laying down the proper quantity, during the last year, ploughed part of it. *Held* that he was liable only in £5 for each acre so ploughed during that year, and not for each of the five years. *Suttie* v. *Somner*, 1828, 6 S. 1122.

749. Tenant—Obligations—Miscropping Acquiescence — Pactional Rent.—A lease referred to regulations of older date, in which a seven-shift rotation of crops was prescribed, and in which there was a clause of pactional rent for miscropping. The lease prescribed a six-shift rotation, and the tenant, several years before the expiry of the lease, changed it to a five-shift. *Held* that the landlord had acquiesced in the change. *Question*, whether, apart from acquiescence, the clause as to pactional rent being in the regulations when a seven-shift was provided for, applied to the lease in which a six-shift was the rotation. *Taylor* v. *Duff's Trs.*, 1869, 7 M. 351; 41 J. 205.

750. Tenant—Obligations—Miscropping—Pactional Rent.—Where a lease provided for husbandmanlike cultivation and against running out the land, as well as fixed a rotation, and stipulated for pactional rent for deviation therefrom, *held* that the landlord was entitled to claim both the pactional rent for miscropping, and also damages for general deterioration. *E. of Wemyss* v. *Ritchie*, 1863, 2 M. 137.

751. Tenant—Obligations—Miscropping—Pactional Rent—Damages.—A lease re-

quired that a particular kind of grass seed should be sown with the white crop of the third year, and stipulated that if the tenant should violate the prescribed course of rotation he should pay a certain additional rent per acre. The tenant, who entered in the third year of rotation, got access to the farm before entry, and sowed seeds other than those prescribed. *Held* that though he might be liable in damages, he was not liable for additional rent, the contravention having taken place when the lease was not operative. *Witham* v. *White*, 1866, 2 S. L. R. 80; 38 J. 586.

752. Tenant—Obligations—Miscropping.—It was stipulated that a tenant might depart from the mode of cropping and management laid down in his tack, upon his paying £2 additional rent per acre. He departed from the mode of cropping. The House of Lords remitted to ascertain and determine what was the number of acres the tenant became bound to cultivate according to the rotation laid down in the tack; what was the number cropped differently; what additional rent, if any, was due at the date of summons; and what remained due. *Graham* v. *Straiton*, 1789, 3 Pat. 119, 367.

753. Tenant—Obligations—Mismanagement.—Damages awarded against a tenant for mismanagement of his farm. *M. of Tweeddale* v. *Brown*, 1821, 2 Mur. 563.

754. Tenant—Obligations—Mismanagement—Interdict—Damages.—It is competent, in a summary petition by a landlord against his tenant before the sheriff, praying to interdict him from pursuing a course of management inconsistent with good husbandry and the stipulations of his lease, to conclude for damages, in so far as injury should be suffered by his actual deviation. *Fraser* v. *M'Donald*, 1834, 12 S. 684.

755. Tenant—Obligations—Residence on Farm—Failure to Reside.—A tenant of a farm was bound by her lease to reside thereon. In an action brought by the landlord, concluding that in the event of the tenant failing to reside it should be declared that her right to possession was forfeited, the tenant lodged a minute offering to keep a furnished house on the farm and a servant therein, and to reside there with her family for ten days in every two months. *Held* that this was a refusal to implement the condition of the lease and that the tenant had forfeited her right to possession of the farm. *Edmond* v. *Reid*, 1871, 9 M. 782; 43 J. 425.

756. Tenant — Obligations — Stocking Farm.—A tenant of a grass farm does not fulfil the implied obligation on him to stock the farm by taking in stock belonging to others for grazing. *M'Dougall* v. *Buchanan*, 1867, 6 M. 120; 40 J. 67.

757. Tenant — Obligations — Stock on Farm—Interdict against Displenishing.—A tenant in an agricultural lease was bound "always to have a full stock" on the farm. The tenant died, and his widow continued to reside on the farm along with her son, the substitute in the lease. The widow having died, the landlord applied for interdict against her executors, and also against her son "displenishing the farm . . . and from carrying into effect an intended sale of the whole stocking and farm implements." Interdict *refused*; the court being of opinion that so broad an interdict could not be granted, there being no proof of intention to displenish the farm, and the son having consigned a year's rent. *Edmond* v. *Abel's Exrs.*, 1862, 24 D. 559; 34 J. 286.

758. Tenant — Obligations — Stock on Farm—Interdict against Displenishing.—Interdict against a tenant displenishing a farm and selling the whole dairy stock and implements thereon, or otherwise from selling such of the stock and implements as were requisite for its proper management, according to the rules of good husbandry and the terms of the lease, *refused* in respect of vagueness in the prayer, and also in respect it was not made out that the farm was let exclusively as a dairy farm. *Cathcart* v. *Sloss*, 1864, 3 M. 76; 37 J. 39.

759. Tenant — Obligations — Repairs — Damage by Fire.—*Held* that a stipulation in a lease by which the tenant bound himself to keep the subjects in repair did not bind him to repair damage by fire. *Observations* on *Clark* v. *City of Glasgow Assurance Co.*, 1854, 26 J. 638; 1 Macq. 668. *Duff* v. *Fleming*, 1870, 8 M. 769; 42 J. 423.

760. Tenant — Obligations — Repairs to Houses.—*Questions* as to the liability of tenants for a sum to put houses in repair. *Hume* v. *Allen*, 1824, 2 S. 777.

761. Tenant—Obligation—"Tenantable" Condition—Construction.—*Observed*, that in a tenant's obligation to keep houses "tenantable," the word must be construed with reference to the custom of the district where the farm is. *Messman* v. *Brocket*, 1810, Hume 850.

762. Tenant — Obligations — Repairs — Reconstruction.—A tenant of a house was bound by the lease "to make repairs and improvements," and for this purpose he was to get possession before the term of entry, and "to keep the premises in repair." *Held* that he was only bound to make ordinary repairs, but not such extraordinary repairs as amounted to reconstruction of the premises, or part of them. *Napier* v. *Ferrier*, 1847, 9 D. 1354; 19 J. 586.

763. Tenant — Obligations — Repairs to Buildings—Pulling down Old Buildings.—A clause by which a tenant was bound to uphold old houses and leave them in tenantable repair, with a power to build an additional steading for which he was to receive payment at the expiry of the tack, does not entitle him to pull down the old houses, and insist for the value of a new and separate steading, but only for its value as an additional steading; and he is entitled to that value as at

the expiry of the tack, and not merely to indemnification of his outlay. *Sinclair* v. *Manson*, 1821, 1 Shaw's App. 1.

764. Tenant — Obligations — Upkeep of Ferry-Boats.—Ferry-boats which had been in use for about thirteen years, were let for one year to tenants, who accepted them as in good repair, and bound themselves to keep them in the like good repair, and deliver them over, at the expiry of the lease, in good and sufficient repair. *Held* that this obligation was to be construed with reference to the age and circumstances of the boats, and did not impose on them an obligation to put them into such a state of thorough repair as would require an expense of about one-half the original value. *Taylor* v. *Brown*, 1800, Hume 308.

765. Tenant—Obligations—Maintenance of Buildings—Construction of Lease.—A long lease of subjects, used partly for manufacturing purposes, contained authority to build houses, mills, etc., and to convert them, or those already built, to any other purpose, and also an obligation to uphold and leave in tenantable order the whole buildings, "to whatever use converted, which either now are or may be added during the lease"; and a subtack by the principal tenant (who subsequently became proprietor) contained a stipulation that the subtenant should uphold the whole buildings in sufficient order and condition, and should "leave them all in a good tenantable condition at his removal,—at least to leave buildings on the lands at the end of the lease to the value of £300, or to pay the proprietor at the end of the lease £300, in his (the subtenant's) option." *Held* that this did not infer any obligation upon the subtenant to restore buildings which had become ruinous from the effect of time or the nature of the works, or to pay the amount necessary to restore them, but only to maintain buildings to the value of £300, or pay that sum. *Dunn's Trs.* v. *E. of Zetland*, 1862, 24 D. 801; 34 J. 406.

766. Tenant—Obligations—Maintenance of Buildings, etc.—Judicial Inspection—Competency of Application—A. S. 10 July 1839, s. 137.—A tenant was bound by his lease to leave the fences and buildings on his farm in the like good repair in which the landlord was bound to put them at the outset of the lease. *Held* that it was competent for the landlord at the tenant's outgoing to present a summary application to the sheriff to have the fences and buildings judicially inspected and their present state reported on. *Gordon's Trs.* v. *Melrose*, 1870, 8 M. 906; 42 J. 535.

767. Tenant—Obligations—Buildings in "Proper Repair" at Removal.—Under a lease, obliging a tenant to leave the biggings on the farm (which, at his entry, were valued at £70) in proper repair at his removal, and he left biggings worth £200, *held* that this was sufficient implement, and that he was not also bound to leave them in proper repair. *M'Donald* v. *Robertson's Trs.*, 1830, 8 S. 974.

768. Tenant — Obligations — March Fences.—A tenant is bound at common law to keep up the march fences of his farm; and therefore an action by a tenant of a farm belonging to one proprietor, against the tenant of an adjoining farm belonging to another proprietor, to compel him to be at one-half of the expense of repairing the march fence, *sustained*. *Dudgeon* v. *Howden*, 23 Nov. 1813, F. C.

769. Tenant — Obligations — Fencing — Counter Claims — Compensation. — On the desertion of a tenant before expiry of the lease, *held* that the landlord was entitled to set off, against the tenant's claim of damages, a claim for repairing fences, so as to enable him to let certain parks. *Young* v. *Colt's Trs.*, 1832, 10 S. 666.

770. Tenant — Obligations — Breach of Contract — Sale or Lease? — A let to B certain premises by written lease, by which he undertook to supply a certain amount of steam-power. *Held*, in an action by the lessor for rent of the steam-power (which the lessee had declined to take on the ground that it had not been supplied timeously), that the action was to be regarded as one for damages for breach of contract, and that these were due. *Observed*, that the contract was rather one of sale than of lease. *Clark* v. *Stewart*, 1872, 10 S. L. R. 152.

771. Tenant—Obligations—Breach of—Action by Landlord against Tenant during Currency of Lease.—*Held* that a tenant having violated the conditions of his lease, an action of damages at the instance of the landlord during the currency of the lease is competent. *Question*: Could repetition of a sum so paid as damage be claimed, if, by extraordinary efforts, the tenant had by the end of the lease restored the lands to condition? *Carron Co.* v. *Donaldson*, 1858, 20 D. 681; 30 J. 347.

772. Tenant — Obligations — Non-Implement—Damages—Amount.—In a question as to the amount of damages due by a tenant to his landlord for non-implement of his lease, reporters differed; and a new report having been ordered, but rendered impracticable by lapse of time, the court decerned for an average of the damages as formerly reported. *Bell* v. *Henderson*, 1822, 1 S. 353.

773. Tenant — Obligations — Failure to Roll in Grass Seeds.—Circumstances in which an outgoing tenant was found liable in damages to the incoming tenant for loss through non-implement of an obligation in the lease to roll in grass seeds sown among his waygoing corn crop. *M'Intyre* v. *Anderson*, 1872, 10 S. L. R. 59.

774. Tenant — Obligations — Failure to Implement.—A tenant was bound to enclose a farm, but did not do so. Having renounced the lease, *held* that the landlord was entitled to the value of the enclosures. *Cuthbert's Trs.* v. *Skene*, 1822, 1 S. 322.

775. Tenant—Obligations—Unconsumed Manure — Compensation. — An outgoing

tenant was bound by his lease "to use and consume the whole of the straw or fodder that shall be raised or grown on his farm in and upon the same, and the whole dung, compost, or other manure made thereon, excepting hay, and the straw or fodder of the outgoing crop," which he might dispose of at pleasure. *Held* that he was not entitled to payment for manure left on the farm unconsumed. *Greig, etc.* v. *Mackay*, 1869, 7 M. 1109; 41 J. 619.

776. Tenant—Obligations—Consumption of Produce.—*Held*, in respect of an agreement, that the tenant of a farm belonging to one landlord (but on which there was no steading) was entitled to carry the produce of the farm to another, the property of a different landlord, where there was a steading; for although the general rule is, that a tenant cannot carry the produce of one farm to another, yet this can only apply where there is a proper steading to manufacture it, and offices to consume the fodder. *Gordon* v. *Falconer*, 1822, 1 S. 386.

777. Tenant — Obligations — Bona fide Carrying off Fodder.—A tenant who conceived that he had right to carry off the fodder of his waygoing crop, notwithstanding a special article in his lease, on which he put an interpretation, which was supported by judgments of the sheriff and Court of Session, but reversed in the House of Lords, found not liable in damages for the loss arising from the destruction of the fodder, pending an action in relation thereto by the landlord. *Gordon* v. *Anderson*, 1834, 7 W. & S. 545. Affg. 11 S. 647.

778. Tenant — Obligations — Failure to Consume Straw on Farm.—An application by a landlord for interdict against his tenant removing from his farm or selling the straw and fodder raised and grown on it, *refused*, there being no steading or offices on the farm. *Mitchell* v. *Adam*, 1866, 1 S. L. R. 247.

779. Tenant—Obligations—Consumption of Produce—Waygoing Crop.—An obligation by a tenant to consume the growing fodder on the farm does not apply to the waygoing crop. *Philp* v. *Morton*, 1816, Hume 865. *D. of Roxburgh* v. *Roberton*, 1820, 2 Bligh 156; 6 Pat. 614. Revg. Hume 867. *Fraser* v. *Peter*, 1823, 2 S. 279. *Gordon* v. *Robertson*, 1826, 2 W. & S. 115. Revg. 3 S. 656. *Gordon* v. *Anderson*, 1828, 3 W. & S. 1. Revg. 4 S. 13. *Gordon* v. *Anderson*, 1835, 7 W. & S. 545. Affg. 11 S. 647.

780. Tenant—Obligations—Consumption of Crop.—A tenant is bound to consume the whole straw, turnips, and green crop, the produce of the farm, on the ground of the same; and he has no right to remove the straw or fodder to be thrashed at a mill on an adjacent farm belonging to another proprietor, and of which he is tenant; nor to remove the turnips or green crop to that farm to be consumed there, even on caution to bring back the straw and fodder when thrashed, or the dung produced by consumption of the turnips and green crop. *Scott* v. *Durham*, 27 May 1813, F. C.

781. Tenant — Obligations — Compensation from Railway—Renunciation of Lease —Right of Landlord to Proportion of Compensation for Unexpired Years.—A tenant got compensation from a railway for damages, and soon after threw up his lease as unproductive, under a clause giving power to do so. *Held* that the landlord was not entitled to a proportion of the compensation effeiring to the unexpired years of the lease. *Peddie* v. *Brown & Co.*, 1857, 20 D. (H. L.) 1; 3 Macq. 65; 29 J. 388.

782. Tenant — Obligations — Shop — Failure to Enter into Possession.—Damages awarded to the landlord of a shop for failure on the part of the tenant to enter to possession. *Dickson* v. *Hill*, 1828, 6 S. 504.

783. Tenant—Obligations—Shop.—*Held* that a tenant of a shop was bound to furnish it, keep fires in it, and air it, but not to open and carry on business in it. *Whitelaw* v. *Fulton*, 1871, 10 M. 27; 44 J. 37.

784. Tenant — Obligations — Thirlage — Mill Carriages.—*Question* as to a clause in a lease relative to mill carriages. *Gilchrist* v. *Niven*, 1833, 11 S. 466.

785. Tenant—Obligations — Conditional Lease.—A mill was let by missives to a tenant, with entry at Martinmas 1831, under condition that he should not raise the dam dyke above a certain height, and in 1836 a formal lease was executed containing the same condition, and between 1831 and 1836 the tenant had erected a dam dyke of more than the stipulated height. *Held* that the condition must receive effect unless it were proved that the landlord agreed to withdraw it. *Foulis* v. *M'Whirter*, 1841, 3 D. 343; 13 J. 150.

786. Tenant—Obligations — Prohibitions —Whether Prohibition may be Violated on Payment of Penalty — Public-House.—A proprietor granted a lease for 999 years of a piece of ground, the tenant and his heirs and assignees being taken bound to erect dwelling-houses thereon, and being prohibited "from keeping a public-house, or selling liquor of any kind, at any time during this lease," without a special yearly licence from the landlord, "otherwise to pay £10 sterling of additional rent for each time they shall be found guilty" of infringing the prohibition. *Held* that the prohibition was absolute, and that the tenant had not the option of contravening the same on payment of £10 additional rent. *Gold* v. *Houldsworth*, 1870, 8 M. 1006; 42 J. 617.

787. Tenant — Obligations — Minister's Stipend — Overpayment — Repetition.—A tenant was bound by his lease to pay a rent of £183 to the landlord, and also "the minister's stipend, schoolmaster's salary, the cess, the statute-labour money, and all other public and parochial burdens imposed, or to be imposed, during the currency of the tack." Shortly before his entry the stipend had been fixed by an interim locality at a certain sum, which the tenant paid to the minister during the whole

currency of the tack; but it was afterwards discovered that too great a proportion had been allocated upon the farm; and the landlord obtained credit for these overpayments in settling with the other heritors as to the sums to be paid by him for his other farms. *Held*, in an action by the tenant, that the landlord was liable in repetition of the sums overpaid by the tenant. *Crawford* v. *E. of Glasgow's Trs.*, 1849, 11 D. 714; 21 J. 238.

788. Tenant—Obligations—Insurance.—A tenant of a farm and mill was taken bound in his lease to have the whole houses and machinery insured, the landlord to relieve him of one-half of the premiums. *Held* that the insurance was solely for the benefit of the landlord, and that the tenant was not entitled to any of the money recovered under the policy. *D. of Hamilton's Trs.* v. *Fleming*, 1870, 9 M. 329; 43 J. 155.

789. Tenant — Obligations — Disbursements by Landlord for First Crop.—Where a landlord has himself been in the occupation of, and has prepared land let to an incoming tenant, the latter is bound to reimburse the former, as he would have been bound to reimburse an outgoing tenant, for the lime, manure, seed, and labour beneficially expended by him for the production of the crop which the incoming tenant reaps. *Marshall* v. *Walker*, 1869, 7 M. 833; 41 J. 445. *Simson's Trs.* v. *Carnegie*, 1870, 8 M. 811; 42 J. 448.

790. Tenant — Obligations — Interest on Improvements.—Where a tenant bound himself to pay "interest" on sums expended on improvements on his farm, at the rate exacted by the Scottish Drainage and Improvement Company, *held* (1) that the sum of £4, 10s. per cent. per annum, being the interest charged by the company, was alone payable, and not an annual rent-charge of £6, 14s. 1d. paid to them by the landlord, as that included a repayment to account of the capital borrowed; and (2) that proof of the usage of the country, to the effect that "interest" was understood to mean the whole sum payable to the company, was inadmissible. *Sinclair* v. *M'Beath*, 1868, 7 M. 273; 41 J. 165.

791. Tenant — Obligations — Public Burdens—Income Tax.—Under an agreement between a landlord and tenant that the latter should pay public burdens, income tax is not included. *Wilson* v. *Holmes*, 1828, 6 S. 551; 3 Fac. 577.

792. Tenant—Obligation to Remove—Agreement to Pay Increased Rent on Failure to Remove—Right of Landlord to Insist on Removal.—A tenant under a nineteen years' lease, at a rent of £140, bound himself to remove at the expiration of it, "wherein, if he failed, he hereby binds and obliges himself and his aforesaids to keep possession of the foresaid lands for the space of seven years thereafter, and to make payment of the sum of £300 sterling in name of tack-duty yearly, for the said seven years, and that at the terms, and under the penalties, and bearing interest as before specified." *Held* that the landlord was entitled to insist on removal at the end of the nineteen years, although the tenant offered to pay the increased rent. *Cross* v. *Muirhead*, 1813, Hume 860. *Campbell* v. *M'Laurin*, 1814, Hume 864.

793. Tenant — Obligations — Thirlage—Usage.—Circumstances in which in the absence of any written title a claim to thirlage founded on prescriptive possession was sustained. *Macalester* v. *D. of Argyll*, 1832, 6 W. & S. 98; 10 S. 864. Affg. 9 S. 763.

794. Tenant—Obligations—Liability of Subtenant.—An obligation by a principal tenant of an urban tenement to keep it in repair, enforced against a subtenant. *Gibson* v. *Moffat*, 1824, 2 S. 766.

795. Tenant—Obligations to Subtenant—Construction—New Fences.—A tenant, in subletting a farm, agreed "to put and keep the dykes in a proper fencible condition, without any expense" to the subtenant. *Held* that this obligation did not extend to erecting new fences so as to connect and complete the enclosures. *M'Master* v. *Cameron*, 1812, Hume 858.

796. Tenant — Powers — Alterations on Premises.—A tenant, on a ten years' lease of manufacturing premises, in course of making repairs rendered necessary by damage done by a hurricane, made alterations, which a man of skill reported improved the buildings, for the purposes of the manufacture. A petition to have the tenant ordained to restore the premises to their original state, and interdicted from making "any further alterations," *refused*. *Stirling* v. *Strang*, 1857, 19 D. 568; 29 J. 268.

797. Tenant — Powers — Alterations on Premises.—A and B, who were ham-curers and provision merchants, took a lease of subjects, in which they were described as provision merchants. On entering into possession they erected a furnace and boiler for the purposes of ham-curing. In order to do this they cut through the joists of one of the floors, and altered some flues; but their operations did not appear to be dangerous, nor their ham-curing a nuisance. *Held* that it was beyond the powers of a tenant to make such alterations on premises without the landlord's consent. *Leck* v. *Fulton*, 1854, 17 D. 408.

798. Tenant—Powers—Bleaching Operations.—*Question*, whether it be competent for a tenant to carry on bleaching operations on land let for agricultural purposes. *Skene* v. *Maberly*, 1822, 1 S. 369.

799. Tenant—Powers—Cutting Peat.—A tenant cannot, without a special agreement, take peats from a moss within the lands let to him for sale, or give to others a power to dig peats for sale. *M. of Queensberry* v. *Haining*, 1812, Hume 859.

800. Tenant—Powers—Charring Coal—Nuisance.—In a question of nuisance, *held* that a landlord who had let his coal with

exclusive privileges to a tenant, was entitled to prohibit charring coal, in respect there was no permission to that effect in the lease. *Heriot* v. *Faulds*, 31 Jan. 1804, F. C.; M. 15255.

801. Tenant — Powers — Construction of Railway on Lands—Acquiescence of Landlord—Personal Bar.—The landlord of a liferent tenant of lands, which were let to him as a rabbit-warren and farm, *held* barred by acquiescence from objecting to an arrangement with the tenant of a neighbouring colliery, under which the latter constructed on part of the lands a railway for the transportation of his coals. *D. of Portland* v. *Samson*, 1843, 5 D. 476; 15 J. 248.

802. Tenant—Powers—Enclosing Land—Compensation for.—A tenant who possessed six acres of land without a lease, having enclosed them, *held* not entitled, on being removed, to the value of the enclosure. *M'Kay* v. *Brodie*, 1801, Hume 549.

803. Tenant—Powers—Erection of Buildings.—*Held* that a landlord could interdict his tenant from erecting a building on a piece of ground which was a pertinent to the lands and was (as held by an arbiter) to be used for the purposes of a piggery. *Walker* v. *Grant*, 1838, 1 Robin. 154. Affg. 1 D. 38.

804. Tenant—Powers—Erection of Fence Darkening Windows of Adjoining House.—The landlord of a dwelling-house and a yard behind it, let by written lease the house to one tenant, and the yard, "presently occupied by A, immediately behind the house," to another. The tenant of the yard erected a close wooden pailing nine feet high and seven and a half feet distant from the house, the windows of which it darkened. *Held* that the landlord would have been entitled at common law to prevent such an erection as the one in question, even apart from the notice in the lease that the subject was let as previously occupied, and adjoined a dwelling-house. *Ross* v. *Moncrieff*, 1859, 22 D. 328; 32 J. 138.

805. Tenant—Powers—Killing Rabbits.—*Question*, whether a tenant is entitled to kill rabbits upon his farm, and to authorise another person to do so for him. *Porter* v. *Stewart*, 1858, 3 Irv. 57; 30 J. 518.

806. Tenant—Powers—Killing Rabbits.—A tenant is entitled to kill rabbits for the protection of his crops without the consent of his landlord. *Moncrieff* v. *Arnott*, 1828, 6 S. 530; 3 Fac. 552.

807. Tenant—Powers—Killing Rabbits—Plantations.—*Held* that an agricultural tenant who had a right to pasture in the plantations adjoining his farm, was entitled as a pertinent of his right to trap or kill rabbits there as well as in other parts of the farm. *Cuninghame* v. *Webster & Royston*, 1867, 3 S. L. R. 327.

808. Tenant—Powers—Interdict against Landlord—Hunting.—An application by a tenant for an interdict against his landlord "hunting on the lands possessed by him, and thereby destroying the fences, hedges, and grounds," *refused*, in respect the landlord did not assert a right to hunt to the effect of destroying the fences, etc.; and action reserved for any actual damage. *Donaldson* v. *Ballantine*, 21 Nov. 1804, F. C.; M. 15270.

809. Tenant—Powers—Shooting Landlord's Pigeons.—*Held* that a tenant was not justified in shooting his landlord's pigeons, on the ground that they were destructive to his farm. *Easton* v. *Longlands*, 1832, 10 S. 542.

810. Tenant—Powers—Hunting—Stat. 1685, c. 20—Stat. 1621, c. 31.—*Held* (1) that the Act 1685, c. 20, is in desuetude, but that the Act 1621, c. 31, is not so; (2) that a tenant is liable in the statutory penalty for hunting on his own farm without a qualification; (3) that a long lease of land more than a ploughgate does not qualify a tenant to hunt; and (4) that shooting game, especially when discovered and followed up by dogs, is hunting in the sense of the statute. *M. of Tweeddale* v. *Somner* (footnote to *E. of Hopetoun* v. *Wight*, 17 Jan. 1810, F. C.).

811. Tenant—Powers—Scaring Game.—A tenant, with the view of scaring the game off his farm, was in the habit of sending muzzled dogs over it—of employing men to perambulate the farm, who discharged firearms loaded with blank cartridges in the close vicinity of the game, for the like purpose of alarming and driving them off, and of setting snares which were alleged to be intended to destroy game. Interdict granted at the landlord's instance against these proceedings as illegal, and notwithstanding that there was a great increase beyond the average quantity of game. *Question*, whether a tenant can obtain an interdict against his landlord increasing the game beyond the average quantity on the farm when he took the lease. *Wemyss* v. *Gulland*, 1847, 10 D. 204; 20 J. 55.

812. Tenant—Powers—Net-Fishing for Trout.—An agricultural tenant has no right to fish with net for trout or other fresh-water fish in a stream on his farm; and if he do so without permission, he is liable to the penalties of contravening 8 and 9 Vict. c. 26. *D. of Richmond* v. *Dempster*, 1861, 4 Irv. 10; 33 J. 133.

813. Tenant—Powers—Trout Fishing.—A landlord stocked with trout a small pond on a farm then let to a tenant. The tenant never possessed the fishing. A new tenant took the farm as possessed by the previous tenant. *Held* that the new tenant had no right to fish in the pond. *Opinions*, that an agricultural lease does not confer upon the tenant a right to fish in lochs or streams upon or adjoining the lands let. *Copland* v. *Maxwell*, 1871, 9 M. (H. L.) 1; 43 J. 246; L. R. 2 Sc. App. 103.

814. Tenant—Powers—Cutting Timber.—A tenant is not entitled to cut saugh or willow trees growing on his farm, whether planted by himself or not, when they are of

a large size. *Bogue* v. *Wight*, 21 Nov. 1806, F. C.; M. "Planting" App. No. 2.

815. Tenant—Powers—Cutting Timber in bona fide.—A prosecution for penalties against a tenant for cutting trees was elided by the defence that the acts were done in the *bona fide* belief that they were authorised by the landlord. *Gillies* v. *Macdonald*, 1824, 3 S. 358.

816. Tenant — Powers — Muirburn — Interdict.—A lease stipulated for conversion of uncultivated land into arable, and that no heather should be burnt on the farm but such as was pointed out by the landlord. In a petition by the landlord, complaining of heather burning without leave, and craving interdict, *held* that though the tenant might reasonably be entitled to burn without special leave on land which he was in process of converting into arable, the burning complained of, though on the uncultivated land, was in the circumstances unjustifiable, the land not being then in process of conversion. *Hamilton* v. *Campbell*, 1869, 6 S. L. R. 427.

817. Tenant — Powers — Nomination of Successor — Validity — Nomination. — A tenant under a lease for thirty-eight years, and thereafter during the lifetime "of any person to be condescended upon by him by a writing under his hand," *held* to have validly exercised the power in favour of his eldest daughter by a nomination in these terms: "I do hereby nominate and appoint the heir-male procreated of my body, and existing at the expiration of the said thirty-eight years; whom failing, I do nominate and appoint my eldest daughter then in life." *Irvine* v. *Thom*, 1827, 5 S. 534; 2 Fac. 308.

818. Tenant — Powers of — Interdict against Neighbouring Tenant.—The tenant of a farm (who was entitled by his lease to work lime for his own use) presented a bill of suspension and interdict to prohibit a tenant of certain lime-works on the same estate from working a lime-work on his farm. The parties differing as to the extent of the workings to which the latter had right under his lease, the court, on his stating his intention not to interfere with the workings of the tenant of the farm, passed the bill, but refused an interdict, reserving to apply to the Judge Ordinary in the event of any interference in the meantime. The landlord *held* entitled to appear to support his interest in such an application. *Young* v. *Cunningham*, 1830, 8 S. 959; 10 S. 502.

819. Tenant — Powers — Reduction of Lease—Judgment under Appeal.—A tenant who had right to the game on his lands, and to appoint gamekeepers, *held* entitled to insist in a suspension and interdict against a party shooting on the lands, although his lease had been reduced by the Court of Session, but the judgment was under appeal, and he was still in possession. *Innes* v. *Partridge*, 1826, 4 S. 761.

820. Tenant—Powers after Reduction of Lease—Interdict by Tenant.—A tenant whose lease had been reduced, but who had not been decerned to remove, *held* entitled to apply for an interdict against parties killing game on the lands. *Innes* v. *Allardyce*, 1822, 2 S. 93.

821. Tenant — Powers — Retention of Possession for Payment of Ameliorations.—A tenant is not entitled to retain possession of his farm as a security for payment of ameliorations. *Turner* v. *Turner*, 1811, Hume 854. *M'Neil* v. *Sinclair*, 1807, Hume 834. *D. of Gordon* v. *Innes*, 1824, 3. S. 10.

822. Tenant — Powers — Shop — Use of Shop for Auction—*Held* that the tenant of a shop was entitled to use it for sales by auction unless he was expressly prohibited by his lease. *Keith* v. *Reid*, 1870, 8 M. (H. L.) 110; 42 J. 425; L. R. 2 Sc. App. 39.

823. Tenant — Powers — Sublet.—A let lands to B for the purpose of a paper-mill. A railway company made a line through part of A's lands. *Held* that B could not sublet part of the lands leased to him to the railway company for the purpose of a siding and loading bank; and that the railway company could not use a road through these lands; and interdict at A's instance granted against the railway company constructing or using the siding or road. *Mercer* v. *Esk Valley Rly. Co.*, 1867, 5 M. 1024; 39 J. 570.

824. Tenant — Powers — Subletting — Urban Tenement.—Circumstances in which it was *held* that a tenant of an urban subject for one year was not entitled to subset it without the consent of the landlord. *Gordon* v. *Crawford*, 1825, 4 S. 95.

825. Tenant — Powers — Subletting — Shootings.—*Opinion*, that a tenant of shootings has no right to sublet unless under express power in his lease. *E. of Fife, etc.* v. *Wilson*, 1864, 3 M. 323.

826. Tenant — Powers — Subletting. — *Held* that a lease for twenty-one years does not imply a power to subset. *E. of Cassillis* v. *M'Adam*, 5 Dec. 1806, F. C.; M. "Tack" App. No. 14.

827. Tenant — Powers — Subletting — Urban Subjects.—An urban tenement may be subset by the lessee, provided the nature of the possession be not changed. *Anderson* v. *Alexander*, 10 July 1811, F. C.

828. Tenant—Powers—Use of Subject—Restoration—Violent Profits.—The proprietor of a coal-work possessed a canal and paid rent until decerned to remove, and found liable for violent profits in an action at the instance of the proprietor on whose lands it was constructed, which did not conclude for decerniture to have the ground left arable. The proprietor of the coal-work continued to occupy, and paid as rent the sum fixed as due per annum for violent profits. *Held* that he was not bound, on ceding possession, to make the ground fit for agricultural purposes.

Steuart v. *D. of Argyll*, 1857, 19 D. 1076; 29 J. 491.

829. Tenant—Powers—Use of Subjects—Interdict.—A tenant of lands, let for the purpose of making and disposing of bricks and tiles, *interdicted* from using the ground for the construction of a railway siding. *Leck* v. *Merryflats Patent Brick Co.*, 1868, 5 S. L. R. 619.

830. Tenant—Powers—Use of Subject. — An upholsterer took a lease of a house, a back-green, and back-house. By the lease, the back-house was described as a tailor's workshop. The tenant was empowered to erect buildings for the purposes of his trade, provided the premises were left at the end of the lease in a proper state. The entrance to the back-green and house from the street was through a narrow passage, which also formed the access to two dwelling-houses over it. *Held* that, having reference to the terms of the lease and nature of the access, the use of the back-house as a stable was an inversion of the possession, which the landlord was entitled to put a stop to by interdict. *Hood* v. *Miller*, 1855, 17 D. 411; 27 J. 176.

831. Tenant—Powers—Use of Subject—Erection of Manufactory. — The tenant of a mill and lands cannot, without consent of his landlord, establish thereon a manufactory or machinery foreign to the purposes of his lease. *Ford* v. *Hillochs*, 20 May 1808, F. C.; M. "Tack" App. No. 17.

832. Tenant—Powers—Use of Buildings. — Note of suspension and interdict *passed* against the tenant of an agricultural farm using a building on it as a posting station, in the immediate vicinity of an inn, the property of his landlord. *Baillie* v. *Mackay*, 1842, 4 D. 1520; 14 J. 585.

833. Tenant—Powers—Use of Buildings. —Tenants of a farm accommodated the horses of a stage-coach, to the injury of a neighbouring inn belonging to the same landlord. Interdict — against subsetting the stables or office-houses on the farm for accommodating stage-coach horses, or using them for any purpose inconsistent with that for which they were built, and from converting the office-houses into stables for coach horses—*granted* on the application of the landlord. *D. of Argyll* v. *M'Arthur*, 1861, 23 D. 1236; 33 J. 616.

834. Tenant—Powers—Use of Subject—Use of Water as Canal—Res meræ facultatis—Prescription.—A proprietor granted to an iron company a lease for 999 years, including "the command of all the water" on his lands, and on any of the neighbouring proprietors' lands which the company might think fit to lead through the granter's lands, "in such way and manner as they might think most proper for the use of their works," "and that either in making dams, water-leads, or otherwise," which they should have "as full power to do" as the granter "might have done before entering into these presents." The company bound themselves to pay rent at the rate of 4½d. per fall for "what part of the ground might be occupied by the said water-leads." For fifty years they used the watercourse merely to convey water to their works; but after the lapse of that time they began to use it as a navigable canal, for conveying goods to and from their works, and its banks as a towing-path. *Held* that they were entitled so to use it; and that the right to do so being *res meræ facultatis*, was not affected by the circumstance that a long period had elapsed before they availed themselves of it. *Swan's Trs.* v. *Muirkirk Iron Co.*, 1850, 12 D. 622; 22 J. 205.

835. Tenant—Powers—Using Sink-Pipe as Soil-Pipe. — A complaint by a landlord against his tenant for using a sink-pipe in the kitchen as a soil-pipe, and thereby creating a nuisance, *dismissed*, in respect that there was no proof of the sink-pipe being employed in an unusual or improper manner, and that the nuisance arose from a defective construction of the pipes and gutter attached to the house. *Mowbray* v. *Evbank, and Anderson* v. *Mowbray*, 1833, 11 S. 714 and 716.

836. Tenant — Subtenant — Action against Landlord.—A subtenant has not a direct action against the landlord where there is not an assignation to the landlord's warrandice. *Smyth* v. *Rogerson*, 1832, 10 S. 433; 7 Fac. 310.

837. Title to Sue — Overpayment. — It being alleged that an outgoing tenant who had sold his crop to the landlord, by whom it had been subsold to the incoming tenant, had received an overpayment to the amount of a sum of £100, paid to account by the incoming tenant for behoof of the landlord, *opinions*, that the incoming tenant had a title to sue the outgoing tenant for the alleged overpayment. *Dawson* v. *Stirton*, 1863, 2 M. 196; 36 J. 89.

838. Violent Profits—Amount—Deduction.—In estimating violent profits payable to an heir of entail by a tenant whose lease had been set aside, no deduction can be allowed for the interest of money expended by the tenant in ameliorations on the property. *D. of Gordon's Trs.* v. *Innes*, 1832, 10 S. 616.

839. Violent Profits — Amount — Subrent.—The subrent payable to the principal tenant of a farm is not conclusive evidence of the value against the tenant, in a question of violent profits. *D. of Buccleuch* v. *Grierson*, 1827, 5 S. 676.

840. Violent Profits — Bona fide Possession.—A landlord who had granted a lease reserving power to feu in whole or in part, feued about half the farm, and required the tenant to cede possession to the feuar. The tenant having refused, the sheriff and the Lord Ordinary ordained him to remove, but found no expenses due. The court altered

and assoilzied, and thereafter unanimously adhered. The House of Lords reversed that judgment, and affirmed that of the sheriff and Lord Ordinary. In the meanwhile the lease had expired. The tenant had remained in possession during the whole period of his lease; and the landlord was obliged to pay the feuar interest on the purchase money, which considerably exceeded the yearly rent. *Held* that the tenant was protected by the plea of *bona fides*, and was therefore not liable for the difference between the interest and the rent as violent profits. *Brisbane's Trs.* v. *Lead*, 1828, 7 S. 65; 4 Fac. 62.

841. Violent Profits—Bona fide Possession.—Circumstances in which a party retaining possession of a farm for several years after the period when it was ultimately found to have expired, pending a litigation on the subject, was *held* to have been in *bona fide* to consume the fruits, and could not be subjected in violent profits till the date of the final judgment against her in the House of Lords. *Carnegy* v. *Scott*, 1830, 4 W. & S. 431. Affg. 6 S. 206; 3 Fac. 211.

842. Violent Profits—Bona fide Possession.—A tenant acquired a lease and possessed under it for payment of a grassum and the former rent, granted by an heir in possession under an entail prohibiting the granting of leases with evident diminution of the rental. It had been the practice under that entail to grant such leases, and one Division of the Court of Session had found them lawful, as also had a majority of the whole court; but the House of Lords found the contrary. *Held* that the tenant being in *bona fide* was not liable in violent profits till the date of the House of Lords' judgment. *D. of Buccleuch* v. *Hyslop*, 1824, 2 Shaw's App. 54. Affg. 2 S. 6; 13 Nov. 1822, F. C. *E. of Wemyss* v. *D. of Queensberry's Trs.*, 1824, 2 Shaw's App. 70. Affg. 2 S. 107.

843. Violent Profits—Bona fide Possession.—Where a lease was reduced as in contravention of an entail, *held* that violent profits were due from date of Court of Session final decree reducing lease and decerning in removing and not from the affirmation of that decree by the House of Lords. *D. of Gordon's Trs.* v. *Innes*, 1830, 4 W. & S. 305. Affg. 6 S. 996; 3 Fac. 1028.

844. Violent Profits—Bona fide Possession.—Where a lease under an entail was sustained by the Court of Session, but on appeal set aside, the tenant *found* not liable in violent profits till the first term after the date of reversal by the House of Lords. *Sir W. F. Elliot* v. *Pott*, 1824, 2 Shaw's App. 181. Affg. 1 S. 445; 30 May 1822, F. C.

845. Violent Profits — Possession after Warrant of Ejection Issued.—A tenant who continued in possession after a warrant of ejection issued, *found* liable in violent profits, although it was not alleged that he had been required to leave the premises. *Watt* v. *Bell*, 1822, 1 S. 556.

LICENSING LAWS

Jurisdiction in Review, see title *Jurisdiction.*

Revenue Laws, see title *Revenue.*

1. Certificate—Breach of—Forfeiture of Certificate.—An appeal against a conviction for a first offence under the Public Houses Act, 1862, on the ground that it declared the appellant's certificate forfeited, although the complaint did not pray for forfeiture, *dismissed*, such forfeiture being, in terms of 9 Geo. IV. c. 58, s. 21, within the discretion of the court in the case of first or second offences. *Ritchie* v. *Mags. of Montrose*, 1869, 8 M. 23; 42 J. 1; 1 Coup. 332.

2. Certificate—Breach of—Conviction—Charge—Plea.—Objections to conviction of breach of certificate (keeping open house on Sunday) (1) that conviction was general while charge was alternative; (2) that plea of guilty was not authenticated by accused or magistrate, *repelled*. *Scott* v. *Morrison*, 1872, 44 J. 377; 2 Coup. 218.

3. Certificate — Breach of — Sunday Trading—Suspension of Conviction.—An innkeeper was convicted of breach of certificate, by selling excisable liquors on Sunday to parties who were not *bona fide* travellers. He brought a suspension, *inter alia*, on the ground that the judgment was oppressive, in respect that the magistrate had held the fact of a sale on Sunday to persons who were not *bona fide* travellers was a sufficient ground of conviction, though the seller had reason to believe that they were *bona fide* travellers. *Held* that this was an attempt to obtain review on the merits, and reasons of suspension *repelled*. *O'Donnell* v. *Linton*, 1864, 3 M. 6; 37 J. 4.

4. Certificate—Breach of—Term of Certificate.—A public-house keeper having been convicted of a breach of his certificate upon Sunday, 2nd October 1864, objected in a suspension to the validity of the conviction, on the ground that his certificate, which was in the terms prescribed by the Act 25 and 26 Vict. c. 35, bore to be in force from the 15th day of May 1864, "and no longer." Objection *repelled*, on the ground that the duration of the certificate was fixed by statute at one year, and that the error in the form of the certificate was immaterial. *M'Isaac* v. *Lang*, 1864, 3 M. 189; 37 J. 92.

5. Certificate — Conditions — Place of Sales.—Justices of the peace, acting under the Licensing Act, 9 Geo. IV. c. 58, are entitled to insert in the certificates, which they grant to publicans to sell spirits, that the spirits shall be sold in the shop only of the publican, and not in the premises behind it. *Miller* v. *Campbell*, 1849, 11 D. 355; 21 J. 98.

6. Certificate — Permission to Sell in another County—Complaint.—*Held* that a person holding a publican's certificate in a

burgh or county may obtain from the magistrates or justices of the peace in another burgh or county special permission to sell excisable liquors in such burgh or county, and therefore that a complaint for selling excisable liquors in the county of A without a certificate, in respect of not holding a certificate for the county of A, was not a relevant charge. *Macdonald* v. *Gordon*, 1868, 7 M. 45; 41 J. 48; 1 Coup. 105.

7. Certificate—Reduction of—Title to Sue.—A justice of peace has a title to reduce a judgment of quarter sessions granting certificates at which he had been present and from which he had dissented. *Minto* v. *Roxburgh*, 1846, 8 D. 481; 18 J. 216.

8. Complaint — Relevancy — 25 and 26 Vict. c. 35.—A complaint under the 25 and 26 Vict. c. 35 *found* not relevant under the Act. *Crosbie* v. *M'Minn*, 1866, 4 M. 803; 38 J. 427.

9. Complaint — Relevancy — 25 and 26 Vict. c. 35.—*Question*, whether a charge under the Public Houses Act, 25 and 26 Vict. c. 35, of keeping open an inn, and permitting or suffering persons to be therein who are not lodgers, and do not require accommodation, is relevant, drinking not being alleged. *Crosbie* v. *M'Minn*, 1865, 5 Irv. 10.

10. Conviction — Nullity.—A conviction under the Acts for regulating public houses bore that witnesses were examined, and proceeded: "The bailie convicts the said R. H. of the offence charged against him," and imposed a penalty of £5. The conviction did not bear that the witnesses were credible, or that the case was proved. *Held* that these defects rendered the conviction null. *Hill* v. *Dymock*, 1856, 19 D. 47; 29 J. 16.

11. Conviction—Penalty—Allocation of —Award to Informer.—In a suspension of a conviction and warrant of imprisonment for failure to pay penalties for contravention of the Public Houses Acts, the conviction bearing, "which sum of penalty adjudges the defender to pay to the complainer, to be applied as the magistrates shall direct in terms of law," *held* (1) that under these statutes a conviction must contain an apportionment of the penalties; and (2) that more than one-half could not be awarded to the informer: and conviction set aside. *Reid* v. *Lang*, 1859, 21 D. 1298; 31 J. 678.

12. Conviction—Penalty—Allocation of —Warrant of Imprisonment.—*Held* that a conviction for selling spirits without a certificate, in which the bailie, after finding the party liable in a penalty, "adjudges the said defender to pay to the complainer immediately, to be applied as the magistrates shall direct in direct terms of law, and, failing payment, grants warrant" of incarceration, was bad, in respect that it contained no allocation of the penalty.

Question, whether it was also bad in respect of containing warrant of incarceration on failure of payment, without any time being granted for payment. *Lamont* v. *Baker*, 1860, 22 D. 718; 32 J. 277.

13. Conviction — Suspension — Alternative Charge.—A licensed spirit dealer holding two certificates, one applicable to porter and ale, the other to spirits and wine, was charged with a breach of the regulations contained in the certificates, "or one or other of them." The complaint was "found proved," and a penalty imposed. Objection, that the sentence was informal, in respect it proceeded on an alternative charge, without specifying under which certificate the offence was committed, *repelled*. *Caldwell* v. *Baker*, 1856, 18 D. 315; 28 J. 131.

14. Conviction—Suspension—Complaint —Irregular Procedure.—A party was convicted of "the offence charged against him" on a complaint charging him with contravention of the Act 16 and 17 Vict. c. 67, s. 15, in respect he had sold liquor without a certificate. He suspended because (1) the complaint did not give the particulars of the offence; (2) the charge was alternative and the conviction ambiguous; and (3) the proceedings were irregular, the trial having been twice adjourned. The note *passed*. *Kennedy* v. *Linton*, 1860, 22 D. 1117; 32 J. 507.

15. Conviction—Suspension—Complaint —Relevancy—Warrant of Imprisonment—Penalty.—In a suspension of a conviction following on a complaint before a police court, under 16 and 17 Vict. c. 67, for bartering or selling spirits without a licence, *held* (1) that it was not necessary that the Act 9 Geo. IV. c. 58, which is referred to in the Act of 16 and 17 Vict. as providing the penalties and forms of procedure, should have been libelled in the complaint; (2) that the complaint and conviction were not bad, although the offence charged was "barter or sale," and the sentence found the charge proved generally, without specifying whether the conviction was of barter or sale; (3) that the magistrate had properly refused to receive the evidence of the accused party, who tendered himself as a witness; (4) that the complaint and conviction were unobjectionable, although they bore to be of a "third offence," and the statutes only provide punishment for the first three offences, whereas the offence charged and proved was a fourth offence; (5) that under the Acts in question, the combination, in one interlocutor, of a sentence to pay a money penalty, and a warrant of imprisonment in case of default, was unobjectionable; and (6) that although one-half of the penalty was adjudged in the sentence to be paid to a charitable institution, there was no irregularity on the part of the magistrate in granting warrant of imprisonment, as in default of immediate payment, at once. *Bruce* v. *Linton*, 1861, 24 D. 184; 34 J. 80.

16. Conviction—Suspension—Complaint — Relevancy — Penalty. — The following reasons of suspension of a conviction on a

charge of contravening the Public House Act *repelled*: (1) that the complaint was not in the terms required by the statutes; (2) that the conviction was general upon an alternative complaint, and did not state of which of the offences the accused was convicted, and convicted the suspender alone, whereas the complaint charged three parties jointly; (3) that the penalty imposed (one-fourth of the statutory amount) was not the penalty appointed by the statute, and was not stated in the conviction to be a mitigated penalty. *Fitzsimmons* v. *Linton*, 1861, 23 D. 1301; 33 J. 655.

17. **"Excisable Liquor"—Ale.**—Ale is an excisable liquor within the meaning of the Public House Acts. *Holland* v. *Dickie*, 1871, 43 J. 446; 2 Coup. 61.

18. **Hawking Excisable Liquors—Expenses.**—*Held* that the 16th section of the Public Houses Acts Amendment Act, 1862, does not specially authorise expenses, and they cannot therefore be given in summary proceedings. *Ross* v. *Stirling*, 1869, 8 M. 49; 42 J. 24; 1 Coup. 336.

19. **Licensing Authority — Disqualification of Justice.**—An alternative averment, that a justice who had sat in petty sessions for granting spirit licences, and afterwards appealed to the quarter sessions against a licence granted *per incuriam*, was either in partnership with a spirit dealer, or otherwise had an interest in presenting the appeal, *held* to be an irrelevant allegation of the justice's disqualification. *Sneddon* v. *Webster*, 1854, 17 D. 72; 27 J. 15.

20. **Licensing Authority — Justices of Peace—Burgh.**—*Held* that the justices of peace of a county have no jurisdiction or commission to grant or renew licences with respect to those parts of the county which are included within the limits of a parliamentary burgh, though outwith the ancient royalty. *Booth* v. *Lang*, 1867, 5 Irv. 371; 39 J. 388.

21. **Magistrates—Damages—Limitation of Actions.**—By s. 35 of the Act of 1852 all actions arising from procedure under the Act must be commenced within two months after the cause of action shall have arisen. *Held* that magistrates who were sued for damages on account of a decision pronounced on 15th April were timeously cited by a summons executed on 15th June following. *Ashley* v. *Macbeth*, 1873, 11 M. 708; 45 J. 440.

22. **Prosecutor—Police—Offences—Jurisdiction.**—The superintendent of police may prosecute for offences under the Public House Acts. *M'Arthur* v. *Linton*, 1864, 2 M. 659; 36 J. 310.

23. **Trafficking without Licence—Apprehension.**—Proceedings under 16 and 17 Vict. c. 67, for selling spirits without a certificate, not being criminal in their nature, apprehension is illegal if executed on Sunday. *Maitland* v. *Douglas*, 1861, 24 D. 193; 34 J. 77.

24. **Trafficking without Licence — "Dealer."**—*Opinion*, that the provisions of the Act 6 Geo. IV. c. 81, imposing penalties for retailing beer, etc., without a licence applied only to dealers, so that a person, who had without a licence sold one bottle of beer, was not liable in the penalty, because it appeared from the proof that the sale was an isolated act. *Observed*, that a single act may legitimately lead to the conclusion that the seller is a dealer. *The Queen* v. *Beattie*, 1866, 5 M. 191; 39 J. 90.

25. **Trafficking without Licence—Steamboats.**—The excise statutes imposing penalties for selling, without licence, ales, spirits, and wine, do not apply to masters and stewards of steamboats plying on the Clyde. *M'Gregor* v. *Proudfoot*, 15 Jan. 1824, F. C.; 2 S. 615.

26. **Warrant of Apprehension.**—Conviction by justices of the peace under the Public House Act, 16 and 17 Vict. c. 67, *suspended*, on the ground that the warrant of apprehension had been signed by only one justice, and expenses given against the procurator-fiscal of court. *Maitland* v. *Douglas*, 1861, 24 D. 193; 34 J. 77.

27. **Warrant of Imprisonment.** — An offender against the Act 16 and 17 Vict. c. 67, was found liable in a penalty and expenses, and adjudged to pay half of the penalty to the prosecutor, the other half to a charitable institution. Thereafter the justices, in respect he had not paid the prosecutor "the sums of penalty and expenses," granted warrant for his incarceration. *Opinion*, that the warrant was bad. *Maitland* v. *Douglas*, 1861, 24 D. 193; 34 J. 77.

28. **Warrant of Imprisonment—Conviction—Suspension—Oppression.**—In a suspension, a conviction by a police magistrate for selling spirits without a certificate was alleged to be oppressive, and it was also objected that the warrant of imprisonment was informal, and inconsistent with Schedule D of the Act 9 Geo. IV. c. 58, because it was for four months "from the time of incarceration," instead of "from this date." The complainer was not in custody at the date of the warrant, and was not apprehended for some time afterwards. *Held* (1) that there was no relevant allegation of oppression; and (2) that, on a sound construction of the statute, it was not imperative upon the magistrate (even if it was under s. 23) to adopt the exact terms of the schedule, but was competent to him to make the warrant suitable to the circumstances of the case. *M'Cabe* v. *Linton*, 1863, 1 M. 273; 35 J. 190.

LIFERENT AND FEE

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1. Liferent or Fee?—Conjunct Fee and Liferent—Husband and Wife.—An estate was settled by a wife on her husband and herself in conjunct fee and liferent, and their heirs to be procreated in fee, whom failing, to the husband, his nearest lawful heirs and assignees. *Held* that the husband was fiar. *Douglas* v. *Montgomerie*, 1714, Robert. 99.

2. Liferent or Fee?—Conjunct Fee and Liferent—Husband and Wife.—A in his marriage-contract provided that the heirs of the marriage should succeed to all that he should conquest or acquire during the marriage. After the marriage A's father conveyed a house to him and his wife in conjunct fee and liferent to the longest liver of them and to their bairns in fee. *Held* that A, being fiar under this destination, might settle the house in liferent on his second wife in his marriage-contract with her. *Allardice* v. *Smart*, 1721, Robert. 399.

3. Liferent or Fee?—Conjunct Fee and Liferent—Husband and Wife.—A wife in her marriage-contract conveyed her estate to her husband and herself "in conjunct fee and liferent, and the survivor of them, and the heirs of" the marriage. *Held* that the fee was in the husband, although the wife survived, and there were no heirs of the marriage entitled to succeed. *Neilson* v. *Murray*, 1732, 1 Pat. 65.

4. Liferent or Fee?—Conjunct Fee and Liferent—Husband and Wife.—A wife's estate was disponed in her marriage-contract "to the husband and wife in conjunct fee and liferent, and to the sons of the marriage; which failing, to the heirs-male of the body of her father; which failing, to the heirs-female of the marriage; which failing, to the heirs of her body of any other marriage; which failing, to the husband and the heirs-male of his body of any other marriage; which failing, to the wife's heirs whatsoever." *Held* that the fee was in the wife. *Murray* v. *Blair*, 1739, 1 Pat. 251. Elc. "Service and Confirmation" No. 5.

5. Liferent or Fee?—Conjunct Fee and Liferent—Husband and Wife.—A wife's estate was taken to herself and her husband in conjunct fee and liferent, and failing them, to the wife's heirs, and failing these, to the husband's heirs and assignees. *Held* that the fee was in the husband. *Henderson* v. *Henderson*, 1791, 3 Pat. 686.

6. Liferent or Fee?—Conjunct Fee and Liferent—Husband and Wife.—In a postnuptial contract an estate was disponed to the husband and wife in conjunct fee and liferent and their children in fee, whom failing, their next heirs. *Held* that as the estate was originally the wife's she was fiar. *Muirhead* v. *Paterson*, 1824, 2 S. 617.

7. Liferent or Fee?—Conjunct Fee and Liferent—Husband and Wife—Divestiture.—A wife by postnuptial deed disponed her heritable estate to herself and her husband in conjunct fee and liferent for their liferent use allenarly; to the children in fee; whom failing, one-half to his heirs and one-half to hers. There were no children. *Held* that, the heirs having merely a *spes successionis*, the wife was not divested of the fee which was hers. *Reid* v. *Reid*, 1827, 6 S. 198; 3 Fac. 199.

8. Liferent or Fee?—Conjunct Fee and Liferent—Husband and Wife—Fiduciary Fee.—A conveyance by a wife, in an antenuptial contract, of her moveable estate to herself and husband "in conjunct fee and liferent, for the liferent use allenarly of the longest liver, and to the children of the marriage in fee," vests in the husband merely a right of liferent, with a fiduciary fee for the children, to the exclusion of his creditors; and they are not entitled to rely on their debtor having married without a contract, and so as to have acquired the common law rights of a husband over his wife's fortune. *Rollo* v. *Shaw*, 1832, 11 S. 132; 8 Fac. 87; 5 J. 125.

9. Liferent or Fee?—Conjunct Liferent and to Survivor in Fee—Husband and Wife.—In an antenuptial contract, the husband conveyed property to himself and his wife "in conjunct liferent during all the days of their lifetime, and to the longest liver of them, and to their heirs or assignees, in fee." The wife survived. *Held* that the destination did not limit the wife to a liferent, but gave the fee to the survivor of the spouses; and that the wife having survived, was therefore fiar. *M'Gregor* v. *Forrester*, 1835, 1 S. & M'L. 441. Affg. 9 S. 675.

10. Liferent or Fee?—Conjunct Fee and Liferent—Husband and Wife—Tocher.—A sum in name of tocher was settled in a marriage-contract on the husband and wife in conjunct fee and liferent and for her liferent if she survived, and for the children, whom failing, the wife's heirs in fee. *Held*, on the terms of the deed, that the fee was in the wife, although she predeceased, and that the husband had only a liferent. *Cameron* v. *Young*, 1837, 15 S. 1205; 12 Fac. 1100.

11. Liferent or Fee?—Conjunct Fee and Liferent—Husband and Wife.—A property was purchased by a party, and the disposition taken in favour of him and his spouse, in conjunct fee and liferent, and to the survivor, and their heirs, assignees, or disponees whomsoever, etc. *Held* that, on his death, his widow, as survivor, was fiar. *Burrowes* v. *M'Farquhar's Trs.*, 1842, 4 D. 1484; 14 J. 567.

12. Liferent or Fee?—Conjunct Fee and Liferent—Husband and Wife.—The destination in a feu-disposition was to the husband and wife, "and to the longest liver of them two, in conjunct fee and liferent, and to the heirs of the marriage, whom failing, to his and her own nearest and lawful heirs." *Held* that, the husband having predeceased the wife without issue, the wife did not acquire a right to the whole fee. *Question*, whether she had right to the fee of one-half. *Madden* v. *Currie's Trs.*, 1842, 4 D. 749; 14 J. 277.

13. Liferent or Fee?—Conjunct Fee and Liferent—Husband and Wife.—A father disponed heritable subjects to his daughter and her husband "in conjunct fee and liferent, and the longest liver of them," and to their eldest son *nominatim*, his heirs or assignees. By a subsequent deed the husband bound himself to pay a price for the subjects, which was less than their value. *Held* that although the wife survived, the fee was vested in the husband. *Fisher's Trs.* v. *Fisher*, 1844, 7 D. 129; 17 J. 59.

14. Liferent or Fee?—Conjunct Fee and Liferent—Husband and Wife—Removing.—Spouses were infeft in property in conjunct fee and liferent, but for the wife's liferent allenarly and for the husband's heirs in fee. *Held* (1) that the wife had a liferent only after her husband's death if she survived; and (2) that she could not therefore oppose a removing by the husband's creditor, the removing being restricted to the spouses' joint lives. *Gordon* v. *Baddon*, 1848, 10 D. 1385; 20 J. 503.

15. Liferent or Fee?—"Conjunct Fee and Liferent"—Husband and Wife.—The father of a wife conveyed lands to the spouses in "conjunct fee and liferent" and to the survivor in liferent. *Held* that there was not a separate liferent right in each of the spouses, but that the husband had the liferent during the marriage, the ultimate fee going to the wife. *Thom* v. *Thom*, 1852, 14 D. 861; 24 J. 516; 1 Stuart 849.

16. Liferent or Fee?—Conjunct Fee and Liferent—Husband and Wife.—A wife destined a property to herself and her husband and the longest liver of them in conjunct fee and liferent, and to the children, whom failing, to the longest liver of them in fee. There were children. *Held* that the wife was fiar under this destination, because the property was originally the wife's and because the purpose of the deed was to divide a property held *pro indiviso* by the wife and a sister and not to divest her. *Myles* v. *Calman*, 1857, 19 D. 408; 29 J. 192.

17. Liferent or Fee?—Conjunct Fee and Liferent—Husband and Wife.—A party assigned a policy to himself and his wife "in conjunct fee and liferent," for her "liferent use only," and to children *nominatim*. *Held* that the fee was in the husband. *Forrest* v. *Forrest*, 1863, 1 M. 806; 35 J. 496.

18. Liferent or Fee?—Conjunct Fee and Liferent—Husband and Wife.—By marriage-contract a husband settled a sum on himself and his spouse and the survivor in conjunct fee and liferent, for her liferent only, and on their children and their issue, whom failing, his heirs and assignees in fee; and the wife settled her property on herself and her spouse and the survivor in conjunct fee and liferent, and the children, whom failing, her heirs in fee. *Held*, the husband had the fee of the sum settled and the wife had the fee of her estate. *Observations* on destinations in conjunct fee and liferent. *Smith Cunningham* v. *Anstruther's Trs.*, 1869, 7 M. 689; 41 J. 359.

19. Liferent or Fee?—Conjunct Fee and Liferent—Husband and Wife—To Parent in Liferent and Children in Fee.—A property was disponed to two spouses and the longest liver in conjunct fee and liferent, for the wife's liferent use allenarly, and to their son *nominatim* in fee. Power was reserved to the father to deal with the subjects as if he were fiar. *Held* that the fee was in the father. *Wilson* v. *Glen*, 14 Dec. 1819, F. C.

20. Liferent or Fee?—Conjunct Fee and Liferent—Husband and Wife—Parent and Child—Marriage-Contract.—By a contract of marriage, the lady contributed a tocher of £2500, which was provided to her and her husband in liferent, and to the children *nascituris* in fee, and the husband's father bound himself, at his death, to pay, or otherwise to secure, to the husband and wife, "in conjunct fee and liferent, for the liferent use allenarly of the wife, in case she shall happen to survive her husband, and to the children to be procreated of the marriage, in fee; whom failing, to the husband, his heirs and assignees whomsoever, in fee, the sum of £5000," with power to him to divide it among his children as he thought fit; but declaring that at the term of payment he should invest it at the sight of parties named; and the father further bound himself, if the husband predeceased him, to pay the interest of the £5000 yearly to the wife, and if she also predeceased, to the children. *Held* that the fee of the £5000 was in the children. *Miller* v. *Miller*, 1833, 12 S. 31.

21. Liferent or Fee?—Conjunct Fee and Liferent—Husband and Wife—To Parent in Liferent and Children in Fee.—*Questions*—(1) whether a conveyance of heritage by a wife in favour of herself and her husband, in conjunct fee and liferent, for their liferent use allenarly, and of the children of the husband by a previous marriage *nominatim* and the

children *nascituri* and existing at the death of the survivor of the spouses in fee, vested the *nominatim* disponees with the full fee, the fee being *pro parte* fiduciary; (2) whether infeftment taken during the life of one of the spouses by two, the only then surviving children of the first marriage, was valid, and if so, to what extent. *Macgowan* v. *Robb*, 1864, 2 M. 943; 36 J. 472.

22. Liferent or Fee?—Conjunct Liferent—Husband and Wife.—By a marriage-contract, £10,000 was vested in trustees for the husband and wife, "in conjunct liferent, and the survivor of them also in liferent," and for the children in fee. *Held* that the wife had only a liferent, even although, with part of the £10,000, property had been purchased and the disposition taken to the spouses "and the longest liver and their heirs and assignees." *Murray* v. *Murray*, 1826, 4 S. 589; 1 Fac. 573.

23. Liferent or Fee?—Conjunct Fee and Liferent—Parent and Child—Fiduciary Fee.—A disposition to a husband and wife in conjunct fee and liferent, and the longest liver "for their liferent use allenarly, and to the children procreate or to be procreate in fee," conveys to the parents only a liferent with a fiduciary fee for children. *Watherstone* v. *Rentons*, 25 Nov. 1801, F. C.; M. 4297. *Rollo* v. *Shaw*, 1832, 11 S. 132; 8 Fac. 87; 5 J. 125.

24. Liferent or Fee?—Conjunct Fee and Liferent—Parent and Child.—An estate was disponed to a husband and wife in conjunct fee and liferent, and to the children according to the division of their parents, whom failing, to the wife in fee, declaring that the liferent should be restricted to an annuity to the survivor of the spouses. *Held*, in a question with the survivor (the widow) and the children, that there was no ground for any claim at the instance of the children *hoc statu*. *Pollocks* v. *Pollock*, 4 July 1806, F. C.; M. "Provisions to Heirs" App. No. 6.

25. Liferent or Fee?—Conjunct Fee and Liferent—Parent and Child.—A father in his son's marriage-contract bound himself "to pay, or otherwise to secure to the said husband and wife, in conjunct fee and liferent, for the liferent use allenarly of the wife if she survived, and to the children of the marriage, in fee, whom failing, to the husband, £5000," with power to divide it among his children as he thought fit; but declaring that, when the sum was payable, he should invest it at the sight of parties named. *Held* that the son was only a liferenter owing to (*a*) the provision as to investment; (*b*) the substitution of the son on failure of children; and (*c*) the power of disposal, which were all inconsistent with his having the fee. *Miller* v. *Miller*, 1833, 12 S. 31.

26. Liferent or Fee?—Conjunct Fee and Liferent—Parent and Child—Marriage-Contract.—*Held* that, under a marriage-contract, whereby the wife disponed to her husband and self, in conjunct fee and liferent, for their liferent use allenarly, and to the husband's children by a former marriage *nominatim*, and the children to be procreated of the marriage in fee, the children of the first marriage had a fee. *M'Gowan* v. *Robb*, 1862, 1 M. 141; 35 J. 72.

27. Liferent or Fee?—Conjunct Fee and Liferent—Construction.—A lady executed an entail in favour of herself and her husband, and longest liver of us in liferent and conjunct fee, and for her husband, his liferent allenarly, and to A and the heirs-male of his body, which failing, to his other heirs-male whatsoever. *Held* that A was not joint fiar along with the entailer, but only heir-substitute to her. *Lord Napier* v. *Livingstone*, 1765, 2 Pat. 108. Affg. M. 15418, 15461.

28. Liferent or Fee?—Husband and Wife—Destination.—An estate was disponed in a marriage-contract to the husband and wife and the survivor in liferent, and to the children in fee, whom failing, to the wife. *Held* that as the estate came from the wife and went to her under the last branch of the destination, the wife was fiar. *Anderson* v. *Laidlaw*, 1816, Hume 218.

29. Liferent or Fee?—Husband and Wife—Destination—Power of Disposal.—A husband disponed heritage to himself and his spouse, and longest liver of them two in liferent, and to their children *nascituris* in fee, whom failing, to their own nearest heirs and assignees, reserving power to each of them to convey the subjects to any one of their relations by a writing under either of their hands. *Held* that the wife (who survived the husband) had the fee of half of the subjects. *Baine* v. *Craig*, 1845, 7 D. 845; 17 J. 297.

30. Liferent or Fee?—Husband and Wife—Destination.—A wife, with her husband's consent, disponed her estate to herself and him and the longest liver, whom failing, to his son, reserving to the spouses a power of alteration. By a later deed (which was declared to form part of the first) the wife, with the husband's consent, altered the destination on their failure and burdened the estate with a legacy to the husband. *Held* (1) that the husband on his survivance was fiar of the estate; and (2) that the second deed did not alter this, and that the imposing of the legacy on the estate was not inconsistent with his having the fee, because it might have been intended for the case of his predeceasing the wife. *Scott* v. *Maxwell*, 1854, 17 D. (H. L.) 15; 1 Macq. 791; 26 J. 535.

31. Liferent or Fee?—Husband and Wife—Mutual Will.—Spouses by mutual will conveyed each to the other, if survivor, the whole property of which they might die possessed. Thereafter they executed another deed, by which they conveyed to their children the whole property belonging to us and the survivor of us, at the death of such survivor, but reserving "our own liferent of the whole premises." It was declared that this deed did

not revoke the mutual will. *Held* that the wife (the survivor) was not restricted to a liferent of heritable estate left by her husband. *Brown* v. *Brown*, 1841, 3 D. 538 ; 16 Fac. 541.

32. Liferent or Fee?—Parent and Child — Marriage-Contract. — A father by his marriage-contract bound himself to convey his estate to the heirs-male of his marriage. *Held* that the fee was still in him, the heirs having merely a *spes successionis*. *Craik* v. *Craik*, 1753, 1 Pat. 542.

33. Liferent or Fee?—Parent and Child—Heirs.—An assignation by a father to his daughter (who was married and had children) in liferent, and to "the heirs of her body in fee," *held* to give the mother the fee of the estate. *Graham* v. *Graham*, 1780, 2 Pat. 537. Affg. M. 4277.

34. Liferent or Fee?—Parent and Child. —A father disponed an estate to his third son "in liferent, for his liferent use, and in fee to the heirs-male of his body, whom failing, to his fourth and fifth sons," etc. *Held* that the third son was fiar under the destination, and was not restricted by the subsequent destination. *Robertson* v. *D. of Atholl*, 20 Nov. 1806, F. C. ; M. "Fiar Absolute" App. No. 2.

35. Liferent or Fee?—Parent and Child. —A father took a disposition, on his death, to his daughter, also in liferent, during all the days of her life, and to the children procreated or to be procreated of her then marriage in fee. *Held* that although there were children alive, yet as there were no taxative words the fee was in the daughter. *Lindsay* v. *Dott*, 9 Dec. 1807, F. C. ; M. "Fiar" App. No. 1.

36. Liferent or Fee?—Parent and Child. —A husband and wife disponed property to the longest liver in liferent, and to children *nominatim*, and other children to be born in fee. *Held* that the fee was in the children. *Dykes & Boyd* v. *Boyd*, 3 June 1813, F. C.

37. Liferent or Fee?—Parent and Child —Service.—A father left his estate to his daughter in liferent, and her heirs in fee, whom failing, to others. The daughter made up her title by special service as heir without mentioning this deed. *Held* (1) that the daughter was unlimited fiar under the deed ; but (2) that the service did not *per se* alter the destination. *Molle* v. *Riddell*, 19 June 1816, F. C. ; 6 Pat. 168. Affg. 13 Dec. 1811, F. C.

38. Liferent or Fee?—Parent and Child. —A disposition to a parent in liferent and to children *nascituris* in fee with substitutions to other parties *held* to constitute the parent fiar. *Maxwell* v. *Gracie*, 1822, 1 S. 471.

39. Liferent or Fee?—Parent and Child. —An estate was disponed by a father to his son in liferent, and to the heirs-male of his son in fee. The son obtained a Crown charter, with a precept to himself "*in vitali reditu tantum*," and to the heirs-male of his body "*procreatis vel procreandis*" in fee, and took sasine "*in vitali reditu tantum*." *Held* that the son had merely a liferent. *Dundas* v. *Lord Dundas*, 1823, 2 S. 145.

40. Liferent or Fee?—Parent and Child. —A disposition to two parties in liferent, whom failing, to the heirs of their bodies, whom failing, to the heirs, disponees, or assignees of the granter, in fee, *held* to give the fee to those two parties. *Kennedy* v. *Allan*, 1825, 3 S. 554.

41. Liferent or Fee?—Parent and Child. —A lady disponed estates by her marriage-contract, under the reservation of her own and her husband's liferent thereof, to the heir-male of this marriage. *Held* that she was fiar. *Dewar* v. *Campbell*, 1825, 1 W. & S. 161.

42. Liferent or Fee?—Parent and Child. —A father bequeathed £1500 to his daughter in liferent, and to her children in fee. There was no trust, and no restriction of the liferent by the word "allenarly," or otherwise. *Held* that the daughter was fiar. *Williamson* v. *Cochrane*, 1828, 6 S. 1035 ; 3 Fac. 1060.

43. Liferent or Fee?—Parent and Child. —A husband bound himself by antenuptial contract to lay out £500 on security, at the sight of another, payable to himself and wife, and the longest liver of the two in liferent, and to the child or children of the marriage, which failing, to him in fee. *Held* that the fee was in the husband. *M'Donald* v. *M'Lachlan*, 1831, 9 S. 269 ; 6 Fac. 182.

44. Liferent or Fee?—Parent and Child—Postnuptial Contract. — Spouses by postnuptial contract conveyed the property which should belong to them at their death "to and in favour of ourselves, and the longest liver of us, in liferent, and to the children that may be procreated of our marriage," in fee, whom failing, to one of the husband's sisters in liferent, and her children in fee. The husband predeceased, and there were no issue. *Held* that the wife had only a liferent. *Observations* on the distinction, as regards the rule of *Frog's Creditors*, between dispositions from third parties and dispositions between the spouses themselves ; and as to destinations to "heirs of the marriage." *Mackellar* v. *Marquis*, 1840, 3 D. 172 ; 16 Fac. 118.

45. Liferent or Fee?—Parent and Child —A father granted a bond of provision, binding himself to pay a sum to his daughter in liferent, and to her children in fee ; or, failing issue of the marriage, to the husband in fee ; declaring that if the money were paid up, it should be reinvested at the sight of certain parties named. *Held* that the fee was in the daughter. *Gordon* v. *Macintosh*, 1845, 4 Bell 105 ; 17 J. 313.

46. Liferent or Fee?—Parent and Child —No Infeftment in Fee.—A father infeft in lands, conveyed them, in terms of his antenuptial contract, to himself in liferent only, and to the heirs-male of his marriage in fee. Sasine was taken on this deed ; but the notary omitted all mention of the fee, giving infeftment to the father "for his liferent use only." *Held* that the fee remained under the

infeftment in the father, and could be attached by his creditors, notwithstanding the personal right to it granted by the conveyance to the heirs of the marriage. *Houlditch* v. *Spalding*, 1847, 9 D. 1204; 19 J. 531. See *Hyslop* v. *Small*, 1821, 1 S. 137.

47. Liferent or Fee?—Parent and Child.—By antenuptial contract a husband conveyed a liferent to his wife if she survived, and to the children *nascituris* in fee. The wife predeceased. *Held* that the fee was in the husband and not in the children. *Findlay* v. *M'Intyre*, 1849, 12 D. 325; 22 J. 78.

48. Liferent or Fee?—Parent and Child—Fiduciary Fee—Powers—Infeftment.—A disponed his estate to himself in liferent, and after his death to B his son in liferent only, and to the heirs whomsoever of his body in fee. A was infeft for his liferent only and without mention of the heirs. *Question*, whether B was fiduciary fiar of the estate; and whether a fiduciary fiar had power to act as a trustee for the real fiars, so as to bind them by any proceedings by him for the protection of the estate. *Emslie* v. *Fraser*, 1850, 12 D. 724; 22 J. 246.

49. Liferent or Fee?—Parent and Child—Infeftment.—A marriage-contract provided to the wife the liferent of £3000, and the fee to the children of the marriage. The precept granted warrant to infeft the said wife and children for their respective rights of liferent and fee; but the instrument bore that sasine was given to the mother for herself and on behalf of her children. *Held* that the sasine was effectual, a fiduciary fee having been constituted in the mother for her children. *Barstow* v. *Stewart*, 1858, 20 D. 612; 30 J. 249.

50. Liferent or Fee?—Parent and Child.—A bequest of money to a parent in liferent, and his children in fee, gives a fee to the parent. *Ferguson's Trs.* v. *Hamilton & Others*, 1862, 24 D. (H. L.) 8; 4 Macq. 397; 34 J. 659.

51. Liferent or Fee?—Parent and Child.—Trustees were directed to dispone heritage to A in liferent and her children in fee. *Held* that A was fiar. *Ranken*, 1870, 8 M. 878; 42 J. 523.

52. Liferent or Fee?—Parent and Child.—*Held* on the special terms of a deed that a daughter was liferenter only of a property previously sold by her. *Cunningham* v. *Thomson*, 1827, 5 S. 814.

53. Liferent or Fee?—Parent and Child—Children nominatim.—A father bought a house and took the disposition to himself and his wife, and the longest liver of them, in liferent, and their daughter *nominatim* in fee. *Held* that the fee vested in the daughter. *M'Intosh* v. *M'Intosh*, 28 Jan. 1812, F. C.

54. Liferent or Fee?—Parent and Child—Destination to Party nominatim and Children nascituris.—A conveyance to A for his liferent allenarly, and to B and the children of A *nascituri* in fee, gives the fee to B for himself and as trustee *quoad* one-half for the children unborn. *Martin's Trs.* v. *Milliken*, 1864, 3 M. 326; 37 J. 155.

55. Liferent or Fee?—Parent and Child—Destination to Three Parties in Liferent and Issue of One in Fee.—A testator conveyed his property to his brothers and sister in liferent, and to the children of his sister in fee. The deed directed that the interest should be divided into three, "one-third whereof shall go to each of my said brothers and sister." One of the brothers having claimed a share of the fee because the deed did not contain the word "allenarly," or set up a trust, *held* that his right was only a liferent. *Ramsay* v. *Beveridge*, 1854, 16 D. 764; 26 J. 329.

56. Liferent or Fee?—Destination—Qualified Liferent—Trust.—A father conveyed his estates to trustees, excepting "the household furniture, which is hereby bequeathed to my son, in liferent, so long as he shall continue to reside in the house at M, and which shall thereafter, or upon my said son dying without lawful issue of his body, then belong to my daughters," A and B, equally in fee. *Held* that the fee of the furniture was not in the son, but in the trustees. *Scott* v. *Price*, 1837, 15 S. 916; 12 Fac. 854.

57. Liferent or Fee?—Parent and Child—Gift of Interest.—The seller of an estate declared that part of the price was to be secured so as the interest thereof should be liferented by the buyer and his wife and the fee thereof should belong to their issue. *Held* that the buyer was not fiar seeing that the interest only was given to him and that there was no conveyance to him of the subject. *Scott* v. *Napier*, 1826, 4 S. 454. Affg. 2 W. & S. 550.

58. Liferent or Fee?—Parent and Child—Liferent Alimentary.—*Held* that a disposition by a father to trustees, with directions to dispone to his son "in liferent, and to his children procreated or to be procreated, in fee," whom failing, to substitutes, and declaring that the liferent should be alimentary, and not liable for the son's debts, and if imprisoned, that his right to levy the rents should be suspended, conferred a mere liferent. *Douglas* v. *Sharpe*, 1811, Hume 173.

59. Liferent or Fee?—Parent and Child—Liferent Allenarly.—A conveyance to a parent in liferent for his liferent use allenarly (or with words of similar restriction), and to his children *nascituris* in fee, gives a bare liferent to the parent. *Newlands* v. *Newlands*, 1798, 4 Pat. 43. *Thomson* v. *Thomson*, 1812, 1 Dow 417. *Harvey* v. *Donald*, 26 March 1815, F. C.

60. Liferent or Fee?—Parent and Child—Liferent Allenarly.—A disposition by a father to his daughter in liferent allenarly, and to the heirs of her body in fee, whom failing, to the heirs and assignees of the father, and empowering her to burden the lands with provisions to younger children, *held* to confer

only a liferent. *M'Gowan* v. *Montgomery*, 1822, 2 S. 21.

61. Liferent or Fee?—Parent and Child—Liferent Allenarly.—A lease was granted to a husband and wife, and the longest liver of them in liferent allenarly, and to their children *nominatim* in fee. *Held* that the parents were merely liferenters. *Paterson* v. *Foreman*, 1824, 2 S. 619.

62. Liferent or Fee?—Parent and Child—Liferent Allenarly—Independent Title.—A party who had right to a property disponed it by antenuptial contract to himself in liferent allenarly, and to children *nascituris* in fee, under reserved powers of sale; whom failing, to his nearest heirs and assignees. He thereafter made up titles without qualification, and was subsequently infeft, in terms of the contract. *Held* that he was fiar. *Observed*, that this case was distinguished from *Newlands* (No. 59), by the father having a title independent of the contract. *Falconer* v. *Wight*, 1824, 2 S. 633; 3 S. 455.

63. Liferent or Fee?—Parent and Child—Liferent only.—By marriage-contract spouses disponed their whole estate (including a share of A's estate falling to the wife) to themselves in liferent and the issue to be born in fee. *Held* that the right of fee which the husband would have taken in the share of A's estate under this disposition, was reduced to a liferent by subsequent clauses excluding his marital rights and declaring that the subjects were not to be affectable by his debts but were for the wife's aliment. *Young* v. *Watson*, 1835, 14 S. 85; 11 Fac. 64.

64. Liferent or Fee?—Parent and Child—Liferent Allenarly—Fiduciary Fee.—*Held* that under a destination to a woman in liferent allenarly, and to her children *nascituri* in fee, the liferentrix is fiduciary fiar for the children till they come into existence, and that there is a vested right in them as disponees. *Douglas* v. *Thomson*, 1870, 8 M. 374; 42 J. 173.

65. Liferent or Fee?—Parent and Child—Liferent Allenarly.—Heritable estate was disponed to A in liferent allenarly and to two children *nominatim* and any children to be born and the survivors of them in fee. *Held* that A was fiduciary fiar for all her children. *Snell* v. *White*, 1872, 10 M. 745; 44 J. 422.

66. Liferent or Fee?—Parent and Child—Liferent only.—A legacy was left to a daughter "in liferent only and not affectable by her debts or deeds" and a share of residue "in liferent and not affectable by her debts or deeds." *Held* that in both gifts the fee vested in the children. *Grant* v. *Murray*, 1872, 44 J. 550.

67. Liferent or Fee?—Parent and Child—Fiduciary Fee.—A testator bequeathed his whole estate to his children in liferent allenarly and their issue in fee. He appointed executors and directed them to divide the proceeds of his moveable estate. *Held* (1) that this last direction did not control the previous clause so as to give the testator's children the fee of the moveables; and (2) that the children took the moveable estate as fiduciary fiars (there being no trust) subject to the obligation to administer for their issue. *Keating* v. *Collins*, 1870, 7 S. L. R. 548.

68. Liferent or Fee?—Parent and Child—Trust.—A father directed his trustees to invest £80 in security "in favour of my son John and his present wife, and longest liver of them, in liferent, for their liferent use of the interest thereof, and the fee to the children procreated between them." *Held* that a trust having been contemplated, John was only a liferenter though the trustees did not accept. *Ewan* v. *Watt*, 1828, 6 S. 1125; 3 Fac. 1135.

69. Liferent or Fee?—Parent and Child—Trust.—Lands were conveyed to A and three others, to divide them into a certain number of shares, with a provision "that 4½ of their shares shall be held by the said A in liferent during his lifetime, and at his decease the fee thereof shall be divided among his children; and the disponees were instructed to see that they should be so divided. *Held* that A was merely a liferenter, as the deed showed that a trust was contemplated. *Mein* v. *Taylor*, 1830, 4 W. & S. 22. Affg. 5 S. 779; 2 Fac. 543.

70. Liferent or Fee?—Parent and Child—Trust—Will—Construction.—A father by his will directed his trustees to pay or secure £20,000 to each of three daughters; and directed them to invest and secure the same so as to be payable to the legatees in liferent exclusive of all rights of any husbands they might marry and to their issue in fee; and if any daughter died without issue the provision was to go to the surviving sisters under the same conditions. *Held* that, notwithstanding the direction to pay, the daughters took only a liferent, seeing that a trust was created. *Dennistoun* v. *Dalgleish*, 1838, 1 D. 69; 14 Fac. 48.

71. Liferent or Fee?—Parent and Child—Trust.—A trust deed contained this provision: "I hereby direct that my trustees shall hold my whole heritable property in trust for my son William in liferent, and his lawful issue in fee, whom failing," etc.; and the trustees were directed to convey the property accordingly. *Held* that as the will implied the subsistence of the trust William had merely a liferent. *Ross* v. *King*, 1847, 9 D. 1327; 19 J. 561. *Watson* v. *Watson*, 1854, 16 D. 803; 26 J. 378.

72. Liferent or Fee?—Parent and Child—Trust—Direction to Pay.—Spouses disponed their property *mortis causa* to trustees, to divide the same into eight shares, to pay four shares to the wife's father, "in liferent, for his liferent use allenarly," and, at his

death, to pay part of these four shares to her brother "in liferent," "and to his lawful children in fee." On the father's death, the brother was unmarried. *Held* that he took the fee. *Hutton's Trs.* v. *Hutton*, 1847, 9 D. 639; 19 J. 274.

73. Liferent or Fee?—Parent and Child—Trust.—Trustees were directed to secure a sum for a lady "for her proper liferent" and for her children *nascituris* in fee. *Held* that the lady had only a liferent as (1) there was an administrative trust set up, and (2) the terms used by the testator showed he meant this. *Morice's Trs.* v. *Yeats*, 1872, 10 S. L. R. 141.

74. Liferent or Fee?—Parent and Child—Title to Sue—Service.—By a settlement a legacy was bequeathed to a lady "in liferent allenarly, and to her children in fee," and it was declared a real burden on the estate. On her death, her children expede a service to her as heirs of provision, and raised an action for recovery of the legacy. *Held* that, irrespective of the services, the children had a valid title to pursue; and *observed*, that service was not necessary to entitle them to carry on any action necessary to establish their rights. *Andrews* v. *Laurie*, 1849, 12 D. 344; 22 J. 85.

75. Liferent or Fee?—Power of Disposal—Reserved Power—Parent and Child.—Lands were sold to a father in liferent, and to his son in fee, with a reserved power to the father to burden, sell, or dispone; and infeftment was taken accordingly. *Held* that the father, in respect of the reserved powers, was fiar. *Baillie* v. *Clark*, 23 Feb. 1809, F. C.

76. Liferent or Fee?—Power of Disposal and Encroachment.—A testator gave his widow the liferent of his whole estate and the fee of one-third, and provided that if necessary for her support she should have the full and free use and enjoyment of his whole estate, to be disposed of at pleasure by her. *Question*, whether this gave her the fee. *Thomson's Tr.* v. *Campbell's Exrs.*, 1849, 12 D. 276; 22 J. 72.

77. Liferent or Fee?—Power of Disposal.—A truster gave a liferent of half of his estate to each of his daughters, and the fee to their issue. If they had no issue he gave them power to convey the fee as they should think fit; and failing exercise of the power the fee was given to others. *Held* that this power did not make the daughters fiars in the event (which happened) of their having no issue. *Morris* v. *Tennant*, 1855, 18 D. (H. L.) 42; 27 J. 546. [See 30 J. 493.]

78. Liferent or Fee?—Power of Disposal.—A testator gave his widow the liferent of his residue, and one-third of the fee was to go to such persons and in such manner as she might have directed "by any testamentary or other writing under her hand." *Held* that the widow was merely a liferentrix with power of disposal and not a fiar. *Observations* as to the effect of powers in raising a liferent into a fee. *Alves* v. *Alves*, 1861, 23 D. 712; 33 J. 354. [As to whether a power of disposal is or is not testamentary, see *Macmorine* v. *Macmorine's Trs.*, 1871, 8 S. L. R. 537.]

79. Liferent or Fee?—Power of Disposal—Married Woman.—A faculty was conferred by a truster on his niece (a married woman), giving her "the sole and ultimate disposal" of a sum of money, of which she was to receive the interest during her life. *Held* that this implied no right to the fee, the faculty not being conferred on a person *sui juris*. *Observations* on liferents with powers of disposal. *Pursell* v. *Elder*, 1865, 3 M. (H. L.) 59; 4 Macq. 992; 37 J. 394.

80. Liferent or Fee?—Marriage-Contract—Construction.—Terms of a marriage-contract which were *held* not to give the wife a fee of the husband's furniture though the word "fee" was used in the contract. *Campbell* v. *Stewart*, 1848, 10 D. 1280; 20 J. 468.

81. Liferent or Fee?—Will—Construction.—A sum was bequeathed to a person, but as he was insane the testator added that it was to be "under the management for his behoof" of A and B, declaring that in case of his death it should go to A and B. *Held* that he was given a right of fee in, and not a liferent of, the sum. *Fyffe* v. *Fyffe*, 1841, 3 D. 1205; 16 Fac. 1299.

82. Liferent or Fee?—Will—Construction—Implication.—A party, on the narrative that he wished his estate to remain in his family, directed his trustees to convey it to his son in liferent only; and failing a son to his eldest daughter. He had no son. *Held* that the eldest daughter was entitled only to a liferent. *Campbell* v. *Campbell*, 1843, 5 D. 1083; 15 J. 439.

83. Liferent or Fee?—Will—Construction.—These clauses occurred in a will: "My daughter's portion I wish to be 'invested' that she may receive the interest of it during all the days of her life; and her children shall be her heirs." Executors were appointed under the will, but there was no trust set up. *Held* that the daughter was a fiar and not merely a liferenter. *Alexander* v. *Alexander's Exrs.*, 1849, 12 D. 345, 348; 22 J. 90.

84. Liferent or Fee?—Will—Construction.—*Held*, on the special terms of a will, that the beneficiaries were entitled only to a liferent and not to the fee of a bequest. *Thomson's Trs.* v. *Alexander*, 1852, 1 Stuart 558.

85. Liferent or Fee?—Will—Construction.—A bequest was made to A in the event of his attaining majority, and "without prejudice" to his disposing of the subjects on his attaining majority among his children "but not otherwise." *Held* that, the other terms of the bequest being such as to give A a fee, the restriction on his power of disposal was not sufficient to reduce his right to a liferent. *Buchanan* v. *Stewart*, 1858, 30 J. 220.

86. Liferent or Fee?—Will—Construction.—In a will trustees were directed to divide residue among and apply the same for behoof of grandchildren, the granddaughters to get payment on their marriages or attaining twenty-three, "it being intended" that the provision should be secured for her own benefit and that of her children. *Held* this direction gave the granddaughters a fee not a liferent. *Scott's Trs.* v. *Stack*, 1865, 3 M. 950; 37 J. 499.

87. Liferent or Fee?—Will—Construction—Power of Disposal.—A truster directed his trustees to pay a legacy to a lady, to be settled on her and her issue with power to her of disposal in case of no issue, and failing issue and disposal to her heirs. *Held* that the trustees were bound to take the securities in name of the lady in fee, and that she was not a liferenter; but that she could not defeat her children's right by gratuitous deed. *Massy* v. *Scott's Trs.*, 1872, 11 M. 173; 45 J. 127.

88. Liferenter and Fiar — Burdens — Annuity.—A party provided an annuity to his wife, and disponed certain subjects to her for her liferent use allenarly. Thereafter he conveyed his whole estate to his daughter in liferent, and to her children in fee. *Held*, in a claim by the widow for arrears of her annuity, that the capital thereof was payable by the children as fiars and that the interest on the arrears was payable by the daughter as liferenter. *Nixon* v. *Borthwick*, 13 Feb. 1806, F. C.; M. "Liferenter" App. No. 2.

89. Liferenter and Fiar — Burdens — Building Church. — A liferentrix under a deed of locality is not liable to relieve the fiar of any part of the expenses of building a manse or repairing churches. *Anstruther* v. *Anstruther's Tutors*, 14 May 1823, F. C.; 2 S. 306.

90. Liferenter and Fiar — Burdens — Debts. — *Held* that a liferentrix under a settlement, to whom the moveable estate was conveyed subject to a declaration that she should pay all the testator's debts while the fiars were burdened with payment of certain legacies, had no claim against the fiars for payment of debts which more than exhausted the moveables, but reserving relief if she had to pay debts exceeding the value of her interest under the deed. *Waddell* v. *Waddell*, 1818, 6 Dow 279; 6 Pat. 374.

91. Liferenter and Fiar — Burdens — Interest on Heritable Securities.—A husband bound himself to infeft his wife, if she survived, in the liferent of all his lands, and to warrant the liferent free of all prior infeftments, incumbrances, and annualrents. He thereafter disponed certain lands in wadset, and granted heritable bonds in security of other debts. *Held* that the liferentrix, not the heir, was liable for the interest of the sums so secured. *Forbes* v. *Forbes*, 1765, 2 Pat. 84.

92. Liferenter and Fiar—Burdens—Repairs—Bankruptcy.—A trustee under a disposition *omnium bonorum* by a liferenter who had obtained a *cessio*, is bound to execute such repairs as are necessary to preserve heritable subjects in an habitable condition. *Scott* v. *Haliburton*, 1823, 2 S. 435.

93. Liferenter and Fiar—Burdens—Repairs — Farm — Renewal of Stocking. — Under a will the widow had a liferent of the testator's estate, and the fee was to go to her children on her death. The estate consisted mainly of a farm. *Held* that it was an implied condition of the liferenter's right that she should keep up the stock and leave it substantially as she got it; and that only in case of a material difference as to the crop and stock would claims arise between her representatives and the fiars. *Rogers* v. *Scott*, 1867, 5 M. 1078; 39 J. 602.

94. Liferenter and Fiar—Capital or Income?—Bonus.—A person who was a limited fiar (the limit being as to her power of disposing of the subjects) *held* not entitled to a bonus on stock. *Cumming* v. *Cumming's Trs.*, 26 Feb. 1824, F. C.; 2 S. 743.

95. Liferenter and Fiar—Capital or Income?—Bonus.—*Held* that a bonus on bank stock fell to the fiar not the liferenter. *Irving* v. *Rollo*, 1803, 4 Pat. 521. Revg. 1 Dec. 1801, F. C.; M "Liferenter" App. No. 1.

96. Liferenter and Fiar—Capital or Income?—Bonus.—The rule is that bonuses go to the fiar and not to the liferenter; but where trustees were directed to employ and lay out residue for A during his minority and then to convey to him, *held* that the rule did not apply, seeing that the bequest to A was one of capital and that bonuses on shares forming part of the residue, which accrued during A's minority, were payable to him and were not to be added to the capital so as to go to substitutes on A's failure. *Ogilvie* v. *Boswell*, 1856, 19 D. (H. L.) 7; 28 J. 646.

97. Liferenter and Fiar—Capital or Income?—Dividends.—The liferenter of stock died after the declaration of the amount of a dividend, but before the period when it became payable. *Held* that it belonged to the fiar and not to the liferenter. *Thomson* v. *Lyell*, 1836, 15 S. 32; 12 Fac. 34.

98. Liferenter and Fiar—Capital or Income? — Dividends — Sale of Shares. — A widow had the liferent of an estate which consisted partly of stock. In July the trustees sold the stock of one company, the dividend of which was annually declared in October; and they got from the purchaser £10 "in lieu of dividend." *Held* that, though no dividend was declared in October, the widow was entitled to a proportion of the £10 corresponding to the period between the last dividend and the sale.

The stock of the other company was sold for a slump sum; and a dividend was paid by it. *Held* that the widow was entitled to a like proportion of the dividend paid. *Donaldson* v. *Donaldson's Trs.*, 1851, 14 D. 165; 24 J. 173; 1 Stuart 147.

99. Liferenter and Fiar—Capital or Income?—Payments in Lieu of Casualties—Grassums.—Parts of lands were feued for a yearly sum, and a sum to be paid every twenty-fifth year in lieu of casualties; other parts were disponed under contracts of ground-annual, stipulating for a yearly payment, and a sum in name of grassum every twenty-fifth year. *Held* that the fiar had right (1) to the sums payable every twenty-fifth year under the feu-contracts in lieu of casualties; and (2) to the "grassums" payable under the contracts of ground-annual, as being of the nature of extraordinary profits. *Ewing* v. *Ewing*, 1872, 10 M. 678; 44 J. 375.

100. Liferenter and Fiar—Capital or Income?—Profits of Trustees' Wrong Investment.—Where different parties are interested in the fee and the liferent of trust funds which have been employed contrary to the truster's directions, and on which large profits have been made, *question*, whether the fiars or liferenters take the benefit of the profits, so far as they exceed 5 per cent. *Cochrane* v. *Black*, 1855, 17 D. 321; 27 J. 139.

101. Liferenter and Fiar—Capital or Income?—Profits of Business—Interest.—A testator left the residue of his estate in liferent and fee, and empowered his trustees to carry on his business. He was a partner in a business under an agreement of copartnery, which provided that he was to receive two-thirds of the profits, and also that 7 per cent. interest should be paid upon all sums at the credit of partners. The trustees held the testator's interest in the business. *Held* that the liferentrices were entitled to the full business profits, as well as the 7 per cent. interest on capital invested by the testator in the business, and that the fiars were not entitled to have the profits treated as capital, the interest of which was alone to be paid to the liferentrices. *Wilson's Trs.* v. *Wilson*, 1871, 8 S. L. R. 437.

102. Liferenter and Fiar—Capital or Income?—Rents of Clay-Field.—A testator conveyed his estate, which consisted substantially of a clay-field, in trust for a liferenter and fiars. *Held* that the liferenter was entitled to the rents of the clay-field. *Guild's Trs.* v. *Guild*, 1872, 10 M. 911; 44 J. 497.

103. Liferenter and Fiar—Capital or Income?—Rents of Mineral Leases.—*Held* that a general liferent of all property, tacks, etc., includes the rents of minerals under lease for 999 years with a power of abandonment on their being worked out or becoming unworkable. *Waddell* v. *Waddell*, 21 Jan. 1812, F. C.

104. Liferenter and Fiar—Capital or Income?—Rents of Quarries.—A liferenter by constitution is not entitled to the rents of stone and lime quarries within the lands over which the liferent is given (no mention having been made of these in the deed of liferent), but may work a lime quarry for the use of the lands liferented. *Swinton* v. *Duchess of Roxburgh*, 1 Feb. 1814, F. C. *Duke of Roxburgh* v. *Duchess of Roxburgh*, 19 Jan. 1816, F. C.

105. Liferenter and Fiar—Capital or Income?—Thinnings of Woods.—*Held* that the price of the thinnings of the woods on lands fell under a bequest of the "whole free proceeds" of the lands. *M. of Breadalbane's Trs.* v. *Duchess of Buckingham*, 1854, 16 D. 359; 26 J. 170.

106. Liferenter and Fiar—Capital or Income?—Trustee's Discretion.—*Held* that it was competent for a testator to leave it to the discretion of his trustees to decide what fell to income and what to capital of sums obtained from quarries, the sale of wood, etc. *Low's Trs.*, 1871, 8 S. L. R. 638.

107. Liferenter and Fiar—Custody of Titles.—*Question*, whether a widow, infeft on a disposition by her husband to himself and her in conjunct fee and liferent, was entitled, in a question with the fiar, to the custody of the title deeds. *Bowes* v. *Fergus*, 1831, 10 S. 164.

108. Liferenter and Fiar—Discharge.—Terms of a discharge by a liferenter and fiar to trustees, which was *held* valid and sufficient for the exoneration of the party to whom the trust fund had been lent. *Moncreiff* v. *Bethune*, 1846, 8 D. 548; 18 J. 268. See *Hume* v. *Stewart*, 1834, 13 S. 90; 10 Fac. 71.

109. Liferenter and Fiar—Inhibition.—A liferenter executed inhibition against a tenant for securing the prestations of the lease. *Held* that the inhibition was not, on the death of the liferenter, available to the fiar. *Liddle* v. *Grieve*, 1831, 9 S. 286; 6 Fac. 195.

110. Liferenter and Fiar—Litigation by Fiar — Effect on Liferenter.—The Judge Ordinary having regulated the state of possession of a vacant piece of ground used as a dunghill for a neighbouring tenement, in a question with the fiar, who, jointly with the liferentrix, his mother, occupied the premises, *held* conclusive as to the possession in a process subsequently raised by the liferentrix. *Denovan* v. *Johnstone*, 1832, 10 S. 206.

111. Liferenter and Fiar — Locality — Rents — Redemption. — A lady was infeft under her marriage-contract, in liferent, after her husband's death, in locality lands, redeemable by the next heir on payment of an annuity at the two terms of Whitsunday and Martinmas, beginning the first half-year's payment at the first term after intimation of the intention to redeem. The husband died in December 1832, and the next heir intimated his intention to redeem in November 1833, and paid the first half-yearly annuity at that term. *Held* that the rents due at Whitsunday 1833, though payment was conventionally postponed to Martinmas, vested in and fell to the widow as at Whitsunday. *Lockhart* v. *Lockhart*, 1839, 1 D. 443; 14 Fac. 488.

112. Liferenter and Fiar — Locality — Powers—Leasing.—*Held* that a husband after granting lands in liferent locality to his wife

might lease them, and that the leases were effectual against her. *Stewart* v. *Countess of Moray*, 1773, 2 Pat. 317.

113. Liferenter and Fiar—Meliorations—Purchaser.—A bought lands which were burdened with a liferent to the seller's wife on the seller's death. A built houses on the lands. *Held* that as against the liferenter A was entitled to the interest of the meliorations made by him. *Laird* v. *Fenwick*, 10 Feb. 1807, F. C.; M. "Liferenter" App. No. 3.

114. Liferenter and Fiar—Removing—Title to Sue—Sequestration for Rent.—A fiar is not entitled to remove a tenant without the liferenter's concurrence, *Buchanan* v. *Yuille*, 1831, 9 S. 843; 6 Fac. 576; but he may, without that concurrence, sequestrate for payment of rent. *Yuille* v. *Buchanan*, 1833, 11 S. 682. *Question*, whether a liferentrix can pursue a removing under an irritancy, where the lease was granted by her and the fiar jointly. *M'Christie* v. *Kea*, 1825, 4 S. 11.

115. Liferenter—Forfeiture—Effect on Fiars.—*Opinions* that where sums were given to parties in liferent and to their issue in fee, a forfeiture of the liferent by the parent did not deprive the issue of the fee. *Harvey's Trs.* v. *Harvey's Trs.*, 1863, 1 M. 345; 35 J. 211.

116. Liferenter—Payment to—Interdict.—Interdict at the instance of a substitute liferenter of the residue of a trust-estate, against a payment to account of liferent being made to the first liferenter, *refused*, although the liferent was to be paid only after providing for other purposes, which it was alleged were still unprovided for. *Sawers* v. *Sawers' Trs.*, 1862, 24 D. 101; 34 J. 53.

117. Liferenter—Powers—Cutting Wood.—Lands with the woods and forests thereon being conveyed in liferent, *held* that the fiar was not entitled to cut the wood on the lands. *Hamilton* v. *Hamilton*, 1723, Robert. 443.

118. Liferenter—Powers—Cutting Wood.—Where an estate was held by trustees for a liferentrix and for A if B had no issue (B being alive but past child-bearing), *held* that A could not cut the trees. *Tait* v. *Maitland*, 1825, 4 S. 247.

119. Liferenter—Powers—Cutting Wood.—A liferentrix by constitution, with power to cut such wood as in the opinion of the granter's executors could be done without injury to the estate, having avowed an intention to cut wood which the fiar considered would be injurious to the estate, the court *passed* a bill of suspension presented by him, and *granted* interdict prohibiting the cutting of all wood as to which a month's previous intimation of the intention to cut should not be specially given to the fiar, whose right to apply *de novo* for an interdict was reserved. *Dingwall* v. *Duff*, 1833, 12 S. 216, 541.

120. Liferenter—Powers—Cutting Wood.—*Held* (1) that though a liferenter is entitled to ordinary windfalls of wood, he is not entitled to cut for sale growing timber, or to sell trees blown down by an extraordinary storm; but he is entitled, at the sight of the fiar, to cut such grown timber, or use blown down trees, for repairing fences and other necessary purposes of the estate; (2) that he is not entitled, at his own discretion, to thin plantations; but he is entitled to do so at the sight of the fiar, to whom the thinnings belong; (3) that he is entitled to cut coppice-wood, which was in use to be cut at intervals of twenty-two years, if he be in possession when the period arrives; but he is not entitled to anticipate that period. *Macalister's Trs.* v. *Macalister*, 1851, 13 D. 1239; 23 J. 584.

121. Liferenter—Powers—Cutting Wood—Working Mines—Embanking River.—*Held*, in a question between a fiar and liferenter, (1) that the fiar is entitled to cut wood on the property, but not so as to interfere with the amenity or shelter of the estate, and to dig for and work mines and minerals, paying surface damages, and having regard to the amenity of the manor-house and estate; and (2) that the liferenter is entitled to cut such coppice-wood as has been in use of being cut; to fell, at the sight of the fiar, such grown timber as is requisite to repair fences, etc., and to have such limestones and other minerals as may be required for the estate; but that he is not bound to erect embankments upon a river running through the estate. *Dickson* v. *Dickson*, 24 Jan. 1823, F. C.; 2 S. 152.

122. Liferenter—Powers—Quarries.—A liferenter by constitution is not entitled to the rents and profits of stone quarries in the lands, no mention of these being made in the deed giving the liferent and the estates being held under entail. *Swinton* v. *Duchess of Roxburgh*, 1 Feb. 1814, F. C.

123. Liferenter—Powers—Quarry.—The fiar is entitled to enter liferent lands and work a lime quarry, provided he reserve a portion of it sufficient for the use of the lands; and the liferenter of locality lands is entitled to work a lime quarry for the use of the lands. *D. of Roxburgh* v. *The Duchess Dowager of Roxburgh*, 19 Jan. 1816, F. C.

124. Liferenter—Powers—Quarry.—A woman, the owner of a quarry, disponed the same to her husband and herself in liferent and the heirs of the marriage in fee. *Held*, on the special terms of the deed, that the woman after her husband's death was not deprived of the power of working the quarry. *Eiston* v. *Eiston*, 1831, 9 S. 716; 6 Fac. 475.

125. Liferent of Lands—Sale of Lands.—A husband executed in favour of his wife, in the event of her survivance, a gratuitous disposition (with absolute warrandice) to the liferent of lands which he had bought, which were burdened with a part of the price. Upon his death the lands were sold. *Held* that she was entitled to payment from her husband's general estate (as in lieu of her liferent) of the interest, not merely of the balance of the price, after deducting the debt, but of the whole price. *Strong* v. *Strong*, 1851, 13 D. 548; 23 J. 244.

126. Title to Sue.—A lady who had possessed a liferent by constitution over certain lands under a personal title since 1848, sued statutory water commissioners for wrongly dealing with a stream which passed through her property, and to compel them to restore it to its condition in 1847. *Held* that she had no title to sue. *Question* whether, if she had completed her title, she had any right to more than the liferent of the property as in 1848. *Hardie* v. *Mags. of Port-Glasgow*, 1864, 2 M. 746; 36 J. 338.

127. Title to Sue.—A mother who had been infeft in a property in terms of a destination to herself in liferent allenarly, and her child *nasciturus* in fee, raised, along with her son, who had made up no title in his own name, an action of declarator to fix the boundary of the property. *Held* that they had a title to sue. *Otto* v. *Weir*, 1871, 9 M. 660; 43 J. 574.

LOAN

Donation or Loan? see title *Donation*.
Interest, see that title.

1. Debt or Loan?—A party obtained an order from another on his cash account, without stating whether it was as a loan or in payment of a debt, and got the cash. *Held*, in an action after his death for repayment, that it was incumbent on the representatives to prove that the money was paid in extinction of debt, and having failed, decree pronounced. *Ross* v. *Fidler*, 24 Nov. 1809, F. C.

2. Evidence—Admission—Qualification—Loan or Payment of Debt?—The admission of the receipt of money *held* to be qualified by an allegation that it was received, not in loan, but in payment of a debt or other consideration. *Minty* v. *Donald*, 1824, 3 S. 394. *Carnegy* v. *Carnegy*, 1825, 3 S. 566.

3. Evidence—Admission—Qualification—Repayment.—The only evidence of a loan being the admission of the party, qualified with a declaration that he had repaid it, *held* not sufficient to entitle the pursuer to recover. *Grierson* v. *Thomson*, 1830, 8 S. 317.

4. Evidence—Oath—Jottings.—*Held* that advances and disbursements made by a person for another who boarded with him were proved by the creditors' oath and by an account made up from pencil jottings. *Macfarquhar* v. *M'Kay*, 1869, 7 M. 766; 41 J. 401.

5. Evidence—Oath—Qualification—Gift.—A party, on a reference to oath as to whether £100 was lent to him, deponed that he received it as a gift. *Held* intrinsic. *Stewart* v. *Walpole*, 1804, Hume 416.

6. Evidence—Oath—Terms—Loan or Remuneration.—In an action for repayment of a loan, the defender admitted the receipt of the money, but stated that it was for services. The pursuer referred the "facts and circumstances of the case" to the defender's oath. Terms of oath which *held* negative of the reference. *Gow's Exrs.* v. *Sim*, 1866, 4 M. 578; 38 J. 307.

7. Evidence—Parole.—Parole proof *held* incompetent in support of an improbative document in order to connect it with another transaction in proof of loan. *Stewart* v. *Syme*, 12 Dec. 1815, F. C.

8. Evidence—Parole.—Parole proof of the balance of a loan of £10 (though the balance was only £4, 17s.) *held* incompetent. *Clark* v. *Glen*, 1836, 14 S. 966.

9. Evidence—Parole—Advances.—*Held* that payment of a recent account, the voucher for which was in the hands of the claimant, might be proved by parole in an action by the claimant against the estate of the party on whose behalf the payment had been made. Proof by parole of other items not singly exceeding £100, but which taken as one item did exceed that sum, not allowed. *Observations* on the rule as to the mode of proof in such cases. *Annand's Trs.* v. *Annand*, 1869, 7 M. 526; 41 J. 278.

10. Evidence—Parole—Writ—Circumstances.—In an action raised against the executor of a party deceased, to recover an alleged loan to the deceased, vouched only by an improbative acknowledgment written by the defender to the dictation of the deceased, and signed by the deceased and by the defender, it appeared that the loan had been included by the defender in the schedule of debts given up to the Revenue Office with the residue accounts of the deceased's estate, and that the defender had paid interest thereon for fifteen years. *Held* that the pursuer was entitled to recover from the defender as an executor. *M'Calman* v. *M'Arthur*, 1864, 2 M. 678; 36 J. 339.

11. Evidence—Separate Advances.—In an action for repayment of advances each advance and payment must be instructed by the debtor's writ or other written evidence. *Birnie's Assignees* v. *Darroch*, 1842, 4 D. 366.

12. Evidence—Writ—Cheque—Proof of Circumstances.—In an action for repetition of a loan, the pursuer produced a cheque in favour of the defender and indorsed by him. The defender admitted that he had received payment of the cheque, but with the qualification that the cheque had been received in payment of a debt. *Held* that the loan had not been instructed by the cheque, and that it was incompetent for the pursuer to prove by parole evidence the circumstances in which the cheque had been granted. *Haldane* v. *Speirs*, 1872, 10 M. 537; 44 J. 305.

13. Evidence—Writ—Deposit-Receipt—Parole.—In an action for payment of money, "being the amount contained in a deposit-receipt in name of the pursuer uplifted by the defender," the defender stated that he had received the deposit-receipt bearing the pursuer's indorsation from a third party, the true owner of the money, and had accounted for it to him. *Held* (1) that in so far as the action was rested on loan by the pursuer to the defender, it could not be proved by parole

evidence, and that the only writing of the defender founded on in proof of it, being the defender's name written on the back of the deposit-receipt, was not legal proof of such loan, nor sufficient to render parole proof admissible; (2) that, in so far as the action was rested on the defender's alleged intromission with the pursuer's funds, the parole evidence had negatived the pursuer's case. *Nimmo* v. *Nimmo*, 1873, 11 M. 446; 45 J. 252.

14. Evidence—Writ—I O U.—In an action for repayment of a sum of money, said to have been advanced on loan, the pursuers founded on an I O U granted by the defender's clerk, to whom the money was paid, and who was proved not to have had authority so to bind his employer. The defender, who averred that on an unsettled account the pursuers were indebted to him in the sum handed to his clerk, did not repudiate the transaction when he became aware of it. *Held* that the loan was not proved. *Woodrow & Son* v. *Wright*, 1861, 24 D. 31; 34 J. 25.

15. Evidence—Writ—I O U—Holograph.—*Opinion*, that an I O U, if not holograph, is not a document of debt that can be sued on, and will not sustain a separate action. *Bowe & Christie* v. *Hutchison*, 1868, 6 M. 642; 40 J. 326.

16. Evidence—Writ—Jottings.—Jottings in the pocket-book, and an account found in the repositories of a debtor, *held* not sufficient to support a claim for money lent him, made after the death of both debtor and creditor. *Waddel* v. *Waddel*, 1790, 3 Pat. 188.

17. Evidence—Writ—Jottings—Onus.—(1) Jottings relating to interest, made on the back of an unstamped promissory-note, may be looked at as supporting other competent evidence of a loan. (2) Where receipt of money has been proved, the *onus* lies on the receiver to prove that he did not get it as a loan, or that he repaid it. *Fraser* v. *Bruce*, 1857, 20 D. 115; 30 J. 70. See *Waddell* v. *Morton*, 1825, 4 S. 170.

18. Evidence—Writ—Jottings. — In an action for repayment of an alleged loan, *held* that a pencil jotting in the private pocket-book of the defender—"Borrowed from R £215,"—made several years before, was not sufficient to instruct the loan. *Wink* v. *Speirs*, 1868, 6 M. 657; 40 J. 340.

19. Evidence — Writ — Law-Agent's Letters.—*Held* that statements in a law-agent's letters not being equivalent to his client's writ, cannot competently be adduced as evidence of an alleged loan of money exceeding £100 Scots. *Smith* v. *Smith*, 1869, 8 M. 239; 42 J. 104.

20. Evidence—Writ—Letters.—Loan can competently be proved only by writ or oath of party. *Held* that loan was not proved by two letters from the defender to the alleged lender, expressing regret for not having "cancelled the debt I owe you," and asking if he would take "a bill for the amount," but without mentioning the sum, or the nature of the debt referred to. *Rutherford's Exrs.* v. *Marshall*, 1861, 23 D. 1276.

21. Evidence—Writ—Letter.—*Held* that a letter found in the respositories of a party deceased, in which the writer acknowledged having received a loan from the deceased, was not sufficient evidence *per se* to instruct the loan as a subsisting debt. *Butchart* v. *Butchart*, 1863, 1 M. 1123.

22. Evidence — Writ — Parole. — Parole evidence is inadmissible to establish donation of a sum which was acknowledged in a holograph document importing loan, but proof by writ or oath *allowed*. *Robertson* v. *Robertson*, 1858, 20 D. 371; 30 J. 209.

23. Evidence—Writ—Partnership Books.—A partner is presumed cognisant of the contents of the books of the company. Where a sum was confessedly advanced to retire a bill due by the firm, and a question arose whether the money was lent by a stranger, or advanced by a partner, *held* that it was sufficiently proved against another partner to have been lent by the stranger by entries in the firm's books to that effect at the time, and by contemporaneous letters of the cashier and book-keeper. *Kennedy* v. *Walker*, 1836, 14 S. 803.

24. Evidence—Writ—Receipt—Presumption.—A party raised an action for repayment of money lent, and produced a holograph acknowledgment by the defender, bearing: "Received from A the sum of £20." *Held* that this proved that the money had been received; that therefore there was a presumption that it was to be repaid; and that the onus of proving otherwise lay on the defender. *Martin* v. *Crawford*, 1850, 12 D. 960; 22 J. 426.

25. Evidence — Writ — Receipt—Onus.—*Held* that an acknowledgment bearing receipt of a sum "as per agreement," implied a loan, and placed on the granter the onus of proving that it was not a loan. Circumstances in which *held* that the granter had failed to prove that he had received the money otherwise than in loan. *Thomson* v. *Geekie*, 1861, 23 D. 693; 33 J. 340.

26. Evidence—Writ—Receipt—Presumption.—*Observed*, that the legal presumption is, that, *in dubio*, an acknowledgment of receipt of money will be held to import an obligation on the granter of the acknowledgment to the person from whom he acknowledges having received it, unless it be shown by the granter that the acknowledgment was not intended as a document of debt.

Held that an acknowledgment must be read along with other correspondence, and that on the terms of that correspondence the presumption of loan did not arise. *M'Keen* v. *Adair*, 1864, 2 M. 392; 36 J. 190. See also *Allan* v. *Murray*, 1837, 15 S. 1130.

27. Evidence — Writ — Receipt — Advances.—In an action by one brother against the executor of another for repetition of payments which he averred he had made on behalf of the deceased, and receipts for which,

though in deceased's name, he held, proof *prout de jure* of these averments *allowed*, but averments as to other disbursements and bills retired allowed to be proved only by writ or oath. *Fairbairn* v. *Fairbairn*, 1868, 6 M. 640; 40 J. 332.

28. Evidence — Writ — Receipt — Holograph.—*Held* that a holograph writing acknowledging receipt of £500 in loan was not a writ *in re mercatoria*, and did not prove its own date. *Purvis* v. *Dowie*, 1869, 7 M. 764; 41 J. 396.

29. Evidence — Writ — Receipt — Partially Holograph.—In an action for repetition of a loan of £50 the pursuer founded on this document: "I acknowledge having received the sum of £50 sterling from my sister, A. M. Should it ever be in my power to repay her this sum, I will do so if required. *Received the sum of £50 stg. James Muirhead.*" The words in italics were holograph of the defender, and had been added by him to the other portion. *Held* that the loan had been proved. *Christie's Trs.* v. *Muirhead*, 1870, 8 M. 461; 42 J. 215.

30. Evidence — Writ — Receipt — Presumption—Payment of Debt.—*Held* that a loan of money was not instructed by letters in which the acknowledgment of the receipt of money was qualified by the statement that it was received in payment of a debt of honour. *Opinion*, that proof of the receipt of money by the writ of the receiver only raises a presumption of loan in cases where the acknowledgment is contained in a document delivered to the disburser by the recipient as a record of the transaction. *Duncan's Trs.* v. *Shand*, 1873, 11 M. 254; 45 J. 188.

31. Partnership—Transaction or Loan.—Three of the partners made super-advances of stock, and the corresponding share of the fourth partner was to be made up out of his profits. *Held* that the advances by the three partners were not loans to the firm. *Finlayson* v. *Rutherford*, 1830, 8 S. 374; 5 Fac. 310.

32. Repayment—Proof of. — Repayment *held* not to be inferred where the amount was entered to the credit of the lender in the books of the agent, who acted for both borrower and lender, and who afterwards became insolvent. *Falconer* v. *Dalrymple*, 1870, 9 M. 212; 43 J. 102.

33. Sale or Loan?—Right to Repurchase.—A firm wrote a letter, saying, "We have this day sold you 100 tons guano at £6 per ton, payment to be made by your acceptance at four months. The guano . . . to be delivered as required. We, however, reserve right to repurchase at the same price at any time during the currency of the acceptance." An acceptance was granted in terms of this letter. *Question*: Was the transaction sale or loan? *Miller's Tr.* v. *Shield*, 1862, 24 D. 821; 34 J. 416.

34. Title-Deeds—Borrowing Receipt.—A party who borrowed title-deeds of a client from an agent on a promise to return them, ordained to do so. *Duncan* v. *Fea*, 1824, 2 S. 636.

35. Title to Sue. — A party granted a document in these terms: "I acknowledge to have received from A and in behoof of his son B, heir to the said A, £100 . . . and for which sum I hereby become bound, my heirs, and executors, to refund to them." *Held* that A had a good title to sue the granter, but that it was proper that B should be made a party. *Campbell* v. *Fisher*, 1838, 16 S. 1279.

LOCAL GOVERNMENT

PUBLIC HEALTH, see that title.
ROAD TRUSTEES, see title *Road*.

1. Commissioners of Supply — Action against—Convener and Clerk.—Commissioners of supply are well brought into court by their convener and clerk being called as defenders. *Lyall* v. *Commrs. of Supply for Lanarkshire*, 1859, 21 D. 1136; 31 J. 631.

2. Commissioners of Supply—Collector of Land Tax.—*Held* that commissioners of supply, nominated under the Acts 37 Geo. III. c. 35 and 36 Geo. III. c. 26, relative to the land tax, and not commissioners under 39 and 40 Geo. III. c. 31, relative to duties upon pensions, etc., in England, were entitled to vote in the election of collector of land tax. *Steuart* v. *Kinloch*, 19 Jan. 1802, F. C.; M. "Commissioners of Supply" App. No. 2.

3. Commissioners of Supply—Duties as to Assessment.—In a petition at the instance of the Crown, to compel commissioners of supply to furnish annually to the collector of the land tax for the county of Edinburgh an assessment-roll of that tax, specifying the subject and amount, and parties liable, and, failing performance, for decree for the *cumulo* amount of land tax payable by the county, *held* that, while the commissioners of supply still constitute the tribunal for determining judicially, on the application of parties, the proportion of valued rent effeiring to the property of each of such parties, they could not be compelled to furnish the roll of assessment so demanded. *Lord Advocate* v. *Commrs. of Supply for County of Edinburgh*, 1862, 24 D. (H. L.) 7; 34 J. 657; 4 Macq. 387.

4. Commissioners of Supply—Qualification.—It does not constitute a qualification for acting as a commissioner of supply that the claimant holds factories from two proprietors of separate lands, neither of whom has a yearly rental of £800, but whose joint rentals amount to that sum. *Walker* v. *Commrs. of Supply of Zetland*, 1870, 8 M. 443; 42 J. 215. *Boyd* v. *Commrs. of Supply of Lanarkshire*, 1876, 14 S. L. R. 489.

5. Parochial Board—Burial-Grounds Act—Competency of Petition.—Certain members of a parochial board presented a petition to the sheriff under the Burial-Grounds Act, setting forth that the board had resolved that

a new burial-ground was necessary, but had, up to date, failed to provide a suitable one, and therefore praying the sheriff to designate one. Objection was taken to the competency of the petition, on the ground that a new burial-ground had been provided, and was repelled. The inspector of poor, on behalf of the board, presented a note of suspension of the proceedings in the petition, and for interdict against further procedure. *Held* that the petition was *ex facie* competent, and no facts had been established before the sheriff showing it to be incompetent; and therefore note *refused*. *Fulton* v. *Dunlop*, 1862, 24 D. 1027; 34 J. 512.

6. Parochial Board — Committee of Management — Access to Books. — The parochial board of a large parish (which was composed of several thousand members) appointed a committee of management, by whom the whole affairs of the board were transacted. *Held* that this committee were not entitled to exclude the other members of the board from access to the books. *Wingate* v. *Barony Parish of Glasgow*, 1851, 13 D. 972; 23 J. 448.

7. Parochial Board—Committee—Power to Bind the Board.—In a reduction, at the instance of an inspector of poor, of an agreement entered into between three persons, therein designed as "three and a quorum of the house committee of the parochial board," and a person who had been appointed governor of the poorhouse, the presiding judge refused to direct the jury, at the request of the pursuer, "that unless they were satisfied that the three members of the board who signed the deed under reduction were a quorum of a meeting duly called of the house committee, and signed the agreement as a quorum of such a meeting, they had no authority to sign the agreement so as to bind the board." Exception against the refusal of the direction *disallowed*, on the ground that the onus of showing that the agreement had not been duly executed, lay upon the pursuer. *Beattie* v. *Mackay & Paterson*, 1863, 1 M. 279; 35 J. 180.

8. Parochial Board — Funds — Dues not under Poor Law Act.—*Held* that dues exacted for proclamation of marriage banns do not fall under the operation of the Poor Law Amendment Act, and that the kirk-session are not bound to account for them, or for any portion of them, to the parochial board. *Question*, whether the exaction of such dues is legal. *Kirk-Session of Crieff* v. *Inspector of Poor of Crieff*, 1854, 16 D. 511; 26 J. 235.

9. Parochial Board—Funds—Transfer of. —*Held* that funds derived from various sources (in some of which the kirk-session was interested exclusively, and in others jointly with the heritors), which the kirk-session had in 1735 invested "for behoof of the poor of the parish," and administered for behoof of the general poor, fell to be transferred to the parochial board. *Flockhart* v. *Kirk-Session of Aberdour*, 1869, 8 M. 176; 42 J. 77.

10. Parochial Board—Funds—Transfer of—Title to Lands. — In 1726 the kirk-session of a parish bought a farm, taking the disposition in favour of the minister and elders, "for behoof of the poor of said parish." In an action by the inspector of poor, concluding for declarator that at the date of the passing of the Poor Law Amendment Act, 1845, the lands were held by the kirk-session as trustees for the heritors and kirk-session, and that the right was now vested in the parochial board for behoof of the legal poor, *held* (1) that the terms of the disposition of 1726 did not show whether the lands were held for behoof of the general poor or of the legal poor; and (2) that the disposition had been explained by usage, which showed that the land had been possessed by the heritors and kirk-session jointly for behoof of the legal poor. *Inspector of Kinglassie* v. *Kirk-Session of Kinglassie*, 1867, 5 M. 869; 39 J. 484.

11. Parochial Board—Powers—Dismissal of Medical Officer — Rights of Board of Supervision.—A parochial board which participated in the parliamentary grant in aid of medical relief, dismissed their medical man for neglect of duty. They afterwards reappointed him. The proceedings having been transmitted to the Board of Supervision, that board dismissed him from office. The parochial board, at a subsequent meeting, continued him in office until a court of law should decide that the Board of Supervision had a right to dismiss him. *Held* that this continuance of the medical man in office, after being dismissed by the Board of Supervision, was illegal and irregular, and an obstruction of the Act; and interdict *granted* against the parochial board acting on their minute continuing the medical man in office. *Board of Supervision* v. *Parish of Dull*, 1855, 17 D. 827; 27 J. 425.

12. Parochial Board—Review of Acts—Petition by.—*Held* that it is competent for the Board of Supervision to bring the proceedings of a parochial board under the review of the court by summary petition and complaint. *Board of Supervision of Poor* v. *Parochial Board of Glasgow*, 1850, 12 D. 627; 22 J. 228.

13. Parochial Board—Unqualified Member—Interdict.—*Held* that an application for interdict is competent by a heritor and ratepayer in a parish, to have a party who has not the statutory qualification prohibited from acting as a member of the parochial board; and that the party was liable in expenses. *Gilmour* v. *Craig*, 1852, 14 D. 521; 24 J. 261; 1 Stuart 482.

LUNACY

Aliment, see that title.
Apprehension of Lunatic, 1–14.
Damages for, 7–14.
Capacity, 15–40.
Criminal, 52–57.
Testamentary, 21, 25, 26, 31–40.

Cognition, 71–73.
Confinement of Criminal, 41–44.
Criminal Law, 41–64.
Degree of Insanity, 52–57.
Plea in Bar, 61–64.
Procedure, 45, 58–60.
Verdict and Sentence, 49.
Curator Bonis, see title *Judicial Factor*.
English Guardians, 66–68.
Evidence, 11, 46–48, 50, 69, 70, 73–75.
Facility, see title *Fraud and Misrepresentation*.
Medical Certificate, 76.
Pauper Lunatic, see title *Poor*.

1. Apprehension — Application by Procurator-Fiscal — Suspension — Expenses.—Upon an application by the procurator-fiscal, the sheriff granted a warrant, under 4 and 5 Vict. c. 60, s. 3, for the confinement of a man in a lunatic asylum; who, after being confined, presented a suspension on the ground that he was perfectly sane, and had always been so. The court, on a review of the evidence, held by a majority, that the sheriff was justified in finding that the suspender ought to be put under restraint, as being "subject to fits of furiosity, and in that state dangerous to his family"; but they allowed the suspender a proof as to his mental condition for the preceding three years. *Held* (1) that the procurator-fiscal was the proper party to institute the proceedings; and (2) that he, as respondent, was entitled to decree against the suspender for expenses in the Court of Justiciary. *Gerard* v. *Grigor*, 1855, 2 Irv. 298; and 1856, 2 Irv. 434.

2. Apprehension—Bond for Safe Custody —Reduction by Lunatic.—A sheriff, on the petition of the procurator-fiscal, granted warrant to apprehend a party alleged to be a dangerous lunatic, for examination; whereupon a relation of the party, before any further steps were taken, subscribed a bond, written on the petition, binding himself, under a penalty, for his safe custody, till a certificate of his recovery should be produced, and upon this, proceedings were stayed. *Held* that a reduction of this bond at the instance of the alleged lunatic, and his relation who granted it, as irregularly and improperly taken, was incompetent. *Observed*, that if any wrong had been done, the proper remedy was an application to the sheriff, whose judgment upon it might be brought under review of the Court of Justiciary. *Mackenzie* v. *Scott*, 1845, 8 D. 271; 18 J. 119. See 6 Bell 84.

3. Apprehension—Dangerous Lunatic—Expenses of Apprehension and Custody—Powers of Sheriff.—The sheriff, in a petition for the commitment to safe custody of a dangerous lunatic, under the Act 20 and 21 Vict. c. 71, has no power (1) to find that the parish in which the lunatic was apprehended is liable *ad interim* for his maintenance; or (2) to decern against the inspector of the poor of the parish for the expense of the apprehension and maintenance of the lunatic. *Beattie* v. *Gemmel*, 1861, 23 D. 386; 33 J. 191.

4. Apprehension—Detention—Warrant.—*Observed*, that the judicial warrant for a lunatic's confinement is not retroactive in its effect, so as to confer privilege on all concerned in any stage of the proceedings. *Mackintosh* v. *Fraser*, 1859, 21 D. 783; 31 J. 421.

5. Apprehension—Parish of Lunatic—Lunatics Act.—The parish in which a dangerous lunatic is apprehended is, in the sense of the Lunatics Act, the parish in and from which he is "taken and sent." *Beattie* v. *Gemmel & Adamson*, 1862, 24 D. 431; 34 J. 213.

6. Apprehension—Reduction of Sheriff's Warrants — Action against Sheriff.—*Held* that an action against a sheriff-substitute, containing a conclusion merely for reduction of warrants granted by the defender for the pursuer's removal to and detention in a lunatic asylum, upon which the pursuer had been removed to an asylum and detained for a short time, was incompetent. *Mackintosh* v. *Arkley*, 1868, 6 M. (H. L.) 141; 40 J. 482.

7. Apprehension — Wrongous Detention —Conspiracy.—Issue *granted* whether certain defenders entered into a conspiracy to imprison a party in a lunatic asylum, and did, in pursuance of the conspiracy, wrongfully confine and detain him in the asylum. *M'Cosh* v. *M'Cosh*, 1832, 10 S. 579.

8. Apprehension — Wrongous Detention —Damages.—In an action based on wrongous imprisonment, by sending a person to a madhouse, if the defender had reasonable ground for believing the party to be insane, he is not liable. *Dickie* v. *Dickie*, 1825, 3 Mur. 509.

9. Apprehension—Wrongous Detention —Damages — Licence from Sheriff.—The keeper of a private asylum cannot receive and detain a patient, unless there have been issued by the sheriff both an order and a licence for such reception and detention, in terms of the statutes; and an averment in a summons of damages, that the pursuer had been received and detained by the defender, on an order by the sheriff, without a relative licence, *held* to afford relevant matter for an issue. *Strang* v. *Strang*, 1849, 11 D. 378; 21 J. 108.

10. Apprehension—Wrongous Detention —Damages—Procurator-Fiscal Acting as Agent for Parties—Employment of Police —Separate Issue.—A procurator-fiscal of a police court, as agent for the relatives of an alleged lunatic, presented a petition to the sheriff for a warrant to detain him in a private madhouse, and employed a police-officer to bring him to the police office, where he was detained for some time, and examined by two surgeons, on whose certificate a warrant was issued by the sheriff, in terms of the petition. In an action of damages at the instance of the alleged lunatic against the procurator-fiscal and his employers, *held* that the procurator-fiscal,

having acted as agent, was not entitled to an issue of malice and want of probable cause, or to a separate issue from his employers. *Strang* v. *Strang*, 1849, 11 D. 378; 21 J. 108.

11. Apprehension—Wrongous Detention—Damages—Issue.—A person who had been placed in a lunatic asylum made his escape. He thereafter raised an action against, *inter alios*, the keepers of the asylum, concluding for declarator that during the whole time he was in the asylum he had been *compos mentis*. No defences were lodged, but the pursuer moved to be allowed a proof, which was taken, and thereafter he obtained a decree of declarator in absence. He then raised an action of damages against the two keepers of the asylum, alleging that one of them had illegally seized and conveyed him to the asylum, where he was by both illegally received and detained. *Held* (1) that he was entitled to an issue of damages for illegal detention, apart from illegal seizure and reception, but that the issue must exhaust the cause, and that he would not afterwards be entitled to an issue of damages for illegal seizure and reception; but (2) that he was not entitled to prefix to the issue a preamble setting forth the decree in absence as fixing his sanity during his detention. *Mackintosh* v. *Smith & Lowe*, 1865, 3 M. (H. L.) 6; 4 Macq. 913; 37 J. 318.

Held that the decree in absence was inadmissible as evidence in the action of damages. *Ibid.*, 1865, 3 M. (H. L.) 6; 4 Macq. 913; 37 J. 318.

12. Apprehension—Wrongous Detention—Damages—Illegality in Mode of Confinement.—In an action of damages for wrongous apprehension and detention in an asylum, *held* that the presiding judge had rightly directed the jury that the issue did not raise any question whether, supposing the pursuer rightly detained in an asylum, there was any illegality in the mode of his confinement; and did not raise any question of breach of statutory regulations in regard to the registers of the asylum, or the manner of keeping them,—the court being of opinion that no such ground of action was disclosed on record, and that the issue was controlled by the record. *Mackintosh* v. *Smith & Lowe*, 1865, 3 M. (H. L.) 6; 4 Macq. 913; 37 J. 318.

13. Apprehension—Wrongous Detention — Damages — Liability of Family Law Agent and Medical Men—Malice.—In an action of damages for wrongous confinement in a lunatic asylum, *held* that the law agent of the family of the alleged lunatic having advised the lunatic's mother to apply for warrant to detain him, and carried out these proceedings in the name of the mother, was not privileged, and that the pursuer was not bound to put in issue whether the law agent had acted maliciously and without probable cause. *Held* also that the issue properly put the question whether the pursuer was not insane. *Mackintosh* v. *Fraser*, 1859, 21 D. 783; 31 J. 421. *Held* further that the medical men who granted the certificate were not liable if they did so *bona fide* though it should turn out that the person was sane. *Ibid.* 31 J. 761.

14. Apprehension — Wrongous Detention — Damages — Surgeon — Issue.—In an action of damages by a party who was confined on a warrant of the sheriff, proceeding on a certificate by a surgeon, on soul and conscience, that the party was a proper object for confinement in a lunatic asylum, and to which another surgeon adhibited his concurrence, *held* (1) that the surgeons were entitled to separate issues; (2) that a surgeon who grants such a certificate is not a privileged defender in such an action, and that the issue ought to be, whether the certificate was granted "without due inquiry,"—not "without want of probable cause." *Strang* v. *Strang*, 1849, 11 D. 378; 21 J. 108.

15. Capacity—Destruction of Deeds—Proving the Tenor.—A proof allowed before answer in a proving of the tenor of a testament, that the *casus amissionis* was, that after execution of the deed the testator became and continued insane till her death, and had destroyed it in that state of mind; but on the evidence, *held* that although the testator was subject to hallucinations, the insanity was not so clearly proved as to warrant a decree of proving the tenor of the testament. *Laing* v. *Bruce*, 1838, 1 D. 59; 14 Fac. 40.

16. Capacity—Inheritance—Incapacity to Accept.—Although a father dispone his whole estate, heritable and moveable, to his child, whom failing, to a substitute, yet, if the child be an idiot, and so can exercise no *voluntas* as to acceptance, his *legitim* will not, on his failure, descend to the substitute, but will belong to his next-of-kin, notwithstanding that the child has enjoyed the benefit of the deed. *Morton* v. *Young*, 11 Feb. 1813, F. C.

17. Capacity — Lease — Demand for Renewal—Insanity of Tenant's Heir.—A lease was renewable upon demand, at least twelve months before the expiry of every nineteen years. The tenant having died, and his heir being insane, *held* that this did not dispense with the necessity for a demand of renewal. *E. of Hopetoun* v. *Hunter*, 1863, 1 M. 1074; 35 J. 612. *Reversed* on other grounds, 1865, 3 M. (H. L.) 50; 37 J. 489; 4 Macq. 972.

18. Capacity—Knowledge of Law—Presumption—Effect of Insanity.—*Question* as to the presumption of knowledge of a change of the law as to intestate succession, in the case of a testator, insane from a period prior to the change until death. *Maxwell* v. *Maxwell*, 1864, 3 M. 318; 37 J. 153.

19. Capacity—Homologation of Deed on Recovery.—A deed granted by a person while insane cannot be homologated by him on his recovery. *Gall* v. *Bird*, 1855, 17 D. 1027; 27 J. 521.

20. Capacity—Ratification of Deeds by Insane Person.—The ratification by an insane person of deeds to his prejudice, executed by another, will not bar the representatives of

the insane person from reducing those deeds. *Dallas* v. *Dallas*, 1765, 2 Pat. 91.

21. Capacity—Reduction of Contract—Degree of Incapacity.—To reduce a contract on the ground of mental incapacity, the law requires a less degree of incapacity to be proved than in the reduction of a mere testamentary deed. *Dewar* v. *Mackay*, 1836, 14 S. 1132; 11 Fac. App. 55.

22. Capacity—Reduction of Decree—Cognition.—It is not relevant to reduce a decree, to allege that the defender was insane at the date of it, he not being then cognosced. *Thomson* v. *Easton*, 1831, 9 S. 759.

23. Capacity—Reduction of Deed.—The Court of Session *reduced* certain deeds on the ground of the insanity of the granter, and sustained others *ex facie* absolute as securities only; but the House of Lords, being satisfied that the evidence preponderated in favour of sanity, *sustained* the deeds *in toto*; and *observed*, that if the granter had been insane, the deeds could not be sustained to any effect. *Towart* v. *Sellers*, 1817, 5 Dow 231; 6 Pat. 301.

24. Capacity—Reduction of Deed—Date of Insanity.—A reduction of deeds was brought on the ground of insanity. The granter of the deeds had been insane in 1795, and the deeds challenged were executed in 1798; but there was no specific allegation that the granter, at the dates of these deeds, was insane. *Held* that the facts alleged were irrelevant, and too vague to go to proof. *Thomson* v. *Tate*, 1807, 5 Pat. 176.

25. Capacity—Reduction of Deed—Date of Insanity — Presumption. — *Ruled*, that where the granter of a holograph deed bearing a certain date was proved to have become insane at a period subsequent thereto, and died insane, there is no legal presumption that the deed was executed during insanity; but the party founding on the document is bound to support or adminiculate its date, which he may do by facts and circumstances of an indirect nature; and the deed itself, and the date expressed in it, are not to be thrown out of consideration. *Waddell* v. *Waddell's Trs.*, 1845, 7 D. 605, 1017; 17 J. 542.

26. Capacity — Reduction of Deed — Delusions on Irrelevant Subjects.—A deed disclosing no trace of incapacity or insanity may nevertheless spring from an insane belief or delusion, in establishing which there must be proved both the groundlessness of the belief, and the impossibility of its being entertained by any sane mind. The existence, however, of a disordered belief upon some extraneous point, having no connection with the subject of a settlement, is not fatal to the deed. *Morrison* v. *Maclean's Trs.*, 1862, 24 D. 625; 34 J. 311.

27. Capacity — Reduction of Deed — General Averment.—In a reduction of a deed *ex capite furoris* brought about twenty years after the death of the granter, who had acted upon it for thirteen years, *held* that a general allegation of idiotry was not relevant. *Moodie* v. *Stewart*, 1730, 1 Pat. 20.

28. Capacity—Reduction of Deed—Sufficient Averments.—In a reduction of a disposition, averments which *held* sufficient to entitle the pursuer to an issue on the ground of mental incapacity. *Halliday* v. *Morison*, 1857, 19 D. 929; 29 J. 410, 431.

29. Capacity—Reduction of Deed—Lucid Interval. — Although it was found, by a verdict of insanity, that the party had had a lucid interval on a certain day within the period during which the insanity subsisted, yet as a reduction had been brought of that part of the verdict, *held* it was no bar to an action of reduction, on the ground of insanity, of a deed executed on that day. *Currie* v. *Jardine*, 1827, 5 S. 838.

30. Capacity — Reduction of Sale — Insanity of Vendor's Author.—A purchase of an estate by a party, in the knowledge that his author had derived it from an insane person, *found* not good. *Hamilton* v. *Harvey*, 1818, 2 Mur. 38.

31. Capacity—Testamentary.—It is not necessary to the execution of a testament that a person should have great powers; it is sufficient if he be capable of knowing what is done, and has the power of volition. *Campbell* v. *Davidson*, 1827, 4 Mur. 179. See *Gillespie* v. *Gillespie*, 11 Feb. 1817, F. C.

32. Capacity — Testamentary. — Settlements which were made by a person capable of disposing of her estate, but incapable of judging correctly of the effect of the deeds, *reduced* as not being her voluntary acts. *Watson* v. *Noble's Trs.*, 1827, 2 W. & S. 648. Affg. 4 S. 200.

33. Capacity — Testamentary. — A testament does not require the same degree of mind as a bargain; it is sufficient if the party be capable of judging of each part as it is presented to him. *Hogg* v. *Macgill*, 1828, 4 Mur. 449.

34. Capacity—Testamentary.—Exception taken to a judge's charge in so far as he directed the jury, that although they might be satisfied that the deceased had understood generally the meaning of a certain clause in the deed executed by him, it was competent for them to consider whether he was aware of its effect in the peculiar circumstances. *Stewart* v. *Boyes*, 1838, M'F. 27.

35. Capacity—Testamentary—Delusions. —*Held*, on a proof, that a writing alleged to constitute a bequest of money was executed at a time when the granter was labouring under insane delusions respecting his property, and was therefore ineffectual as a testamentary writing. *Maitland's Trs.* v. *Maitland*, 1871, 10 M. 79; 44 J. 48.

36. Capacity — Testamentary — Drugs — Incapacity to Understand Deed.—*Held*, on a proof, that a testator, seventy years of age, and labouring under a disease from which he died four days after the date of the execution of his general disposition and settlement, was,

from the influence of opiates, given to lessen the pain of the disease, unable to understand the nature and effect of the deed, although the draft had been prepared for and considered by him six months before. *Laidlaw* v. *Laidlaw*, 1870, 8 M. 882 ; 42 J. 525.

37. Capacity — Testamentary — Mutual Settlement — Validity quoad Estate of Sane Testator. — A brother and sister executed a mutual settlement. The brother had survived the sister, and on his death a reduction of the settlement was brought on the ground of her insanity. In applying a verdict to the effect that the settlement was not her deed, *held* that the deed remained effectual *quoad* the brother's estate. *Graeme* v. *Graeme's Trs.*, 1869, 7 M. 1062 ; 41 J. 599.

38. Capacity — Testamentary — Monomania. — *Question*, whether a father who executed a deed of settlement, excluding his eldest son, did so under the influence of monomania. *Fraser* v. *Fraser's Trs.*, 1834, 13 S. 703.

39. Capacity—Testamentary—Paralysis. —A settlement executed by a person labouring under palsy, and whose speech was greatly affected, was *sustained*. *Simpson* v. *Gardiner's Trs.*, 1833, 11 S. 1049. *Scott* v. *Jerdon*, 3 Pat. 683.

40. Capacity—Testamentary—Will Executed in Asylum—Lucid Interval—Partial Insanity. — *Held*, on a proof, that a will executed by a person in a lunatic asylum, where he had been confined on the ground of insanity for several years, and in which he died two months after the date of the will, was valid and effectual, he having recovered his reason at the time when the will was executed. *Observed*, that in judging of the validity of a deed executed by a person who has been afflicted with general insanity, the rationality of the deed itself is an important element, especially if it is framed by or on the instructions of the granter. *Question* as to the effect of partial unsoundness of mind on testamentary capacity. *Nisbet's Trs.* v. *Nisbet*, 1871, 9 M. 937 ; 43 J. 530.

41. Crime — Confinement of Insane. — Authority *granted* to transfer an insane criminal to a lunatic asylum. *Mags. of Dundee*, 1829, S. (Just.) 223.

42. Crime — Confinement of Insane — Private Custody.—A party who had committed murder while insane, delivered over to private custody, on caution to the amount of £200, to prevent his doing harm to himself or others. *Campbell*, 1830, S. (Just.) 236. Cf. *Douglas*, 1831, S. (Just.) 236.

43. Crime — Confinement of Insane — Lunatics Act, 1857. — Circumstances in which a jury declared a prisoner to have been insane at the time of committing the murder of two of her children, and the court assoilzied her *simpliciter*, and ordered her to be imprisoned, in terms of the provision contained in the 88th section of the Lunatics Act, 1857 (20 and 21 Vict. c. 71). *H.M. Advocate* v. *Clafton*, 1871, 2 Coup. 73.

44. Crime — Confinement of Insane — Subsequent Liberation.—A person who had been tried for a criminal offence, but who was found to have been insane at the time of its commission, was ordered to be confined, subject to the further orders of the court. He thereafter presented a petition for liberation, on the ground that he was now perfectly sane, and he produced medical certificates to that effect. The court, after hearing additional evidence as to his state of mind, *refused* the prayer of the petition *in hoc statu*, but, at the desire of the petitioner, ordained him to be removed from the lunatic department of the General Prison at Perth to the Crichton Institution at Dumfries. *Smith*, 1856, 2 Irv. 447, 565.

45. Crime—Declaration during Hysteria. —*Held* a relevant objection to a declaration, that when emitted the panel (a female) was under an attack of hysteria, and not fit for examination, but the objection *repelled* for want of proof. *Elder*, 1827, S. (Just.) 178 ; Syme 113.

46. Crime—Defence—Evidence—Heredity.—*Held* that evidence of the insanity of a paternal uncle of accused was inadmissible in support of a plea of insanity. *Brown*, 1855, 2 Irv. 154. Cf. *Gibson*, 1844, 2 Broun 332. *M'Leod*, 1838, 2 Swin. 88.

47. Crime—Defence—Evidence—Heredity.—In a charge of murder, where the defence was insanity at the time when the crime was said to have been committed, it was proposed by the panel to ask a medical witness "whether, in determining if the panel had an access of delirium, it is not of importance to inquire whether there was insanity among her relations." The question *held* to be incompetent. *M'Que*, 1860, 3 Irv. 578 ; 32 J. 478. *Dingwall*, 1867, 5 Irv. 466.

48. Crime—Defence—Evidence—Heredity.—Where a special defence to the effect that the panel was insane had been put in, *held* that in accordance with practice and previous decisions it was incompetent to lead evidence of hereditary insanity. *Laing or Paterson*, 1872, 44 J. 378 ; 2 Coup. 222. [See also No. 75.]

49. Crime—Defence—Form of Verdict.—Circumstances in which, in a charge of murder, a defence on the ground of insanity at the time the offence was committed, was *held* to be established by the evidence. Form of verdict and sentence applicable to such a case under the Act 20 and 21 Vict. c. 71. *Wylie*, 1858, 3 Irv. 218. *Murray*, 1858, 3 Irv. 262 ; 31 J. 31. *M'Fadyen*, 1860, 3 Irv. 650. *Bryce*, 1864, 4 Irv. 506.

50. Crime—Defence—Inspection by Jury. —Circumstances in which the court *refused* to allow the jury to inspect the head of a panel, in support of a plea of insanity, as to a mark said to have been occasioned by an injury, it not having been previously shown in evidence that this mark was there before the panel

committed the act for which he was tried. *Thomson*, 1848, J. Shaw 129.

51. Crime — Defence—Murder.—Circumstances in which, on a charge of murder, the jury convicted a panel for whom a defence on the ground of insanity had been pleaded, but recommended him to mercy on account of his general mental imbecility. *Scott*, 1853, 1 Irv. 132.

52. Crime—Defence—Nature of Insanity.—To constitute a defence to a criminal charge, insanity must be complete mental disease and not merely "moral insanity" or loss of control due to habitual intemperance or indulgence. *Smith & Campbell*, 1855, 2 Irv. 1. Cf. *Gibson*, 1844, 2 Broun 332.

53. Crime—Defence—Nature of Insanity.—To constitute a defence to a criminal charge insanity must be such that by reason of mental disease the accused "was unable to know what was the act he was committing." *Brown*, 1866, 5 Irv. 215. Cf. *Yates*, 1847, Ark. 238.

54. Crime—Defence—Nature of Insanity—Monomania.—Species of mental delusion, or monomania, which was held not to free from responsibility for a criminal act. *Whelps*, 1842, 1 Broun 378.

55. Crime—Defence—Nature of Insanity.—Statement of the law as to insanity when pleaded as a defence to a criminal charge. *Milne*, 1863, 4 Irv. 301; 35 J. 470.

56. Crime—Defence—Nature of Insanity.—If a panel when he committed the act had sufficient mental capacity to know, and did know, that the act was contrary to, and punishable by, the law, he is liable for the consequences of the act. This is not a sufficient degree of insanity to afford a defence. *Dingwall*, 1867, 5 Irv. 466.

57. Crime—Defence—Nature of Insanity—Murder or Culpable Homicide?—Delirium tremens.—Weakness of mind which is not sufficient as a defence may have the effect of reducing the crime from murder to culpable homicide. So *ruled* in a charge of murder where the panel had suffered from *delirium tremens*. *Dingwall*, 1867, 5 Irv. 466.

58. Crime — Defence — Procedure. — Procedure in a case in which the panel admitted a charge of murder, but pleaded insanity at the time the act was committed. *Smith*, 1852, 1 Irv. 77; 25 J. 7.

59. Crime—Feigned Insanity.—Procedure where a panel feigned insanity. *Cooper*, 1843, 1 Broun 617.

60. Crime—In Bar of Trial—Examination at Instance of Court.—The court *ex proprio motu ordered* witnesses to be examined as to his sanity before proceeding to trial. *Douglas*, 1827, S. (Just.) 192. *Warrand*, 1825, S. (Just.) 130.

61. Crime—Plea in Bar of Trial.—Circumstances in which the plea of insanity was *sustained*, in bar of trial. *Lees*, 1845, 2 Broun 484. *Daly*, 1846, Ark. 217. *Paterson*, 1842, 1 Broun 200. *Repelled* in *Caldwell*, 1866 5 Irv. 241. *Robertson*, 1836, 1 Swin. 15.

62. Crime—Plea in Bar of Trial.—Insanity pleaded in bar of trial, and question certified. *M'Farlane*, 1819, S. (Just.) 36.

63. Crime—Plea in Bar of Trial—Sentence.—Plea of insanity in bar of trial *sustained*. Form of sentence applicable to such a case in terms of 20 and 21 Vict. c. 71, s. 87. *Smith*, 1858, 3 Irv. 167. *Manolatos*, 1864, 4 Irv. 485. *Arnot*, 1864, 4 Irv. 529.

64. Crime—Plea in Bar of Trial.—Circumstances in which the plea of insanity, in bar of trial, was admitted to proof; but *held* that the proof, when led, was insufficient to establish the plea. *Sliman*, 1844, 2 Broun 138. *Caldwell*, 1866, 5 Irv. 241.

65. Custody — Private Dwelling — Delivery to Curator.—On the petition by a brother and the *curator bonis* of a woman who had been insane for some months, but less than a year, and who was detained by a relative in her private dwelling-house, the court *ordained* her to be delivered up to the curator for removal to an asylum, it being certified that a private dwelling-house was unsuitable, and confinement in an asylum necessary. *Gardiner* (*Christie's Curator*), 1869, 7 M. 1130; 41 J. 507.

66. Guardians Appointed in England—Title to Sue—Heritable Property.—*Question*, whether a committee appointed by the Lord Chancellor to the person and estate of a Scotswoman in a state of mental alienation, who was originally domiciled in Scotland, but after her lunacy was removed into England, had a title to raise an action for obtaining and vesting in the committee heritable security for payment of an annuity due to the lady. *Gordon* v. *E. of Stair*, 1835, 13 S. 1073.

67. Guardians Appointed in England—Title to Sue.—*Held* that persons appointed in England by the Lord Chancellor to manage the affairs of a lunatic, are not thereby entitled to maintain action in Scotland upon the lunatic's right; but as the Scottish court could not recognise the English proceedings, a power of attorney granted by the party for the management of whose affairs the appointment had been so made, was *held* to be a sufficient title to pursue in Scotland for a debt due to him there. *Bayne* v. *E. of Sutherland*, 1749, Elc. *voce* "Idiotry and Furiosity" No. 2; M. 4595; H. L. 1750; 1 Pat. 454.

68. Guardians Appointed in England—Title to Uplift Bond.—A lady took an assignation to a bond in favour of herself, her heirs and assignees, whom failing, to A and B as trustees for such purposes as she might direct by any writing. An English commission of lunacy was issued against her. *Held* that the committee of lunacy might uplift the sum in the bond and that the trustees could not object. *Rose* v. *Grant*, 1835, 7 J. 403. See also *Leith* v. *Hay*, 17 Jan. 1811, F. C.

69. Proof.—Impartial and intelligent witnesses having sworn that they considered a person capable of managing his affairs, and specified particular facts, *held* that he was not an idiot or fatuous, and incapable of understanding business, though other witnesses swore that they considered him so. *White* v. *Clark*, 1817, 1 Mur. 233.

70. Proof—Action on Fraud.—In a question as to the sanity of a person alleged to have committed fraud, proof of the fraud *admitted*. *Graham & Co.* v. *Newlands*, 1825, 3 Mur. 533.

71. Proof — Cognition — Advocation.—*Questions*, whether it be competent to cognosce a married woman at the instance of her nearest cognate; and whether a brieve of cognition may be advocated before any procedure on it. *Jardine* v. *Currie*, 8 July 1825, F. C.; 4 S. 158.

72. Proof—Cognition—Idiotry and Insanity in same Brief.—*Question*, whether both idiotry and insanity can be sent to a jury in the same brief. *Dewar* v. *Dewar & Reid*, 25 Feb. 1809, F. C.

73. Proof — Cognition — Reduction—Examination of Party by Jury.—A verdict of a jury cognoscing a person as an idiot, *reduced*, in respect mainly that the jury had not examined the party, and that the court, on examining him, was satisfied that the evidence was insufficient. *Dewar* v. *Dewar & Reid*, 25 Feb. 1809, F. C.

74. Proof—Function of Medical Witnesses—Province of Jury.—In a question of insanity, the inferences to be derived from general peculiarities in the manner, speech, behaviour, and letters of the alleged lunatic, should be drawn by the jury for themselves, and they should not be guided by the opinions formed by medical witnesses. *Morrison* v. *Maclean's Trs.*, 1862, 24 D. 625; 34 J. 311.

75. Proof—Heredity.—In a proof of insanity, it is not competent to examine witnesses with regard to the insanity of the relations of the party alleged to be insane. *Walker* v. *M'Adam*, 8 Mar. 1806, F. C.; M. "Proof" App. No. 3. See 1 Dow 177.

76. Proof—Medical Certificates.—Medical certificates as to insanity must be on soul and conscience. *Campbell*, 1830, 8 S. 307.

77. Proof—Oath of Calumny.—*Question*, whether it be a good objection to the verdict of a jury finding a person an idiot, that the parties insisting in the brief had not in their oath of calumny expressly deponed to their belief of the facts stated in the brief. *Dewar* v. *Dewar & Reid*, 25 Feb. 1809, F. C.

LYON KING AT ARMS

1. Lyon—Depute—Fees.—Circumstances in which a claim by an interim Lyon-Depute against the Lord Lyon for extra duties was remitted to a jury, and a verdict returned finding a sum due to the depute. *Clyne* v. *E. of Kinnoull*, 1832, 10 S. 836.

2. Interim Appointment.—An interim appointment to the office of Lyon King at Arms made on the Lord Advocate's application. *Lord Advocate*, 1866, 1 S. L. R. 193.

3. Powers—Coat-of-Arms—Private Act.—A clause in a private Act of Parliament bore: "Whereas the senior heir-of-line of the family has succession to all their indivisible honours, and specially the right to bear and use their arms and supporters: Be it enacted, that the said rights and arms are hereby reserved entire to such senior heir-of-line; and that the said D, being a younger branch of said family, he and his heirs-male, in taking the name of C, shall do so with a difference or mark of cadence in the arms applicable to such younger branch." D was a baronet, and the heir-male of the family. The Lord Lyon assigned to him the family arms and supporters, "with the badge of Nova Scotia on a canton" for a difference. *Held* (1) that it was not competent for the Lord Lyon to inquire whether the heir-of-line or the heir-male was entitled to the heraldic honours of the family, that question being decided by the Act; (2) that under the Act the heir-of-line alone was entitled to supporters, and it was incompetent in the Lord Lyon to grant them to the heir-male; (3) that "the badge of Nova Scotia on a canton" was not a mark of cadence, and that, to assign it as the only difference in the coat-of-arms, was not a sufficient compliance with the statute. *Cuninghame* v. *Cunyngham*, 1849, 11 D. 1139; 21 J. 437.

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1. Constitution — Deed Executed after Marriage.—In conformity with the opinion of English counsel, *held* that a deed executed in England four weeks after a marriage formed part of the marriage settlement, and was irrevocable. *Ramsay* v. *Cowan*, 1833, 11 S. 967.

2. Constitution — Document of "Proposals." — A document denominated "proposals," with reference to a contemplated marriage, given to a woman's brother, but not shown to her or her father, *held* not to be equivalent to a marriage-contract (although the marriage took place). *Campbells* v. *M'Glashan*, 5 June 1812, F. C.

3. Constitution — Letter. — Terms of a letter written by a father in reference to the marriage of his son, *held* to import an obligation to invest a sum of £4000, so that the interest might yield an annuity to the lady, but only after her husband's death. *Rennie* v. *Campbell*, 1831, 9 S. 714.

4. Constitution — Letter — No Formal Deed.—A father, after the marriage of his eldest daughter, without contract, wrote to her husband's father, that he was willing to settle £2000 on them, payable at his death, and in the meantime to advance the interest, or £100 per annum, as an addition to their income; and the £100 was paid yearly till his death, but without special reference to the £2000. He executed no deed in terms of his letter. Subsequently, in the contracts of marriage of his younger daughters, he bound himself to pay each of them £2000; and he died without sufficient funds to satisfy the whole. *Held* that the letter could not be regarded as equivalent to a postnuptial marriage-contract, and the eldest daughter could not compete with the others. *Villiers* v. *Connell*, 1833, 12 S. 19.

5. Constitution—Marriage-Contract or Mutual Will? — Jus crediti — Trust. — By mutual deed proceeding on the narrative that they had no marriage-contract, spouses disponed a property to themselves in liferent and on their death to a trustee who was directed to convey to their son. *Held* (1) that this deed was equivalent to a marriage-contract, and (2) that their son had a *jus crediti* in the subjects. *Hyslop* v. *Small*, 15 Nov. 1821, F. C.; 1 S. 137.

6. Construction—Clause of Return—Defeasance.—A clause of return in a conveyance by a father in the contract of marriage of one of his daughters, *held* to be gratuitously defeasible by an heir of the marriage. *Observations* on such clauses. *Mackay* v. *Campbell's Trs.*, 1835, 13 S. 246.

7. Construction—Conditional Obligation. —A party in his marriage-contract came under an obligation, conditional upon his succeeding (*a*) to the whole of certain estates, or (*b*) to a part of the yearly value of £3000. He succeeded to the whole. *Held* that he was not relieved from the obligation by showing that the whole yielded less than £3000 a year.

Erskine v. *Williams*, 1843, 6 D. 226; 16 J. 141.

8. Construction—Conditional or Absolute Provision?—By a postnuptial contract the husband conveyed the liferent of his whole property to the wife in case she survived him; and upon her death the whole subjects, etc., liferented by her "are hereby conveyed to the children of the marriage." *Held* that the conveyance to children in the postnuptial contract was dependent on the wife's survivance, and did not take effect as she predeceased the husband. *Somerville's Trs.* v. *Dickson*, 1867, 5 M. (H. L.) 69; 39 J. 421.

9. Construction—Date of Payment—Interest.—The father of one of the parties to a postnuptial contract bound himself to pay them a sum, the term of payment not being mentioned. *Held* that interest on this sum was due, not from the date of the contract, but from the first term after the death of the father. *Berry* v. *Henderson's Trs.*, 1836, 14 S. 1008.

10. Construction—Disposition in Security or in Implement?—In a marriage-contract the husband undertook to provide £1000 and invest it for his wife in liferent after his death; and in security he disponed heritable subjects to himself and his wife conjunctly and for her liferent after his death. The titles of the subjects were taken in these terms. *Held* that this disposition was in security, not in implement, of his obligation; and that the wife was not liferentrix of the subjects after his death, but must account for the rents after deduction of the interest of the £1000. *Lambe* v. *Chapman*, 1834, 12 S. 775.

11. Construction—Failure of Issue—Alimentary Provision—Payment to Surviving Spouse.—By marriage-contract a husband disponed £5000 to trustees for payment to the longest liver of himself and his wife, for his and her liferent only, and to their children in fee; whom failing, to the husband. The wife and her father disponed £2500 to trustees for the joint liferent of the spouses, and "as an alimentary provision for the support" of the survivor and the children, and the fee was given to the children, and failing these it was to be held for the wife. The husband died without issue, leaving his whole property to his wife. *Held* that the widow was entitled (1) to the £5000 as she was universal legatee of her husband and (2) to the £2500 as the provision as to its being alimentary was limited to the subsistence of the marriage. *Martin* v. *Bannatyne*, 1861, 23 D. 705; 33 J. 347.

12. Construction — Forfeiture. — By a marriage-contract a share of rents was made payable by trustees to the husband till he should do or suffer any act or thing whereby the same would cease to be receivable by him. *Held* that the forfeiture was not incurred by the fact that a creditor of the husband arrested the rents (without a furthcoming), seeing that the husband's right to receive the rents did not thereby cease, but was merely suspended. *Campbell's Exrx.* v. *Clinton's Trs.*, 1866, 4 M. 858; 38 J. 447.

13. Construction—Funds — Universitas.—Where a *universitas* is given to a wife and children in a marriage-contract, the husband remains the owner of the property, and gratuitous alienations by him will be sustained unless they are a fraud on the contract. *Champion* v. *Duncan*, 1867, 6 M. 17; 40 J. 17.

14. Construction—Funds—Wife's Estate — "Belong" — Creditors' Claims. — By a marriage-contract trustees were directed to pay the interest of the sums settled (which came from the wife) to her and the capital on the death of the spouses to the children. It was declared that the sums should "belong" to the wife exclusive of the *jus mariti*. *Held* that notwithstanding this declaration the wife's creditors could not carry away the sums from the marriage-contract trustees. *Carphin* v. *Clapperton*, 1866, 38 J. 541.

15. Construction — Funds Carried. — Terms of an antenuptial contract under which *held* that a child had right to a proportional share of £1000, therein provided, but that the rest of the father's estate did not fall under the contract. *Fraser* v. *Fraser's Trs.*, 1835, 14 S. 174; 11 Fac. 145.

16. Construction—Funds Carried.—*Held* that a conveyance in a marriage-contract of heritable and moveable subjects "generally and particularly before described" was not to be limited to certain small portions of property which had been in fact generally and particularly before described, but comprehended the whole subjects pertaining to the party at his death. *M'Gowan* v. *Jaffray*, 1842, 4 D. 1546; 14 J. 620.

17. Construction—Funds Carried—Acquirenda.—In her marriage-contract a lady conveyed "all and sundry goods, gear, debts . . . and all rights that she may succeed to or that may devolve upon her . . . and all that shall pertain to her during the existence of the said marriage." *Held* that this conveyance did not include rights acquired by the lady after the dissolution of the marriage. *Wilson* v. *Richardson*, 25 Feb. 1817, F. C.

18. Construction—Funds Carried—Acquirenda.—By postnuptial contract spouses settled on themselves, in conjunct fee and liferent, allenarly, and the issue in fee, all property then belonging, "or that shall at any time hereafter" belong, to us, or either of us. After the marriage was dissolved by the husband's death, a legacy became payable to the wife. *Held* that the legacy did not fall under the postnuptial contract. *Aytone* v. *Moir*, 17 Feb. 1814, F. C.

19. Construction—Funds Carried—Acquirenda.—By antenuptial contract a lady conveyed to her husband all sums, etc., to which she might succeed, or might conquest or acquire during the marriage. *Held* that this carried to the husband a provision which vested in the wife, but was not payable till

after the death of the granter (who survived her). *Napier* v. *Orr*, 1864, 3 M. 57 ; 37 J. 33.

20. Construction—Funds Carried—Conquest. — Legacies to a wife falling to the husband *jure mariti*, *held* not to be conquest under a marriage-contract by which she was provided to the liferent of the half of the conquest acquired during the marriage. *Rae* v. *Fraser*, 23 Jan. 1810, F. C.

21. Construction—Funds Carried—Conquest — Leases. — *Held* that a clause in a marriage-contract conveying all heritages or moveables, which should be conquest and acquired during the marriage, included leases (although secluding executors and assignees) of which the term of entry had arrived before the death of the tenant, but not those of which the entry had not arrived. *Duncan* v. *Rae*, 15 Feb. 1810, F. C. See *Sutherland* v. *Jeffrey*, 1805, Hume 133.

22. Construction—Funds Carried—Conquest.—A provision in a marriage-contract of what the husband might conquest during the marriage *held* not to embrace a house purchased during the marriage, as it was bought with funds which his wife had brought him on the marriage. *Fairie* v. *Watson*, 1763, 1770, 2 Pat. 213.

23. Construction — Funds Carried — "Conquest."—In a marriage-contract a lady conveyed all she might "conquest or acquire" during the marriage. *Held* that "conquest" was not used in its technical sense, and that the conveyance included what the lady inherited from her father. *Diggens* v. *Gordon*, 1867, 5 M. (H. L.) 75 ; 39 J. 434 ; L. R. 1 Sc. Apps. 136.

24. Construction — Funds Carried — Exclusion of Marriage-Contract Trustees. —By a marriage-contract, to which the lady's father was a party, to the effect of binding himself to settle a sum upon her, the spouses became bound that all property of which the wife might become possessed during the marriage should be settled in trust. The father, by a codicil, directed his trustees to convey the estate of M. to his widow in liferent, and to his daughter in fee, exclusive of her husband's *jus mariti*, and also to convey to his daughter one-fourth of the residue of his estates, free and unfettered by her marriage settlement. *Held* that neither of these provisions fell under the daughter's marriage-contract trust. *Thurburn's Trs.* v. *Maclaine*, 1864, 3 M. 134 ; 37 J. 41.

25. Construction—Funds Carried—Jus mariti.—Spouses in their marriage-contract bargained that the whole estate belonging to them at the dissolution of the marriage should be divided and one-half should be at the disposal of the survivor, while, as to the other half, he or she should have a liferent and the children the fee. *Held* that, as this only touched the funds belonging to them at the dissolution of the marriage, the whole funds in the meantime fell under the husband's *jus mariti*. *Jameson* v. *Strachan*, 1835, 13 S. 318.

26. Construction — Funds Carried — Savings.—The special terms of a contract construed. The question was whether savings (during the life of an heir called before the granter of the obligation in the marriage-contract) did or did not fall under the contract. *Spalding* v. *Small*, 1821, 1 S. 123.

27. Construction — Funds Carried — Universitas. — A husband and wife in a marriage-contract conveyed to each other the liferent of all estate "pertaining and belonging or that shall pertain and belong to them, or either of them, at the dissolution of the marriage"; and provided that the fee should at the death of the longest liver be divided equally between the husband's and wife's heirs and executors. The husband effected after marriage an insurance on his wife's life, payable after her death, and thereafter assigned it gratuitously. *Held* in a competition between the assignees and the wife's executors, that as the husband had an income, not included in the marriage-contract, sufficient to cover the premiums paid, the policy did not fall under the marriage-contract. *Champion* v. *Duncan*, 1867, 6 M. 17 ; 40 J. 17.

28. Construction — Liferent on Survivance—Provision to Wife—Jus crediti or Right of Succession?—By antenuptial contract a husband conveyed land to his wife in liferent in case she should survive him and to the children in fee. *Held* (1) that the wife's right was conditional on her survivance ; and (2) that the children had no *jus crediti* but merely a right of succession. *Findlay* v. *M'Intyre*, 1849, 12 D. 325 ; 22 J. 78.

29. Construction — Object—"Children" —Power of Distribution.—A provision of conquest to "children" is a provision to all the children ; and the fact that the father took heritage which he had conquered to himself and "his heirs" is not evidence that he intended to exercise his implied power of distribution in favour of the eldest son. *Wilson* v. *Wilson*, 1811, Hume 534.

30. Construction — Object—"Children." —A destination to the "child or children" of a marriage carries lands to the children generally, and not to the heir of the marriage. *Waddell* v. *Pollock*, 1828, 6 S. 999 ; 3 Fac. 1017.

31. Construction—Object—"Foresaids." —In a marriage-contract, provisions were made to the wife and children *nascituris*, declaring that these provisions "in favour of the said Mrs. Ann Mudie and her foresaids" are in full contentation of all that she or they can ask, etc. *Held* that "her foresaids" applied to her next-of-kin, and did not include children to the effect of excluding their claim of *legitim.* *Stephen* v. *Straiton*, 1803, Hume 286.

32. Construction — Object — "Heir"—Conquest.—By a postnuptial marriage-contract, the whole property of the spouses (which was conquest), was disponed in liferent to the longest liver, and in fee to grandchildren, the heirs of their bodies and their assignees, whom

failing, one-half to the heirs whatsoever of each of the spouses. A grandchild survived both spouses, but died in pupillarity. *Held* in a competition between the heir of line and the heir of conquest of the husband, each of whom claimed as heir of provision to the succession to the one-half of the property, that the character of the property as heritage or conquest in the person of the disponer was immaterial, and that the heir of line was entitled to succeed. *Opinion*, that the heir of conquest would have been entitled, if the first part of the destination had not come into operation. *Robison* v. *Robison*, 1859, 21 D. 905; 31 J. 500.

33. Construction — Object — "Heirs"—Marriage-Contract—Provisions to Children—"Heirs of the Marriage."—A special provision, in a marriage-contract, of money to be laid out on land or other security, and also of conquest in lands, heritages, fishings, sums of money and others, to the *heirs* of the marriage, goes to all the children, and not to the eldest son only. *Allardice* v. *Smart*, 1721, Robert. 399.

34. Construction—Object—"Heirs and Bairns"—"Children."—*Held* that a destination of heritable property to "heirs and bairns" carried the estate to the heir in heritage. *Observed*, that a destination to "children and bairns" would carry the estate to all the children. *Duncan* v. *Robertson*, 9 Feb. 1813, F. C. *Herries* v. *Herries*, 1806, Hume 528.

35. Construction—Object—"Heirs and Bairns"—Conquest.—*Held* that "heirs and bairns" used in a conveyance of conquest meant the whole children, not the heir alone. *Ponton* v. *Trotter*, 1832, 4 J. 401.

36. Construction—Obligation—No Disposition in Deed.—By an antenuptial contract it was provided, that (failing children of the marriage) on the death of the survivor, the whole property "shall divide in two parts" in favour of certain persons. *Held* that although the deed contained no proper dispositive or direct obligatory words, yet a valid obligation had been constituted, binding the heir of the husband to make up titles, and grant conveyances of the heritable as well as of the moveable property. *Reid* v. *Young*, 1838, 16 S. 363.

37. Construction—Obligation to Educate Children.—*Held* that an obligation by a father in his marriage-contract to provide for the education and establishment in the world of the children related only to the period of subsistence of the marriage and conferred no right after his death. *Campbell's Trs.* v. *Campbell*, 1862, 24 D. 1321; 34 J. 676.

38. Construction—Obligation—Payment to Heirs of Predeceasing Spouse.—Spouses by mutual contract disponed their whole property as at the dissolution of the marriage to the survivor, declaring that on his or her death one-half of the then value of the subjects should be paid by his or her heirs to the heirs of the predeceaser. The husband survived, married again, and executed a second marriage-contract. *Held* that his wife and son were on the husband's death bound to pay the one-half to the representatives of the first wife. *Wood* v. *Fairley*, 3 Dec. 1823, F. C.; 2 S. 549.

39. Construction—Provision to Children—Implied Condition.—*Held* that provisions to daughters in a marriage-contract were conditional on there being no failure of male issue of the contractors. *His Majesty's Advocate* v. *Drummond*, 1753, 6 Pat. 692.

40. Construction—Provision to Wife—Postnuptial.—Terms of a postnuptial contract which the court construed as giving the wife an absolute right in a provision of a sum of money in the event of her surviving her husband and there being no issue. *Dill* v. *Houston's Trs.*, 1841, 2 Robin. 298. Revg. 2 D. 214; 15 Fac. 206.

41. Construction—Validity.—A marriage-contract, although absurd and inconsistent in some of its clauses, yet, being clear in the destination clause, *sustained*. *Murray* v. *Carlyle*, 1770, 6 Pat. 779.

42. Destination — Construction. — A destination in a marriage-contract to the heirs-male of the marriage, whom failing, the heirs-male of any other marriage, whom failing, heirs-female of the marriage, whom failing, the heirs-female of any other marriage, *held* not to be altered by a later clause providing that the eldest son and the descendants of his body should always succeed, preferably to the younger sons and their descendants, so as to admit a daughter of the eldest son and his issue-male failing, in preference to that eldest son's second brother. *Grahame* v. *Grahame*, 1825, 1 W. & S. 353. Affg. 20 June 1816, F. C.

43. Destination — Construction.— A, on marrying B, conveyed his estate by an antenuptial contract "to the heirs-male of the marriage, and to the heirs and assignees whatsoever of the said heir-male in fee"; whom failing, to the eldest daughter of the marriage. A died, leaving several sons and four daughters. His eldest son succeeded, but he and the other sons died without issue. *Held* that the clause imported that the daughters as heirs of the eldest son were preferable to the eldest daughter claiming as heir of provision. *Richardson* v. *Stewart*, 1824, 2 Shaw's App. 149. Affg. 5 July 1821, F. C.; 1 S. 105.

44. Destination — Construction. — In a marriage-contract (containing the fetters of an entail) lands were destined in the dispositive clause to heirs-male of the marriage, whom failing, heirs-male of any other marriage, whom failing, heirs-female of the marriage. The procuratory of resignation provided that the eldest son and his descendants should always succeed preferably to the younger sons and their descendants. *Held* that the clause in the procuratory did not alter the destination in the dispositive clause so as to entitle the daughter of the eldest son (his male issue failing) in preference to the eldest son's next brother. *Observed*, that "descendants" is a

flexible term. *Observations* as to the construction of deeds where a principal and a subordinate clause are inconsistent. *Graham* v. *Graham*, 1825, 1 W. & S. 353. Affg. 20 June, 1816, F. C.

45. Destination—Construction—Heirs.—A father, in implement of an obligation in his daughter's marriage-contract, executed an entail of his estate on her "and the heirs-male of her body" of her then marriage, "and the heirs whatsoever of the bodies of the said heirs-male"; whom failing, a similar destination under any other marriage. *Held*, in a question between two daughters of an heir-male of the marriage claiming as "heirs whatsoever of the bodies of the said heirs-male," and a younger brother of that heir-male claiming as the heir-male of the marriage, that the daughters were preferable. *Lockhart* v. *Macdonald*, 1840, 2 D. 377; 15 Fac. 433.

46. Destination—Evacuation.—An estate was, by a party infeft on a destination in favour of heirs-male, settled in a marriage-contract upon the heirs-male of the marriage; whom failing, upon the heirs-male of the body of the husband by any other marriage; whom failing, upon the heirs-female of the marriage. *Held* that the heir-male of the second marriage, who succeeded to the estate, and served under the old investiture, might gratuitously dispose of it to the exclusion of the heirs-female of the first marriage. *Edgar* v. *Maxwell or Johnston*, 1742, 1 Pat. 334. Affg. M. 3089; Elc. "Service" No. 2.

47. Destination — Evacuation. — In her marriage-contract a wife's lands were settled on the issue and failing issue on her nearest heirs. *Held* that the wife could after the dissolution of the marriage without issue convey away the lands from her heirs. *M'Leod* v. *Cunninghame*, 1846, 5 Bell 210. Affg. 3 D. 1288; 16 Fac. 1381.

48. Legacy—Right of Trustees to Payment.—In a will shares of residue was made payable to granddaughters on marriage or at twenty-three, the shares being for the benefit of them and their children. *Held* that the testator's trustees could not refuse to pay a daughter's share to her marriage-contract trustees, on the ground that the provisions of the marriage-contract were inconsistent with those of the will. *Scott's Trs.* v. *Stack*, 1865, 3 M. 950; 37 J. 499.

49. Obligation by Spouse's Father—Constitution.—The fact that a father signs a marriage-contract along with his daughter (a minor) involves no obligation on him. *Wilson* v. *Richardson*, 25 Feb. 1817, F. C.

50. Obligation by Spouse's Father—Contingency—Competition with Creditors.—A party bound himself, by his son's marriage-contract, to provide £4000 to a daughter of the marriage. Thereafter, on a daughter being born, he entailed his estate on his son, and by a relative settlement provided that £500 per annum should be set aside out of the rents of the estate, and accumulated so as to secure the £4000 which was to be liferented by the son, and thereafter paid to the daughter, if she should not succeed to the entailed estate. *Held* that the daughter was entitled to have the rents accumulated and the provision secured in terms of the settlement as against her father's creditors. *Cochran* v. *Paterson*, 1824, 3 S. 109. See 4 S. 234; 7 S. 226.

51. Obligation by Spouse's Father—Deed in fraudem.—A father *mortis causa* made provisions to his younger children, and disponed his estates to his eldest son, subject to these burdens. He thereafter bound himself, in his eldest son's contract of marriage, to leave his whole estates to him, under burden of the provisions "made by him for his younger children." He subsequently advanced to them large sums during his life, and granted to them additional provisions, partly of a permanent nature, and partly payable at his death. *Held* on the construction of this clause (1) that the exception applied to *mortis causa* provisions, and that the father was not barred from advancing sums to the younger children during his life; but (2) that all provisions of a permanent nature, or payable after his death, were *in fraudem* of the contract, and were to be imputed in extinction of the original provisions, and *quoad ultra* were ineffectual. *Miller* v. *Miller*, 1822, 1 Shaw's App. 308. The judgment construed and applied by the Court of Session in 12 S. 31, 708.

52. Obligation by Spouse's Father — Implement—Beneficium competentiæ.—In a question with his grandchildren, claiming under their father's marriage-contract, to which the grandfather had been a party, *held* that the grandfather was not entitled to retain a competency for himself before fulfilling his obligations in the marriage-contract. *Hogs* v. *Hogs*, 1750, 1 Pat. 469; Elc. *voce* "Beneficium Competentiæ," M. 4862 and 1390. See also *Hardie* v. *Hardie*, 1 July 1813, F. C.

53. Obligation by Spouse's Father — Implement—Entail.—An heir of entail in possession bound himself, in his daughter's marriage-contract, to pay to trustees a certain provision at the first term after his death. Under the entail he could not do so without first clearing off a provision made by a former heir of entail. *Held* bound to clear off that burden. *Sinclair* v. *Duffus*, 1840, 2 D. 356; 15 Fac. 356.

54. Obligation by Spouse's Father — Implement — Legacy — Declaration as to Marriage-Contract.—*Held* that a declaration in a settlement that the share of residue falling to one of the truster's sons should be held by the trustees for behoof of that son's marriage-contract trustees, and should be in full of all claims against the truster under the son's marriage-contract, did not import a legacy of the share to the marriage-contract trustees for behoof of the spouses, but only gave these trustees a security for the due implement of the obligations prestable by the

truster in their favour. *Brown's Trs.* v. *Brown*, 1868, 40 J. 145.

55. Obligation by Spouse's Father—Incidence — Relief — Construction. — Lord Galloway, in the marriage-contract of his son William, undertook to provide £5000 to the children of the intended marriage at majority or marriage; but if William or his heirs should succeed to the estate of X, then he or the heir in possession was to charge it with the said sum. William's grandson succeeded to X after William's death and after the sum had been paid with money charged on Lord Galloway's estate. In an action at the instance of Lord Galloway's heir against William's grandson, *held* (1) that William's obligation was not confined to the event of the succession to X opening in his lifetime; (2) that Lord Galloway's obligation was superseded when William or his heir succeeded to X; and (3) that there being a personal obligation undertaken by William, his grandson, as his representative, was bound to relieve the Galloway estates of the charge, although the terms of the entail of X prevented the sum being raised out of X. *E. of Galloway* v. *Stewart*, 1865, 3 M. (H. L.) 73; 37 J. 484.

56. Obligation by Spouse's Father — Onerosity.—A son, in contemplation of his marriage, received from his father an obligation for an annuity during his father's life. *Held*, in a question with the father's creditors, that the obligation was onerous. *Scott* v. *Ross*, 1822, 1 S. 481.

57. Obligation by Spouse's Father — Onerosity—Competition with Legatees.—A father, by the antenuptial contract of his son, conveyed to the spouses in liferent, and their children in fee, a sum payable after his death, which the son was taken bound to invest for his children at the sight of trustees, at whose instance execution was to pass. The capital was not paid up for some time after the father's death; and in the meantime the interest was paid by his trustees to the son. There was a deficiency in the father's estate. *Held*, in a question with beneficiaries under the father's trust deed, that the payments of interest to the son were properly made, as the liferent was an onerous provision. *Miller's Trs.* v. *Miller*, 1848, 10 D. 765; 20 J. 268.

58. Obligation by Spouse's Father — Onerosity — Preference of Provisions as against Legacies.—In an antenuptial contract, the wife's father became bound to pay the spouses a sum at his death; and it was declared that "this contract is not to injure the settlements made by me (the father) in any way." *Held* that this declaration did not impair the onerosity of the contract so as to reduce the provision to the nature of a bequest; and therefore that the marriage-contract provision was a debt preferable to testamentary bequests. *Miller's Trs.* v. *Miller*, 1848, 10 D. 765; 20 J. 268.

59. Obligation by Spouse's Father — Provision to Wife—Incidence of—Satisfaction.—A father, after entailing an estate, conveyed his unentailed property to trustees for payment of debts, family provisions, etc., and became bound, in his son's marriage-contract, along with him, to pay his widow, in case of survivance, an annuity of £500. The son, on succeeding to the entailed estate, granted an annuity of £600 to his widow, declaring it to be in addition to that provided by the marriage-contract. *Held* that the annuity provided by the marriage-contract was payable by the father's trustees out of his property, and was not satisfied by that provided out of the entailed estate. *Cruickshank* v. *Cruickshank*, 1845, 4 Bell 179; 17 J. 326. Affg. 5 D. 733; 15 J. 311, 332.

60. Obligation by Spouse's Father — Tocher — Competition with Creditors. — Under an antenuptial contract the father of the lady bound himself to pay to the husband and her the interest of £1000 in liferent, by termly payments, at Martinmas 1804, etc., and the capital to the children of the marriage after his death. *Held*, in a competition between the husband and the creditors of the father, that the husband was entitled to be ranked as a creditor. *Blackburn* v. *Oliver*, 29 May 1816, F. C.

61. Postnuptial Provisions—Competition with Creditors.—Provisions to a wife and children, under a postnuptial contract, made by a person then solvent, *sustained* in a competition with his creditors. *Jeffrey* v. *Campbell*, 1825, 4 S. 32.

62. Postnuptial Provisions—Competition with Creditors.—A postnuptial contract *held* good as against creditors. *Morrice* v. *Sprot*, 1846, 8 D. 918; 18 J. 248.

63. Postnuptial Provisions—Competition with Creditors—Funds Carried.—Mrs. F's father having died in 1851, she and her husband in 1852 executed a postnuptial contract whereby her husband bound himself to settle £2000, and Mrs. F conveyed all goods, etc., and in particular all interest in her father's estate, to trustees for herself and her husband for life, and for the children (some of whom were then in existence) in fee. The fund was declared alimentary. The husband was solvent in 1852, but in 1860 became bankrupt. *Held* (1) that Mrs. F's *legitim* had not vested in the husband, but was assigned by the contract to the trustees; and (2) that the contract being executed when the husband was solvent, and being reasonable, was binding on his creditors as regarded the capital sum. *Question*, whether the husband's life interest in the *legitim* fund was validly assigned to the trustees. *Miller* v. *Learmonth* (H. L.), 1870, 42 J. 418. Affg. 1 S. L. R. 111.

64. Postnuptial Provisions — Deed in fraudem.—By postnuptial contract a husband conveyed to his second wife in liferent, and his children by her in fee, the whole property belonging or which should belong to him. *Held* that a bond granted by the husband to a child by his first marriage in compromise

of a possible claim she might have against him as her curator was not *in fraudem* of the postnuptial contract. *Colquhoun* v. *M'Kay*, 1826, 4 S. 692; 1828, 6 S. 875; 3 Fac. 923.

65. Postnuptial Provisions — Father's Powers—Child of First Marriage—Interest. —By postnuptial contract with a second wife a father undertook to invest a sum for her in liferent, and for the children of that marriage, and for A, the child of the first marriage in fee. His second wife predeceased, and also A, who left issue. The father disponed his whole property to his brother. *Held* (1) that A's issue were entitled to a share of the capital and that this right was not defeated by the disposition to the father's brother; and (2) that interest was due from the wife's death. *Wilson* v. *Niblie*, 13 Jan. 1825, F. C.; 3 S. 430.

66. Postnuptial Provisions — Obligation to Bequeath—Implement.—Spouses executed a postnuptial settlement containing provisions in favour of the survivor and their children, with an obligation on the husband, in the event of his entering into another marriage, "to set aside one-half of my estate, to be divided among the children of my present marriage after my death." The husband married again. *Held* that he was not bound to make a special investment of one-half of his property for the security of his children by the first marriage, nor to restrict his use to a liferent. *Greenoak* v. *Greenoak*, 1870, 8 M. 386; 42 J. 178.

67. Postnuptial Provisions — Power to Alter—Second Marriage.—By postnuptial contract spouses conveyed to trustees their whole estates as at the death of the first deceaser for the survivor in liferent and the children in fee. *Question*, whether on the death of the wife the husband could by postnuptial deed dispone part of that estate to his second wife and others. *Guthrie* v. *Cowan*, 1846, 9 D. 124; 19 J. 38.

68. Postnuptial Provisions — Power to Alter — Children's Rights. — By mutual settlement the spouses conveyed their whole property to each other, reserving a power jointly to alter. The wife's estate was conveyed to her husband in liferent and to her daughter by another marriage in fee. The wife on her husband's death made up title under the settlement to one-half of heritage belonging to her husband, and purchased the other half and then gratuitously conveyed away the whole from her daughter. *Held* that the destination to the daughter was not contractual; that the daughter had no *jus crediti*; and that the wife's conveyance was valid. *Lang* v. *Brown*, 1867, 5 M. 789; 39 J. 407.

69. Provision to Children—Abatement—Residue.—A father, by his marriage-contract, destined his estate to his eldest son, subject to provisions of £8000 to his younger children, and with a power to augment them. By a subsequent trust deed he augmented these provisions, directing the residue to be paid to his eldest son, and that the provisions of such children as might die before majority should fall into the residue so to be conveyed to the eldest son. He afterwards contracted debts, so that after his death the whole free estate did not exceed £6000. *Held* that the heir had no claim in competition with the younger children; and that the shares of children dying in minority lapsed into the general fund, and did not fall to the heir. *Russell* v. *Russell*, 1835, 13 S. 551.

70. Provision to Children—Abatement—Heir's Liability—Discharge.—*Held* that the heir taking under a marriage-contract was bound to pay to another child the full value of a provision made to her in that contract, and that the fact that the estate was of smaller value than anticipated did not entitle the heir to demand that the provision should be proportionally reduced. *Held* also that the heir was entitled to be relieved of a sum in favour of the other child, which he had granted in ignorance of the marriage-contract and in implement of a reducible deed granted by his father. *Leslie* v. *M'Leod*, 1870, 8 M. (H. L.) 99; 42 J. 489; L. R. 2 Sc. App. 44.

71. Provision to Children—Amount—Deduction from.—A father executed a bond of provision in favour of a younger son, A, and, on receiving a discharge of it, granted a bond for the same sum to a trustee for A's creditors. The father afterwards discharged all debts due to him by A, and declared that they were not to form burdens on his provision. Before these bonds were granted, the eldest son entered into a contract of marriage, in which the father undertook obligations in that son's favour, which were materially encroached upon by provisions afterwards made in favour of the younger children. In an action between the eldest son and the younger children, the House of Lords decided that onerous obligations contracted by the father to third parties for behoof of the younger children, subsequent to the eldest son's contract of marriage, should stand good, and be taken *in computo* of prior provisions in their favour; but that all gifts or payments of money, not of the nature of permanent provisions, during the truster's life, should form no deduction from the provisions granted prior to the marriage-contract. *Held* that the sum contained in the bond to the trustee was of the nature of a gift, and therefore was not to be deducted. *Miller's Trs.* v. *Miller*, 1848, 10 D. 765; 20 J. 268.

72. Provision to Children—Amount—Equality between Children.—In equalising provisions to children in terms of the father's obligation, where one of them had during the life of the father received payment of interest, the court *allowed* to the other simple interest for the same period, but *refused* interest on interest. *M'Queen* v. *Nasmyth*, 1832, 10 S. 470; 7 Fac. 343.

73. Provision to Children—Amount—Number of Class—Incidence of Provision. —A father by his marriage-contract and sub-

sequent bond of provision gave £14,000 to his seven children. *Held* (1) that this was not a provision of £2000 to each child but a provision to the whole class, and that it was not liable to reduction if the number of the children was reduced by death; and (2) that an entailed estate was liable to be attached for payment of the provision, but only after the father's executor had been discussed. *Burnett* v. *Burnett*, 1854, 16 D. 780; 26 J. 370.

74. Provision to Children—Amount—Equality between Children—Jus crediti.—A father bound himself, in his second son's marriage-contract, to pay him £1000, and, further, to "put him on an equal footing" with any of his younger children, by paying or bequeathing to the son the difference between that sum and any larger sum he might give or bequeath to any of them. By the subsequent marriage-contract of a daughter, he bound himself to pay her an annuity of £200 for life, commencing with her marriage; and in his settlement he directed his trustees to divide the reversion of his estate among his children, on the death of his wife, to whom he gave a liferent of the whole. *Held* (1) that the son was a creditor of his father under his marriage-contract, to the effect of being immediately put on a footing of equality with his married sister; (2) that the bequest to him of a share of the reversion, upon the death of his mother, the liferentrix, was not implement of the father's obligation; and (3) that, to put him on an equality with his sister, he was entitled to draw immediately a sum equal to the amount of the sister's annuities already paid, and prospectively to the amount of such further annuities, or share of reversion, as she might receive. *Threshie* v. *Threshie's Trs.*, 1845, 7 D. 403; 17 J. 200.

75. Provision to Children—Amount—Sliding Scale.—A marriage-contract provided that, in the event of there being only one child of the marriage, £5000 should be paid to it, and if three or more, £10,000 among them, payable at marriage or majority, but not till after the father's death; and there was a destination-over in the case of any child dying before his share was payable to the surviving children. Three children were born, two of whom died in infancy. *Held* that the surviving child was entitled to the whole provision of £10,000. *Broomfield* v. *Campbell*, 1835, 14 S. 51; 11 Fac. 36.

76. Provision to Children—Bond—Amount—Deductions.—*Held* that a bond of provision granted by a brother to two sisters, in satisfaction of a provision by their father, and in full of *legitim*, was onerous; and that in a question with the heir to the estate over which they were granted as to arrears of interest, the sum thereof was not to be diminished in consequence of the sisters having been alimented by their mother while living in family with her, but that their aliment while living in family with their brother, the granter, fell to be deducted. *Forbes* v. *Gordon*, 1760, 2 Pat. 43.

77. Provision to Children—Bond—Conditions—Construction.—By a marriage-contract, and two other deeds executed after marriage, spouses destined certain provisions to their children unconditionally. By a subsequent bond of provision and codicils, the previous deeds were narrated, and each of the younger children was provided in a larger sum, but on certain conditions; and it was provided that any sums received under the earlier deeds should be reckoned part of the larger sum. *Held*, on a construction of the bond of provision, that the intention of the granters was, that the conditions attached to the sums conferred by the bond should also attach to the provisions under the former deeds, and that the beneficiaries could take under the bond of provision and codicils only on the footing that the conditions imposed by these deeds applied to the whole provisions in their favour. *Harveys* v. *Harvey's Trs.*, 1860, 22 D. 1310; 32 J. 613. [See 1 M. 345; 35 J. 211.]

78. Provision to Children—Bond—Onerous or Gratuitous?—Bankruptcy—Illegitimate Children.—A bond was granted by a father when solvent to the mother of his illegitimate children, containing provisions to herself, and, on her death, to the children, and also a further provision to them on his own death. The bond was delivered, and he became bankrupt. *Held* that it was onerous, and effectual in competition with creditors. *Ballantyne* v. *Dunlop*, 17 Feb. 1814, F. C.

79. Provision to Children—Bond—Competition with Heir — Satisfaction. — *Held* that a younger son who had obtained a bond of provision from his father, in virtue of a power under a contract of marriage, was preferable to his elder brother, who had ratified the bond; and that money advanced by the father for the support of the younger son was not to be imputed in extinction of the bond. *Erskine* v. *Erskine*, 1827, 5 S. 696.

80. Provision to Children — Child's Right to Dispone.—*Held* that the heir of a marriage who survived his mother (in whom the fee of the lands had been vested under the destination) but predeceased his father was entitled gratuitously to dispone the lands, although he thereby defeated a substitution in favour of his father. *Murray* v. *Blair*, 1739, 1 Pat. 251; Elc. *voce* "Service and Confirmation" No. 5.

81. Provision to Children—Creditors.—A father conveyed his estate to his son for payment of debts, and then for payment on his death of provisions to his younger children. The son was infeft, and granted a bond over the estate to the younger children on which they were infeft. *Held*, on the father's death, that the younger children were postponed to the father's creditors, the provisions being made payable only out of the reversion of his estate after payment of his debts. *Poole* v. *Anderson*, 1834, 12 S. 481; 9 Fac. 287.

82. Provision to Children—Creditors—Father's Liferent.—A party in an antenup-

tial contract assigned to trustees a sum which had been bequeathed to him, but which was neither vested in him or payable; and the trustees were directed to pay the interest to him during his life, which interest was not to be affectable by his creditors. His estates were thereafter sequestrated. *Held* that the principal sum must be paid over to the marriage-contract trustees, but that the trustee in the sequestration was entitled to the interest. *Wood* v. *Begbie*, 1850, 12 D. 963.

83. Provision to Children—Discharge—Burden on Heir.—A father, by postnuptial contract, settled heritage on his son, declaring that if he failed to burden him with provisions to his younger children, he should be burdened with the payment of £40 to each. Later he executed a testament, appointing his son his executor and residuary legatee, and burdening him as such with the payment of £400 to a daughter (who did not accept the provision, but betook herself to her *legitim*). *Held* that the son, as heir of the marriage, was not liberated from payment of the £40 by the father having burdened his executry with the £400. *Frew* v. *Frew*, 1828, 6 S. 554; 3 Fac. 586.

84. Provision to Children—Discharge.—An heir under a marriage-contract may, during his father's life, renounce for himself and his successors all claim under the contract. *Moodie* v. *Stewart*, 1730, 1 Pat. 20.

85. Provision to Children—Discharge.—A father, in his marriage-contract, destined an estate to the heirs-male of the marriage; whom failing, to the heirs-male of any other marriage; whom failing, to the heirs-female of the first marriage. The marriage was dissolved, leaving one daughter. *Held* that a discharge by her of her own right, and that of her heirs under the contract, though she died before her father, was effectual against her son. *Routledge* v. *Carruthers*, 1819, 2 Bligh 692. Affg. 19 May 1812 and 19 June 1819, F. C.; Buch. 121. Remitted, 4 Dow 392.

86. Provision to Children—Discharge.—*Observations* on the necessity for fair and open dealing in the case of a discharge taken by a parent from his child of rights secured under a marriage-contract to the child. *Fraser* v. *Fraser's Trs.*, 1834, 13 S. 703. See also *Leiper* v. *Cochran*, 1822, 1 S. 552.

87. Provision to Children—Discharge—Construction.—*Held*, upon the terms of a discharge, that it imported a discharge by a daughter of all her rights under her parent's postnuptial contract. *Ewen* v. *Ewen's Trs.*, 1825, 1 W. & S. 595. Revg. 2 S. 612. [The discharge was afterwards reduced on the head of fraud; 4 W. & S. 346. Revg. 6 S. 479.]

88. Provision to Children—Discharge—Construction.—In her marriage-contract, a lady, in respect of tocher paid by her father, discharged all that she could claim in right of her father and mother in any manner of way. *Held* that this did not discharge a bond of provision granted by her mother in her favour. *Gordon* v. *Glendonwyn*, 1835, 13 S. 882.

89. Provision to Children—Discharge—Construction.—A daughter who was entitled, under her father's contract of marriage, to a provision of £3000, subject to a power of distribution among his children, accepted from her father (in ignorance of her right), under her own marriage-contract, of £2000 "in name of tocher" "in full satisfaction of her patrimony," and "in name of *legitim*." *Held* that the daughter could not have intended to discharge the provision of £3000; that the terms of the discharge did not apply to that provision; and that the £2000 was not to be imputed in satisfaction *pro tanto* of the £3000. *Greenock Banking Co.* v. *Smith*, 1844, 6 D. 1340; 16 J. 572.

90. Provision to Children—Discharge—Construction.—A daughter sued her father for a share of the goods in communion at her mother's death. The daughter's marriage-contract contained a provision by her father of £5000, to be paid to the marriage-contract trustees at the first term after his death; and this sum was declared to be her share of her father's "means and estate intended to be left her at his death, which she hereby agrees to accept in full satisfaction of *legitim*, etc., and everything else she could claim by and through the death" of her father. The marriage-contract was dated after the mother's death. *Held* that the pursuer's claim in this action was a debt due by the father at the date of the marriage-contract, and was not discharged by the clause quoted. *Kennedy* v. *Bell*, 1863, 1 M. 1127; 35 J. 651. [See 6 M. (H. L.) 69; 40 J. 476; L. R. 1 Sc. App. 307.]

91. Provision to Children—Discharge—Effect of.—A discharge of their claim on a provision in their father's marriage-contract granted by two of the children to their father for valuable consideration, *held* to operate in the father's favour and not so as to carry the whole of the provision to the other children. *Allardice* v. *Smart*, 1721, Robert. 399.

92. Provision to Children—Discharge—Effect of—Claim to Lapsed Share.—A lady entitled to one-fourth of a fund under the marriage-contract of her parents accepted it in her own marriage-contract in full of all her claims against their estates. *Held* that on the lapsing of another fourth of the fund she was entitled to her share of it. *Robertson, etc.*, 1869, 7 M. 1114; 41 J. 621.

93. Provision to Children—Discharge—Effect of.—Effect of discharge by daughter in her marriage-contract (in respect of an appointment by her father in her favour of funds falling under his and her mother's marriage-contract), of all her claims under that contract, where the discharge partook of the nature of a transaction between the father and daughter, and where the father did not exhaust his powers of appointment *considered*. *Smith Cuninghame* v. *Anstruther's Trs.*, and *Mercer* v. *Anstruther's Trs.*, 1872, 10 M. (H. L.) 39; 44 J. 407; L. R. 2 Sc. App. 223.

94. Provision to Children—Discharge—Reduction.—Circumstances in which a discharge granted by a son after his marriage to his father of an obligation undertaken by the father in the son's marriage-contract to settle lands on the son and his wife for life, and on the sons of the marriage in fee, was *held* not to be a fraud on the marriage settlement. *Campbell* v. *Pollock*, 1720, Robert. 324.

95. Provision to Children—Discharge—Repetition of Sums Paid in Ignorance.—A father bound himself in his daughter's marriage-contract to make certain provisions for her and her husband. These were paid on his death, seventeen years after, by his son. Twenty-eight years thereafter the son brought an action for reduction of the deed, under which the provisions were paid, founding on a letter addressed by the daughter and her husband to the father two years after the marriage, in which they bound themselves to restrict their marriage-contract provision. *Held* that the letter, taken in conjunction with the whole facts, did not afford grounds for reduction. *Fowler* v. *Mackenzie*, 1874, 11 S. L. R. 485. Affg. 44 J. 332; 9 S. L. R. 379.

96. Provision to Children—Exclusion of Rights in Succession. — A father became bound, in the antenuptial contract of a daughter, to secure, in name of trustees, for behoof of her and her husband, £500, "and that in full satisfaction" of her "patrimony, and all that they can crave of" her father "or his representatives, through his death, or the death of his spouse, in name of *legitim*, etc., and this was accepted as in full of any claim for *legitim*, etc." The father thereafter died intestate, and was survived by his widow and three other children. *Held* that the daughter's claim to a share in the dead's part had been renounced. *Johnston* v. *Miller*, 1847, 9 D. 1389; 19 J. 611.

97. Provision to Children — Exclusion from Share of Goods in Communion.—*Held* that, by a marriage-contract settling the wife's fortune only, and making no reference to the husband's moveable estate, the children of the marriage were not barred from claiming their mother's share of the goods in communion. *Hog or Lashley* v. *Hog*, 1792, 3 Pat. 247.

98. Provision to Children—Implement—Discharge of Burden.—A party purchased an estate under a reserved burden of £3000, and then disponed it by marriage-contract to the heirs of the marriage. He afterwards executed a settlement, the first purpose of which was to pay his debts. *Held* that the estate was disponed as it stood in the disponer, and that the heir of the marriage was not entitled to demand that the trustees should pay the debt. *Henderson* v. *Hamilton*, 1858, 20 D. 473; 30 J. 240.

99. Provision to Children—Implement—Title to Enforce.—Terms of a provision in a marriage-contract by a mother upon one of three younger daughters and her husband, according to which *held* (some years after the term of payment mentioned in the contract, and the death of the mother and the daughter so provided for) that the husband was entitled to an accounting, and to have the obligation for the provision in the marriage-contract implemented by the mother's executors, notwithstanding it was inconsistent with her intention. *Maclean* v. *Campbell*, 1840, 2 D. 1071.

100. Provision to Children—Implement—Surrogatum—Sale of Lands.—If a father in a marriage-contract settles lands on his heir and thereafter sells the lands, the heir is entitled to the value of the lands as a *surrogatum*, the value being estimated at the date of the sale, not at the father's death. *E. of Wemyss* v. *E. of Haddington*, 1818, 6 Pat. 390. Affg. 28 Feb. 1815, F. C.

101. Provision to Children—Implement—Competition with Heir of Entail.—*Held* that children having provisions under an antenuptial contract were entitled, in a question with heirs of entail, to attach the entailed estate as creditors of their father, who was the institute, and to whom the fetters did not apply; and that it was not relevant for the heirs, in such a question, to allege that the trustees of the party to whom the estate originally belonged, and who had directed the entail to be made, ought to have applied the fetters to the institute. *Dundas* v. *Dundas*, 1839, 1 D. 731; 14 Fac. 799.

102. Provision to Children—Implement—Surrogatum—Sale of Lands—Provisions on Second Marriage. — A husband bound himself by a postnuptial contract to secure lands to the heir of the marriage; and he afterwards sold them, and bought other lands with the price, at which time the heir was in existence. Having married again, he charged these acquired lands with provisions to his wife and children of the second marriage. *Held*, in a question between the heir and the wife and children of the second marriage, (1) that the heir was not entitled to the acquired lands as a *surrogatum* for the original lands, but was entitled to indemnification; and (2) that the father was entitled to charge the lands with rational provisions to the wife and children, but no more. *Cunningham* v. *Hathorn*, 20 Dec. 1810, F. C.

103. Provision to Children—Jus crediti—Trust for Creditors.—A fee-simple proprietor conveyed his estates for payment of debts then existing to a trustee, who was bound to reconvey them, or the reversion on being relieved of the whole engagements he might have come under. Thereafter the trustee became a party to the truster's antenuptial contract, under which he received from the lady's father £10,000 for the trust purposes, and the trustee consented to the truster disponing the lands (under burden of the trust) to himself and the heir-male of the marriage under fetters of an entail. The truster took infeftment in favour of himself and the heirs. *Held*, in an action by subsequent creditors of the truster, that the trustee must denude of the lands, or what remained of these, in favour of the heir-male

in terms of the marriage-contract; and that the subsequent creditors of the truster were not entitled to do diligence against the lands so as to affect the rights of the heirs. *Herries, Farquhar, & Co.* v. *Brown*, 1838, 16 S. 948; 13 Fac. 567.

104. Provision to Children—Jus crediti or Right of Succession?—A disposition in a marriage-contract to the heir of the marriage in fee *held* to import only a right of succession, and not a *jus crediti*, in a question with onerous creditors, although there was an obligation to infeft and absolute warrandice. *Sutherland* v. *Gordon*, 1751, 1 Pat. 493. Affg. M. 4398.

105. Provision to Children—Jus crediti or Right of Succession?—A provision in a marriage-contract to children *nascituris*, though not demandable till after the death of the father, confers a *jus crediti* on the children if interest is to run from their majority or marriage. *Mackenzie of Redcastle's Crs.* v. *Mackenzie*, 1795, 3 Pat. 409. Bell's Oct. Cases 404.

106. Provision to Children—Jus crediti or Right of Succession?—Father's Powers.—A husband, by his marriage-contract, conveyed lands to himself and wife in liferent, and the children of the marriage in fee. He bound himself in absolute warrandice; and sasine was taken when children were in existence. *Held* that they had merely a *spes successionis*, and that he had power to sell the lands. *Fulton* v. *King*, 1811, Hume 533.

107. Provision to Children—Jus crediti or Right of Succession?—*Held* that a son had no *jus crediti* where there was no direct settlement in his favour in the marriage-contract but only a provision that he should have certain rights in the event of his father marrying a second time. *M'Millan's Crs.* v. *M'Millan*, 1813, Hume 536.

108. Provision to Children—Jus crediti or Right of Succession?—Disposition.—By a marriage-contract, a husband bound himself to make certain provisions, and take the securities to himself and wife, in conjunct fee and liferent, and the children in fee, payable "at the first term of Whitsunday or Martinmas next and immediately after the decease" of him. *Held* that the children did not thereby acquire a *jus crediti*; and that a disposition by him generally in security thereof, with sasine, did not give the children a right to compete with his creditors. *Wilson* v. *Wight*, 1816, Hume 537.

109. Provision to Children—Jus crediti or Right of Succession?—Children have no *jus crediti* under an obligation in a marriage-contract to aliment them, and to pay them certain sums after the father's death. *Macintosh* v. *Gibson*, 1819, Hume 10.

110. Provision to Children—Jus crediti or Right of Succession?—Infeftment.—A provision in a marriage-contract by a father for payment to children *nascituris* of a sum twelve months after his death of the father, *held* not to constitute, in a competition with creditors, a *jus crediti* in the children, although infeftment was taken for their behoof. *Brown* v. *Govan*, 1 Feb. 1820, F. C.

111. Provision to Children—Jus crediti or Right of Succession?—A father, in consideration of the renunciation of a lease by his son (who was about to be married), granted a bond, obliging himself to pay to the children of the marriage a sum of money at the first term after his own death. A relative contract of marriage was, on the faith thereof, executed between the son and his intended spouse, by which the bond was assigned to trustees for behoof of the children *nascituri*. The father became bankrupt, and children were born. *Held* that the children were entitled to be ranked as creditors on the estate of the father. *Thomson* v. *Gourlay*, 1824, 2 Shaw's App. 183.

112. Provision to Children—Jus crediti or Right of Succession?—A person by antenuptial contract disponed his property to himself in liferent allenarly and to the children *nascituris* in fee, reserving power to sell and do other acts. He thereafter made up titles without qualification and was thereafter infeft in terms of the contract. *Held* that the child of the marriage had a *jus crediti* enabling her to rank as a creditor for the value of the estate less the father's liferent. *Falconer* v. *Wight*, 1824, 2 S. 633; 3 S. 455.

113. Provision to Children—Jus crediti or Right of Succession?—Infeftment.—A party who had right to the fee of an estate as heir, disponed it, by his marriage-contract, to himself in liferent allenarly, and to his children in fee, and made up titles as heir. He was thereafter infeft in liferent under the contract, but no infeftment was taken in favour of the children; and he disponed the estate to trustees for creditors, who were infeft. *Held* that (although the trustees had acquired the real right to the estate) a child of the marriage was entitled, in respect of the personal right to the fee, to be ranked *pari passu* on the price, under deduction of the value of the liferent, with the other creditors of the bankrupt. *Falconer* v. *M'Arthur*, 1825, 3 S. 455; and 16 Dec. 1825, F. C.; 4 S. 322.

114. Provision to Children—Jus crediti or Right of Succession?—Trust.—*Held* that a conveyance in a marriage-contract by a husband to trustees of a sum for behoof of the children gave them a *jus crediti* though it was not payable till his death. *Bushby* v. *Renny*, 1825, 4 S. 110.

115. Provision to Children—Jus crediti or Right of Succession?—In his marriage-contract a person bound himself to lay out a sum on security at the sight of another for himself and his wife and the survivor in liferent, and for the children in fee, whom failing, his heirs and assignees. *Held* that the children had merely a *spes successionis* and that creditors of the father might attach the fund. *M'Donald* v. *M'Lachlan*, 1831, 9 S. 269; 6 Fac. 182.

116. Provision to Children—Jus crediti or Right of Succession?—Consideration—Obligation by Spouse's Father.—*Held* that a provision by a father in his daughter's marriage-contract of a sum to her in liferent and her children in fee gave the daughter and children a *jus crediti*, though it was not payable till his death seeing that the daughter renounced her *legitim*. *Gordon* v. *Murray*, 1833, 11 S. 368.

117. Provision to Children—Jus crediti or Right of Succession?—By a bond of provision a father undertook to pay his children a certain sum. He reserved a power to apportion the sum, and it was not to be paid till his death. *Held* that though the deed contained a clause of registration for execution, the children were not creditors of the father so as to compete with his creditors. *Geddes* v. *Waddell*, 1836, 14 S. 1084.

118. Provision to Children—Jus crediti or Right of Succession?—Father's Powers.—A husband, in his marriage-contract, bound himself: "If there be a son or sons, or son and daughter, or sons and daughters of this marriage, and alive at the dissolution thereof," to dispone to that son, or these sons, half of certain lands, "and to do no deed in hurt or prejudice of this obligation, only he is to have liberty to divide the same amongst the children, if more than one son." *Held* that the children were not entitled to compete with creditors of their father, or to challenge his onerous deeds; but that they could challenge any deeds executed gratuitously or fraudulently, in prejudice of the obligation in the marriage-contract. *Browning* v. *Browning's Trs.*, 1837, 15 S. 999; 12 Fac. 921.

119. Provision to Children—Jus crediti or Right of Succession?—Trust.—In a marriage-contract the husband bound himself to infeft trustees in security of £20,000, which he undertook to pay at such times as he should appoint, and failing appointment on his death. He granted a precept to infeft the trustees in security of this provision; and infeftment was taken by the trustees and the husband. *Held* that the trustees for the children were entitled to compete with the diligence of creditors and to rank in their order according to the preference conferred by the security. *Statement* of the conditions under which children have a *jus crediti*. *Herries, Farquhar, & Co.* v. *Brown*, 1838, 16 S. 948; 13 Fac. 567.

120. Provision to Children—Jus crediti or Right of Succession?—In a question with creditors, *held* that children had not a *jus crediti* in the provisions in a marriage-contract where these were made payable only on the father's death. *Goddard* v. *Stewart*, 1844, 6 D. 1018; 16 J. 449.

121. Provision to Children—Jus crediti or Right of Succession?—Exclusion of Eldest Child.—A marriage-contract declared provisions payable to younger children on marriage or majority. The eldest son was to be separately provided for; but in the event of his being deprived of the succession intended for him, his father was bound to secure to him a provision in money equal to the provisions of the other children. Lands were conveyed to trustees, in security of the provisions to the younger children. Subsequently the father conveyed these lands to the same trustees, for payment to himself of an annuity, but confirming the provisions to his children. The separate provision for the eldest son became unavailable. *Held* (1) that the provisions to the younger children were payable during the lifetime of their father, and that they had a *jus crediti*, which entitled them to compete with their father's creditors; and (2) that the eldest son was excluded from claiming a share in the provision for the younger children. *Cruikshank's Trs.* v. *Cruikshank*, 1853, 16 D. 7; 26 J. 19.

122. Provision to Children—Jus crediti or Right of Succession?—A husband by antenuptial contract bound himself to invest a sum in favour of himself and his wife in conjunct fee and liferent, and for the children in fee; and declared that if ever uplifted it should be reinvested in the same terms, and that action for implement should pass at the instance of certain trustees. *Held* that this did not give the children a *jus crediti* in competition with the husband's creditors. *Wilson's Trs.* v. *Pagan*, 1856, 18 D. 1096; 28 J. 545.

123. Provision to Children—Jus crediti or Right of Succession?—*Held*, on the terms of a marriage-contract, that a *jus crediti* had been conferred upon children which was available to exclude the wife's creditors before marriage, although a power of apportionment was reserved. *Murray's Exrs.* v. *Carphin*, 1866, 2 S. L. R. 198.

124. Provision to Children—Jus crediti or Right of Succession?—Father's Powers.—A husband in his antenuptial marriage-contract disponed lands in favour of himself and the heirs to be procreated of his body, and his or their assignees. *Held* that the heir of the marriage had a protected right of succession which his father was not entitled to defeat gratuitously. *E. of Glasgow's Tr.* v. *E. of Glasgow*, 1872, 11 M. 218; 45 J. 145.

125. Provision to Children—Nature of.—A provision to children in a marriage-contract is not of the nature of a gift or a legacy. *Advocate General* v. *Trotter*, 1847, 10 D. 56.

126. Provision to Children—Nature of—Estate Burdened—Father's Powers.—By a marriage-contract in 1815, a husband provided to himself in liferent, and the children of the marriage in fee, half of his whole estate, including what then belonged to him, and all that he might acquire during the marriage. One son was born of the marriage. The wife died in 1848. The son died in 1856, leaving issue, and bequeathing his whole estate to trustees. The husband, who contracted a second marriage, died in 1860, and was survived by his second wife, whom he appointed his executrix and universal legatee. He never

made any settlement in fulfilment of the obligation in the marriage-contract of 1815. *Held* (1) that the obligation in the marriage-contract of 1815 did not admit of specific performance during the lifetime of the husband, who remained during his life absolute owner of the whole of his estate, subject only to an obligation to leave one-half of it to the children of the marriage; (2) that the children could not compete with the father's creditors, but were creditors on his estate after his death; (3) that in accounting between the issue of the first marriage and the second wife, the amount of the husband's estate must be ascertained as at the date of the dissolution of the first marriage, one-half of the free estate, *deductis debitis*, being placed to the credit of the children of the first marriage; (4) that no acquisitions by the husband after the dissolution of the first marriage could go to increase the estate to which the children of the first marriage were entitled; (5) and that debts contracted by the husband after the dissolution of the first marriage, and also the provisions to the second wife, were chargeable primarily against the half belonging to the husband of the free estate ascertained as at the dissolution of the first marriage. *Arthur & Seymour* v. *Lamb*, 1870, 8 M. 928; 42 J. 542.

127. Provision to Children—Powers of Father.—*Held* that it was *ultra vires* of the husband by gratuitous *mortis causa* deed to affect the rights of the children of the marriage provided to them by a marriage-contract, although a power of apportionment was reserved. *Davidson* v. *Reid*, 1873, 10 S. L. R. 511.

128. Provision to Children—Powers of Father.—By antenuptial marriage-contract the husband obliged himself to settle his lands on the heirs-male of the marriage, and inhibition followed thereon. *Held* he was barred from gratuitously alienating the said lands. *Home* v. *Home*, 1712, Robert. 47.

129. Provision to Children—Powers of Father — Entail. — A person who by his marriage-contract settles his estate in fee-simple upon the heirs-male of the marriage, is not entitled thereafter to subject his heirs to the conditions of an entail. *Munro* v. *Munro*, 13 Feb. 1810, F. C.

130. Provision to Children—Powers of Father—Fraud—"Heirs."—An estate being provided in a marriage-contract "to the heirs of the marriage," the father was *held* not entitled to settle it by an entail upon any child other than the heir; and an entail thus settling it *reduced* as being *contra fidem tabularum nuptialium*. *Stewart* v. *Graham*, 1744, 1 Pat. 364; Elch. "Mutual Contract."

131. Provision to Children—Powers of Father—Fraud.—Where a specific sum and conquest were in a marriage-contract settled on the children of the marriage, *held* that the father could not exclude the only child and settle the same on her issue. *Ormiston* v. *Ormiston*, 1809, Hume 531.

132. Provision to Children—Powers of Father—Fraud—Entail.—An entail of an estate by a father *reduced* (in special circumstances) at the instance of the heir of the marriage as being *in fraudem* of the marriage-contract. *Flemings* v. *Fleming*, 1782, 2 Pat. 588.

133. Provision to Children—Powers of Father—Fraud.—By a marriage-contract the husband disponed lands "to the children of the marriage," under burden of his liferent. He afterwards made a settlement, by which he conveyed the lands to his eldest son, under burden of provisions to his daughters. *Held* that as the settlement disposed of the lands differently from the contract it fell to be *reduced*. *Herries* v. *Herries*, 1806, Hume 528. See *Duncan* v. *Robertson*, 9 Feb. 1813, F. C.

134. Provision to Children—Powers of Father—Fraud—Insane Child.—A father who was bound by his marriage-contract to provide his estate to heirs-male of the marriage, whom failing heirs-female, had an only son, who was insane, and a daughter. He executed a disposition in favour of the daughter, but declared that if the son convalesced it should be null. The son predeceased the daughter without convalescence. *Held* that the right of the daughter was, under these circumstances, valid. *Stewart* v. *Stewart*, 2 Mar. 1815, F. C.

135. Provision to Children—Powers of Father—Fraud—Title to Challenge.—The heir of a marriage may in his own right as creditor, without a general service, challenge any deed of his ancestors contrary to the terms of a marriage-contract. *Blair* v. *Moncrieff*, 1766, 2 Pat. 126. Affg. M. 12871.

136. Provision to Children—Powers of Father—Jus crediti—Provision to Wife.—*Question*, whether a party who has settled all his property on the children of a former marriage, so as to confer on them a proper *jus crediti*, can, by a postnuptial deed in favour of a second wife, enable her to compete with the children of the first marriage to the extent of a moderate provision. *Guthrie* v. *Bell*, 1846, 9 D. 124; 19 J. 38.

137. Provision to Children—Powers of Father.—*Held* that an obligation on a father, in an antenuptial contract to make up titles to his lands in favour of himself and the heir-male of the marriage, did not give the eldest son a right to prevent the father selling the estate, or granting onerous obligations as to it, or to compel him to reinvest the prices in other lands for the heirs-male of the marriage. *Cunynghame* v. *Cunynghame*, 17 Jan. 1804, F. C.; M. 13029.

138. Provision to Children—Powers of Father—Entail.—A father who settled his estate in his daughter's marriage-contract on a certain series of heirs, *held* not entitled to impose additional restrictions by a subsequent deed of entail, although no alteration was made in the order of succession. *Douglas* v. *Johnston*, 5 Dec. 1804, F. C.; M. "Fiar Absolute" App. No. 1.

139. Provision to Children—Powers of Father—Entail.—A father who was bound by his contract of marriage to dispone his estate to the heirs-male of the marriage and a series of heirs, *held* not entitled to make an entail at variance with the destination. *Watson* v. *Pyot*, 28 Jan. 1801, F. C.; M. "Provision to Heirs" App. No. 4. *Macleod* v. *Macleod*, 1828, 6 S. 1043; 3 Fac. 1069.

Nor can a father, who by his marriage-contract is entitled to make an entail with certain prohibitions, execute an entail with further prohibitions. The deed is null if so executed. *M'Neill* v. *M'Neill's Trs.*, 1826, 4 S. 393; 1 Fac. 267.

140. Provision to Children—Powers of Father—Entail.—*Question* as to the validity of an entail executed by a father who was bound by his marriage-contract to secure his estates to the heir of the marriage. The father had power to entail, but it was averred he had exceeded the power. *Macpherson* v. *Macpherson's Trs.*, 1831, 5 W. & S. 77; 5 S. 826.

141. Provision to Children—Powers of Father—Provision to Second Wife.—A husband was bound by marriage-contract to provide £3000 for his children, and in security to take out a policy of insurance for £1500. After the provision had vested in two children the father contracted a second marriage, before which he granted to his intended wife a writing, making her a reasonable provision. In a competition between the children's representatives and the widow, *held* that the widow had a preferable claim to the funds beyond the proceeds of the policy. *Walkinshaw's Trs.* v. *Walkinshaw*, 1872, 10 M. 763; 44 J. 439.

142. Provision to Children—Powers of Father—Fraud—"Heirs"—Onerous Provision to a Child's Wife.—A husband bound himself, by contract of marriage, to secure to "the heir or heirs" of the marriage an heritable estate. He afterwards disponed part of it to a younger son in fee, and his wife in liferent, under a marriage-contract. *Held* (1) that "heir or heirs" meant not the children, but the eldest son; (2) that the disposition to the younger son being gratuitous, was *in fraudem* of the rights of the heir; and (3) that the liferent to the wife was onerous, and effectual against the heir. *Dykes* v. *Dykes*, 9 Feb. 1811, F. C.

143. Provision to Children—Powers of Father—Fraud—Alteration of Destination.—A party, by antenuptial marriage-contract, destined his lands to his heirs in a certain order, declaring that it should not be lawful for the heirs to alter the order of succession. The granter of the conveyance afterwards executed a gratuitous disposition in favour of his son and another line of heirs. *Held* that the later deed being gratuitous was *ultra vires* both of the granter and the heir. *Haig* v. *Haigs*, 1857, 19 D. 449; 29 J. 188.

144. Provision to Children—Powers of Father—Reduction of Deed—Title to Sue.—A party designing himself "the eldest son and heir" of a marriage, and libelling on a disposition to children in fee, *held* entitled to sue a reduction of a disposition to his prejudice, although he had an elder brother and a sister who had an interest, but were not pursuers. *Wilson* v. *Webster*, 1831, 10 S. 66; 7 Fac. 63.

145. Provision to Children—Preference over Creditors—Funds Inmixed with Father's Estate—Jus crediti.—A wife, by her marriage-contract, vested her husband with the power of dividing the price of her estate among the heirs and bairns of the marriage. The estate was sold after her death, and the price paid to the father. The father died insolvent, after making provisions to his children. *Held*, in a competition with the father's creditors, that the children were not entitled to a preference to the extent of the price so paid to the father, except so far as it was distinguishable from his other funds; and, *quoad ultra*, the children were entitled to rank *pari passu* with the other creditors. *Erskine* v. *Erskine*, 1826, 4 S. 357.

146. Provision to Children—Preference over Creditors.—The title completed by an heritable creditor over the lands of a deceased debtor was preferable to that completed by the debtor's trustee under a settlement. *Held* that the claims for provisions (under a marriage-contract) of the debtor's children, even although constituted as burdens against the trustees, or declared to be conditions of their right, were not preferable to the security of the heritable creditor. *Macgregor* v. *Macdonald*, 1843, 5 D. 888; 15 J. 369.

147. Provision to Children—Revocability.—A widow, on the narrative that the provisions to the children in her marriage-contract were inadequate, conveyed her whole estate to trustees for behoof of the children on her death or remarriage. *Held* that the deed was of the nature of an *inter vives* deed of provision, and therefore not revocable. *Leith* v. *Blaikie*, 1853, 2 Stuart 197.

148. Provision to Children—Satisfaction.—Circumstances in which marriage-contract provisions of 4000 and 2000 merks per annum *held* to be satisfied by acceptance of a provision of 4000 merks per annum in a subsequent deed. *Lovat* v. *Lovat*, 1721, Robert. 355.

149. Provision to Children—Satisfaction.—Disposition.—A marriage-contract provided a sum to the children of the marriage, in satisfaction of all they could claim, except what the father should further provide to them of his own free will. *Held* that the eldest son, by accepting a disposition of an estate from his father, was not deprived of his right to share in this sum. *Pringle* v. *Pringle*, 1741, 1 Pat. 297. Elc. "Mutual Contract" No. 15; "Clerk Home" No. 145; Kilk. 147; 5 Br. Sup. 693.

150. Provision to Children—Satisfaction—Advances.—*Held* that disbursements made by a father to his daughter, and entered by

him in his books, were not to be deducted from a provision which he was bound under a postnuptial marriage-contract to pay to her after his death. *Observations* on the circumstances in which advances will be held as in satisfaction of a marriage-contract provision. *Scott* v. *Scott*, 1846, 8 D. 761; 18 J. 413.

151. Provisions to Children—Satisfaction.—A provision in a child's marriage-contract was stated to be in full of all she could claim from her father's estate. *Held* that this provision was in implement of what the father had provided in his own marriage-contract, but not of gifts to the child in his will. *Kippen's Trs.* v. *Kippen*, 1858, 20 D. (H. L.) 11; 3 Macq. 203; 30 J. 563.

152. Provision to Children—Satisfaction.—*Held* that an anticipated payment of a provision to a child had been made. *Burrell* v. *Burrell*, 1828, 6 S. 801.

153. Provision to Children—Satisfaction.—*Held* that a sum of money given by a testator to the family of his nephew-in-law (to whom he had bequeathed one-half of his effects) was an anticipated payment of their provision, and not a donation. *Buchanan* v. *Mollison*, 1824, 2 Shaw's App. 445. Affg. 1 S. 346.

154. Provision to Children—Satisfaction.—In a marriage-contract an estate was settled on the father and the heirs-male of the marriage. *Held* that a subsequent absolute conveyance by the father to the son of a part of the estate and other lands did not discharge the son's right under the contract. *Watson* v. *Pyot*, 28 Jan. 1801, F. C.; M. "Provision to Heirs" App. No. 4.

155. Provision by Wife—Obligation to Insure—Implement.—By antenuptial contract of marriage, a liferentrix bound herself to take out a policy of insurance in her own name, and assign it to marriage-contract trustees for securing a provision to her husband in the event of her predeceasing him, whom failing, to his mother and his children by a former marriage. A policy was taken out in name of the marriage-contract trustees, and, after nineteen years, surrendered. The husband predeceased the wife, leaving no children by the second marriage. The trustee thereafter charged the widow to take out a policy in terms of the contract. Suspension of that charge *granted* without caution or consignation, and note *passed* to try the question, whether the obligation under the marriage-contract had not been fulfilled. *Muir* v. *Mackersey*, 1853, 16 D. 289.

156. Provision to Wife—Amount of—Sale of Lands.—In his marriage-contract a husband disponed his lands to his wife if she survived him. The rental of the lands was £60 after deduction of debts. The husband also bound himself to grant her a liferent annuity of £140. He died insolvent and the lands were judicially sold. *Held*, in a question with creditors, that the wife was entitled to the interest of the price (after deduction of debt and a proportional share of the expenses of sale), and not merely to an amount corresponding to the rental of the lands. *Buchanan* v. *Ferrier*, 1822, 1 S. 323.

157. Provision to Wife—Annuity—Competition with Legatees.—In a question between a widow, who was secured by her marriage-contract in an annuity out of her husband's estate, and gratuitous legatees to a capital sum, where the interest of the price realised from the estate was inadequate to pay the annuity, *held* that she was entitled either to have the annuity valued, and the value paid to her, or that full payment of the annuity during her life should be secured to her by some other form of investment of the whole or a part of the price. *Ross* v. *Mackenzie*, 1838, 16 S. 1385.

158. Provision to Wife—Charge on Lands.—A husband possessed of property in Jamaica bound himself by marriage articles to secure to his wife, in case of her surviving him, an annuity of £400 payable out of the Jamaica estates, and in the event of purchasing lands in Scotland, to take the titles to himself and wife in joint fee and liferent, in further security of the annuities. He bought lands in Scotland, but took the titles to himself alone, and died. *Held* that the annuity was a burden on the Jamaica estate, and not on the Scots estate. *Ogilvie* v. *Dundas*, 1826, 2 W. & S. 214.

159. Provision to Wife—Conquest.—A party, in an antenuptial contract, provided to his wife, on his death, an annuity, and the liferent of half of the conquest which he should acquire during the marriage; and to fix what the conquest might be, it was declared that £4000 was the amount of his estate at the date of the contract. During the marriage he disponed to her, on his death, a dwelling-house in liferent, and certain furniture in fee, without prejudice to the provisions in the contract of marriage. *Held*, on his death, that the value of the annuity was not to be deducted from the conquest, but from the £4000; that in computing the amount of conquest, the value of the liferent of the house, and fee of the furniture, and onerous debts and obligations must be deducted. *Hunter's Trs.* v. *Macan*, 1839, 1 D. 817; 14 Fac. 900.

160. Provision to Wife—Construction.—By an antenuptial contract a husband assigned to his wife "in fee" the household furniture. Power was given in it to the spouses jointly, but not to the wife alone, to sell the furniture; and if she remained she was to forfeit it. *Held* this did not give the wife a fee or put the furniture beyond the reach of the husband's creditors. *Campbell* v. *Stewart*, 1848, 10 D. 1280; 20 J. 468.

161. Provision to Wife—Creditor or Heir-Substitute?—By antenuptial contract a husband provided a sum to the children, and failing children, to the wife. *Held* that the wife was a creditor and not an heir-

substitute. *Burden* v. *Smith*, 1738, 1 Pat. 214. Elc. "Mutual Contract" No. 7; "Succession" No. 5.

162. Provision to Wife—Deed in fraudem.—By an irrevocable deed a party conveyed two sums of £6000 and £2000 to marriage trustees. *Held* that subsequent deeds conveying these sums to other parties were reducible by the wife and the marriage trustees. *Ramsay* v. *Cowan*, 1833, 11 S. 967.

163. Provision to Wife—Defeating.—Under a marriage-contract the wife was fiar. She and the husband sold the lands. *Held* that this sale and the terms in which the bond for the price was taken could not prejudicially affect the wife's rights under the contract, and that she remained fiar. *Anderson* v. *Laidlaw*, 1816, Hume 218.

164. Provision to Wife—Defeating—Lease.—Circumstances under which a lease by a husband to his nephew and an heir-portioner was set aside, as *in fraudem* of an unrecorded liferent infeftment granted to his wife *intuitu matrimonii*. *Davie* v. *Denny*, 1827, 5 S. 903.

165. Provision to Wife—Defeating—Sale of Subjects.—By an antenuptial contract, shares of stock belonging to another in the name of the wife were secured to her, and the *jus mariti* and the rights of creditors excluded. The husband having obtained the consent of the wife (who was not aided by any separate advice) sold the shares and applied the price to his own purposes. After the death of the husband, *held* that her consent had not been validly obtained, that the sale of the stock was in breach of the contract, and that she could claim against his estate for her provision. *Meldrum* v. *Wilson*, 1842, 15 J. 90.

166. Provision to Wife—Discharge—Construction — "Heirs." — A widow discharged liferent provisions in her marriage-contract, stating that her object was to afford funds to maintain her two daughters (without mention of their heirs); but the obligatory clause bore a renunciation in favour of them, "their heirs and assignees"; and both daughters died in minority without issue. *Held*, in a question with their paternal uncle and heir-at-law, that the renunciation must be understood to be limited to heirs of the body. *Moodie* v. *Anderson*, 1829, 7 S. 743; 4 Fac. 1010.

167. Provision to Wife—Discharge—Taxative or Demonstrative?—A party, by a postnuptial contract, provided to his wife, in the event of her surviving him, two several sums of £200 each, the second to be paid "from the money conveyed by the contract by her to her husband." She survived him; and while regularly drawing the interest for the first provision, made no claim for the second. After her death, her representatives, on receiving a sum of £210, agreed to grant a discharge of certain claims, but the claim for the other sum of £200 was not in view. *Held* that the clause was demonstrative, not taxative, and that they were entitled to payment of the second sum of £200. *Moon's Trs.* v. *Carmichael*, 1836, 14 S. 1026; 11 Fac. 839.

168. Provision to Wife—Furniture—Transference.—In an antenuptial contract the husband disponed to his wife his household furniture, conform to inventory indorsed upon the contract. The furniture remained in the house occupied by the spouses. *Held* that there was no effectual transference of the furniture to the wife, and that she could not claim it as against his creditors. *Brown* v. *Fleming*, 1850, 13 D. 373; 23 J. 176.

169. Provision to Wife—"Furniture"—"Effects."—A husband in his marriage-contract conveyed absolutely to his wife "the whole household furniture, . . . and other plenishing and effects, including carriage and carriage horses, and other effects, in so far as the same may form part of, or be situated or used at, his ordinary residence." *Held* that this did not include greenhouses, iron fences, and an observatory. *Tod's Trs.* v. *Finlay*, 1872, 10 M. 422.

170. Provision to Wife—Implement—Disposition — Construction. — A fund was settled in a marriage-contract in terms which gave the wife a liferent. The husband with part of the fund purchased an estate and took the disposition of it in terms which might be held to give the wife the fee. *Held* that the destination in the contract controlled the terms of the disposition, and therefore that the wife was only a liferentrix. *Murray* v. *Murray*, 1826, 4 S. 589; 1 Fac. 573.

171. Provision to Wife—Implement—Title to Sue.—By antenuptial contract, the husband bound himself to invest a sum for his wife in liferent in the event of her survivance, and his children in fee, so soon as he or they should be called on to do so by trustees. By relative bond of caution, his brother (one of the trustees) bound himself to pay these provisions in the event of the husband failing to do so. The husband died insolvent. *Held* (1) that although the trustees had not called on him to implement the obligation, the brother was liable upon the bond; and (2) that the wife had a good title to sue upon it, without the concurrence of the trustees. *Wilson* v. *Wishart*, 1844, 7 D. 125; 15 J. 520.

172. Provision to Wife—Jus crediti—Creditors.—A disposition of houses by a husband while solvent to his wife *sustained* against his creditors. *Sharp* v. *Christie*, 1839, 1 D. 396; 14 Fac. 438.

173. Provision to Wife—Jus crediti.—A husband, by antenuptial contract, disponed to his wife, if she survived, the furniture then belonging, or which might belong, to him, during the marriage. His estate was sequestrated, and the furniture sold by the trustee. *Held*, on the husband's death, that the widow was not entitled to be ranked for the value

of it. *Darling* v. *Mein*, 1851, 14 D. 296; 24 J. 139; 1 Stuart 233.

174. Provision to Wife—Jus crediti—Conveyance to Trustees. — A widower married again, and by antenuptial contract of marriage bound himself to invest a sum in favour of himself and wife in conjunct fee and liferent, and of the children of the marriage in fee; declaring that action for implement should pass at the instance of trustees for behoof of his wife and children. In implement *pro tanto* of this obligation, he conveyed to the trustees a policy of insurance, the proceeds of which were to be invested in terms of the marriage-contract. In a competition between the children of the first marriage, who claimed their proportion of their mother's share of the goods in communion, and *legitim*, and the trustees for the second wife and children, *held* (1) that the widow was entitled to be ranked as an onerous creditor on her husband's estate for the provisions in the marriage-contract; and (2) that the interest of the proceeds of the policy was secured to the widow in satisfaction *pro tanto* of these provisions, and therefore that the trustees were entitled to be ranked preferably to that extent. *Wilson's Trs.* v. *Pagan*, 1856, 18 D. 1096; 28 J. 545.

175. Provision to Wife—Jus crediti or Right of Succession?—By an antenuptial contract of marriage the husband bound himself to pay to trustees £1200, to be applied for behoof of the spouses in such manner as they should instruct, declaring that if the wife predeceased, any part thereof remaining should be at the absolute disposal of the husband, and if the husband predeceased, any part so remaining should "form part of his estate hereinafter assigned and conveyed." This was followed by a conveyance of the husband's whole estate to the wife in liferent and the children in fee. The husband became bankrupt. *Held* that the wife's interest was a mere right of succession, which could not compete with the husband's creditors. *Grant* v. *Robertson*, 1872, 10 M. 804; 44 J. 547.

176. Provision to Wife—Non Implement—Retention of Funds Assigned to Husband. —In his marriage-contract a husband bound himself to pay his wife £1500 in name of aliment and mournings after his death. The husband died insolvent. *Held* that, as the husband's obligation was merely personal, the wife could not retain, as against this unfulfilled obligation, funds of hers which were assigned to the husband in the marriage-contract. *Boswell* v. *Miller*, 1846, 8 D. 430; 18 J. 210. *Greenhill* v. *Aitken*, 1824, 3 S. 169.

177. Provision to Wife—Pension.—In his marriage-contract a husband bound himself to provide his wife on her survivance with an annuity payable to the widows of officers from a fund. The annuity was subject to reduction in certain circumstances (by the regulations of the fund) and was terminable on re-marriage. *Held*, on a reduction taking place, that the widow was not entitled to have the annuity made up to the full amount by the husband's representatives, but that she was entitled to payment of it from them on her re-marriage. *Forlong* v. *Taylor's Exrs.*, 1838, 3 S. & M'L. 177. Affg. 15 S. 126; 12 Fac. 128.

178. Provision to Wife—Reduction of Husband's Interest — Creditors. — In his marriage-contract a husband conveyed to trustees his interest in his father's estate. The purposes of the trust were to provide the husband with a liferent and on his death to provide his widow with a jointure. The father's trustees in exercise of a power reduced the husband's interest to a liferent. *Held* that the marriage-contract trustees could not retain as against the husband's creditors the income to provide the widow's jointure. *Ker's Trs.* v. *Justice*, 1866, 5 M. 4; 39 J. 11.

179. Provision to Wife—Wife's Desertion—Action for—Title to Sue.—*Held* (1) that a wife's desertion was not a good defence to an action by her against her husband for payment of an annuity, which the antenuptial contract of marriage provided should be paid to her during the marriage, exclusive of the *jus mariti*; (2) that a wife had a title to sue her husband for payment of a provision in a marriage-contract, although other persons were nominated in the contract at whose instance all action and execution in implement thereof should pass. *Smith* v. *Smith*, 1866, 4 M. 279; 38 J. 145.

180. Reduction—Fraud.—Can marriage articles be reduced on the ground of fraud if marriage has followed on them? *Irvine* v. *Irvine*, 1753, 1 Pat. 547. See also *Stevenson* v. *Wallace*, 1839, M'F. 229.

181. Reduction—Grounds for.—A marriage-contract, on the faith of which a marriage has been solemnised, is not reducible on the ground of defects in the solemnities of probative writs. *Observed*, that forgery is the only relevant ground of reduction. *Falconer* v. *M'Leod*, 1830, 8 S. 312.

182. Revocability of Trust.—A trust was constituted by a woman *in gremio* of a marriage-contract, whereby the *jus mariti* was excluded in regard to her own heritable property, which was to be held for her behoof exclusively, and was declared irrevocable. *Held* not revocable during the marriage by the wife, with consent of her husband. *Observed*, that it might be revoked on the death of the husband, the cause of granting being then removed. *Anderson* v. *Buchanan*, 1837, 15 S. 1073; 12 Fac. 992.

183. Revocability of Trust—Postnuptial. —*Held* that a trust constituted in a postnuptial contract in favour of the wife, who was deaf and dumb, but *sui juris*, and the heirs of the marriage, was revocable by the wife after the husband's death, without concurrence of the heir of the marriage, who had attained majority, although there was no provision for the trustees denuding in the event which

occurred. *Craigie* v. *Gordon*, 1837, 15 J. 1157; 12 Fac. 1064.

184. Revocability of Trust. — A trust, declared to be irrevocable, having been constituted by a lady in her antenuptial contract of marriage for behoof of herself, her husband, and the heirs of her body, *held* that, apart from the interest of the heirs of her body, the trust was not revocable during the marriage by her and her husband. *Pringle* v. *Anderson*, 1868, 6 M. 982; 40 J. 563.

185. Revocability of Trust.—A lady by her marriage-contract conveyed to trustees £5000 to be held for the issue, and the rest of her estate to be held for herself and her heirs, with a liferent to the husband if he survived. The husband having renounced his contingent liferent, *held* that the spouses could put an end to the trust (except *quoad* the £5000) and that the trustees were bound to denude. *Ramsay* v. *Ramsay's Trs.*, 1871, 10 M. 120; 44 J. 77.

186. Revocability of Trust. — Trustees under a marriage-contract *held* bound to denude and convey the funds to the husband in liferent and the only child of the marriage in fee after the wife's death, on receiving a full discharge. *Crawford* v. *Crawford's Trs.*, 1873, 11 S. L. R. 2.

187. Revocability of Trust—Consent of Issue — Postnuptial Contract — Caution. — Spouses by postnuptial deed assigned to trustees a fund to be held for the wife and the children of the marriage, it being provided that on the death of the survivor of the spouses it "shall be equally divided amongst the children" with a destination-over to "the issue of such as may predecease us or either of us." When the wife was forty-nine years of age, and the only child of the marriage, a daughter, was of full age, the spouses, with consent of their daughter, sought to have it found that they were entitled to revoke the trust-assignation. *Held* (1) that a right had been secured to the children or their issue who should be alive at the death of the surviving parent, and that the parents could not, even with the consent of the only child, revoke the deed; and (2) that as a question was involved as to the right of issue of the existing, or of any other, child of the marriage, the court was not justified in the exercise of its discretion in permitting the deed to be revoked on caution to make good the fund if other children were born. *Allan* v. *Kerr*, 1869, 8 M. 34; 42 J. 6.

188. Revocability of Trust—Conveyance in Security of Wife's Annuity.—A father and his son, in the son's antenuptial contract of marriage, bound themselves jointly and severally to provide an annuity to the son's wife in the event of her surviving him. After the father's death his representative conveyed to the son certain heritable subjects on condition of receiving a discharge of liability for the annuity, and the son conveyed the property to his marriage-contract trustees in security of payment of that annuity. In consideration of these conveyances the son's wife discharged her claim against her father-in-law's estate for the annuity. *Held* that the spouses could not revoke the conveyance to their marriage-contract trustees. *Hope*, 1870, 8 M. 699; 42 J. 362.

189. Revocability — Marriage-Contract. —A lady, by her marriage-contract, conveyed an estate to trustees to execute an entail in favour of the issue of the marriage, whom failing, "to such persons, or to such uses and purposes, as should be appointed by her" in any writing to be executed by her either during the subsistence of the marriage or after its dissolution by the decease of "her husband," whom failing, to "her own nearest heir." *Held* that she was entitled, after the divorce of her husband, and during his lifetime, there being no issue, to execute a deed effectual to compel the trustees to convey the estate to a party other than her heir. *M'Leod* v. *Cuninghame*, 1846, 5 Bell 210. Affg. 3 D. 1288; 16 Fac. 1381. See *Smitton* v. *Tod*, 1839, 2 D. 225; 15 Fac. 227.

190. Revocation — Destruction. — Where there was no issue of a marriage, *held* that the husband and wife had revoked it by destroying it. *Donald* v. *Kirkcaldy or Donald*, 1788, 3 Pat. 105. Affg. M. 15831.

191. Revocation—Mutual Will.—A wife in her antenuptial contract conveyed her whole means to trustees (1) for payment of the income to herself, and if she predeceased, to her husband; and (2) if there were no children of the marriage the whole trust-funds to be paid to her heirs and assignees. The spouses afterwards executed a mutual settlement bearing to be in supplement of the marriage-contract, whereby they each conveyed their whole estate to the other in liferent, and to the children in fee, whom failing to their respective heirs. The wife died without leaving children. *Held* that the spouses had power in the circumstances to revoke the contract but had not done so. *Grant*, 1873, 10 S. L. R. 245.

192. Title to Sue — Trustee — Use of Truster's Name.—A husband, in his marriage-contract, conveyed his property to a trustee, with power to sue all actions relative to the reduction of settlements of his uncle and father deceased. *Held* bound to allow his name to be used for this purpose by the trustee, and not entitled to disclaim an action raised in his name, the trustee relieving him of the expenses and consequences of the action. *Pitcairn* v. *Fraser*, 1834, 12 S. 769.

193. Title to Sue—Heir.—An action of reduction of titles to an heritable estate was founded on a contract of marriage, under which the pursuer claimed right to the fee. *Held* that the retour of the general service of the pursuer was a sufficient title to call for production of the defender's titles. *Baillie* v. *Murdoch*, 1822, 1 S. 388.

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1. Apprentice — Desertion. — Circumstances in which an apprentice was *held* liable in damages for deserting his master's service. *Gunn* v. *Goodall*, 1835, 13 S. 1142 ; 10 Fac. 111.

2. Apprentice — Desertion — Apprentice Reclaimed from Navy — Security. — A master who reclaims his apprentice from the royal navy, into which he had enlisted, is not bound by the statute 44 Geo. III. c. 13, to find security that the apprentice shall return to the navy on expiration of his indenture. *Smith*, 23 June 1814, F. C.

3. Apprentice — Desertion — Claim by Master—Mora.—An apprentice, after having deserted and been compelled to return to his service, was impressed as a seaman, and continued in the navy for sixteen years. On his return home, the master claimed payment of certain articles furnished to him when an apprentice, but nothing else. *Held* not entitled thereafter to claim damages for breach of indenture. *Ferguson* v. *Mackenzie*, 1815, Hume 21.

4. Apprentice — Desertion — Damages—Mora.—An apprentice to a stocking-weaver deserted, and was compelled to return to his service. He again deserted, and occupied himself for four years as a farm labourer, with the knowledge of his master. *Held* that the master had thereby discharged the indenture so as to be barred from insisting for the penalty against his apprentice, his cautioner, and an officer with whom he had enlisted. *Robertson* v. *Smith & Co.*, 1800, Hume 20.

5. Apprentice — Desertion — Imprisonment.—*Question*, whether a warrant of incarceration of an apprentice who had deserted his service was lawful where there was a regular indenture, with cautioners, and a clause of registration, on which diligence by horning and caption might have proceeded. *Bookless* v. *Normand*, 1832, 11 S. 50 ; 5 J. 87.

6. Apprentice — Desertion — Imprisonment. — If an apprentice has deserted his

service, it is illegal to grant warrant to imprison him till he find caution to return thereto and "fulfil his engagement," in respect that this implies not merely to return to his service, and continue therein during the period of his indentures, but also to implement all the stipulations thereof. *Stewart* v. *Stewart*, 1832, 10 S. 674; 1833, 11 S. 628.

7. Apprentice—Desertion—Wages.—Circumstances in which an apprentice *held* to have improperly left his service, and not entitled to wages and board wages. *Stirling, Gordon, & Co.* v. *Calderhead's Exrs.*, 1832, 11 S. 180.

8. Apprentice—Dismissal—Disobedience—Insolence.—*Held* that a master had justifiably dismissed from his service an apprentice who had been guilty of insolence, and of great irregularity in attendance. *Stewart* v. *Crichton*, 1847, 9 D. 1042.

9. Apprentice—Duty.—A master printer *held* entitled to require a party bound apprentice as a pressman to teach a younger apprentice in the same branch. *Ballantyne & Co.* v. *Kerr*, 21 Nov. 1811, F. C.

10. Apprentice—Duty.—An apprentice is not bound to work for his master except in relation to his trade. *Peter* v. *Terrol*, 1818, 2 Mur. 28.

11. Apprentice—Duty—Sunday Work—Barber.—*Held* that an apprentice to a barber was not bound to work on Sabbath morning. *Phillips* v. *Innes*, 1837, 2 S. & M'L. 465. Revg. 1835, 13 S. 778.

12. Apprentice—Duty—Penalty—Title to Sue—Master not Licensed.—A master currier who had ceased to take out the licence required by statute, *held* not entitled to enforce a penalty in an indenture of an apprentice, alleged to have violated his agreement; and the apprentice found entitled to be freed from the indenture, though receiving instruction in the trade. *Watson* v. *Grindlay*, 1826, 5 S. 3.

13. Apprentice—Duty—Enforcement of—Imprisonment.—A summary warrant to imprison an apprentice till he shall implement all the obligations of his indentures (not merely to return to service), is incompetent. *Wright* v. *M'Gregor*, 1827, 5 S. 855.

14. Apprentice—Duty—Enforcement of—Imprisonment.—A petition, praying for warrant of imprisonment against an apprentice until he should find caution to return to and to continue in the service of his master during the term of his apprenticeship, was served on the apprentice, with certification that, in case of failure to enter appearance, he should be held as confessed. No appearance having been entered, the sheriff, in the absence of the apprentice, ordained him to be imprisoned until the expiration of the term of his apprenticeship, or until he should find caution to return to his master's service, and to continue therein during his apprenticeship. In a suspension of this sentence, on the ground that the proceedings were illegal, and that the suspender was unable to find caution, *held* (1) that it was competent for the sheriff to pronounce the order for service, with the above certification; and (2) that the judgment pronounced in absence was competent, and suspension *refused*. *Cameron* v. *Murray & Hepburn*, 1866, 4 M. 547; 38 J. 281.

15. Apprentice—Duty of Master—Baker.—Damages awarded to an apprentice for failure on the part of his master (a baker) to teach him an important part of his trade. *Lyle* v. *Service*, 1863, 2 M. 115; 36 J. 42.

16. Apprentice—Employment—Dissolution of Copartnery — Homologation of Agreement of Partners on Dissolution of Company.—*Held* that an apprentice bound to a company, or to the partners of a company, by continuance with one partner, who carried on the business after dissolution of the company by voluntary agreement, acquiesced in by the apprentice, must be held to homologate the voluntary arrangement of the partners, and becomes bound to implement his indenture to the partner with whom he remained. *Pagan* v. *M'Kie*, 1837, 10 J. 90.

17. Apprentice—Employment—Dissolution of Company.—An apprentice bound himself to a company, and the subsisting members thereof carrying on the same; and, on its dissolution, his services were transferred to a new company formed by the non-retiring partners. *Held* that he was bound to serve the new company. *Young* v. *Brown & Co.*, 1785, 3 Pat. 42.

18. Apprentice — Indenture — Engagement by Other Party.—A party having taken an apprentice in the knowledge that he was under indentures to another master, *held*, in a question with the latter, not entitled to compel his services. *M'Gregor* v. *Mitchell*, 1825, 4 S. 51.

19. Apprentice — Indenture—Penalty.—An apprentice was bound to work two days for every day he should be absent. He absented himself for a few days, and on his return offered to work the two days for one, which the master refused. *Held* that the master was not entitled to exact the penalty. *Learmonth* v. *Blackie*, 1828, 6 S. 533.

20. Apprentice — Indenture—Rei interventus.—An informal indenture of an apprentice *held* to be validated *rei interventu* by a year's service. *Neil* v. *Vashon*, 1807, Hume 20.

21. Dismissal — Abolition of Office—Claim against Crown.—A party who was clerk to the Judge Advocate, having been dismissed on the abolition of that office, *held* to have no claim of damages against the Crown. *Hay* v. *Officers of State*, 1832, 11 S. 196.

22. Dismissal—Absence from Service—Gardener.—*Held* that a master was entitled to dismiss a gardener who had been absent from his service without leave for four days. *Reid* v. *Lady M. Lindsay Crawford*, 1822, 1 Shaw's App. 124.

23. Dismissal—Ad vitam aut culpam—Culpa.—A person, holding office *ad vitam aut culpam*, sued the body employing him for damages for wrongous dismissal, averring that he had not been guilty of *culpa*. *Observed*, that this was not the proper form of action; that he should have sued for declarator that he was still in office, and for reduction of the minute containing the resolution to dismiss him; and the action *dismissed*. *Goldie* v. *Christie & Petrie*, 1868, 6 M. 541; 40 J. 275.

24. Dismissal — Bank Manager. — The directors of a bank who dismissed their manager, engaged during pleasure, *held* not bound to justify their dismissal. *Mitchell* v. *Smith*, 1836, 14 S. 358; 11 Fac. 292.

25. Dismissal — Bank Manager. — *Held* that under their contract a banking company were entitled to dismiss their manager without assigning any reason. *Pollock's Trs.* v. *Commercial Banking Co.*, 1829, 3 W. & S. 430.

26. Dismissal—Board Wages—Residence of Female Servant.—*Question*, whether a master may dismiss a servant without cause, on paying wages and board wages; and whether he can compel a female servant to reside out of the house, on paying board wages. *Graham* v. *Thomson*, 1822, 1 S. 309.

27. Dismissal—Designer.—Circumstances in which *held* that a person engaged as a penner and designer for a year had been unlawfully dismissed at the end of the half-year. *Craig* v. *Graham*, 1844, 6 D. 684; 16 J. 317.

28. Dismissal — Disobedience.—Circumstances in which *held* that a master was entitled to dismiss a servant for disobedience. *A* v. *B*, 1853, 16 D. 269; 26 J. 129.

29. Dismissal — Disobedience. — Circumstances warranting dismissal of a servant, on the ground of disobedience. *Hamilton* v. *M'Lean*, 1824, 3 S. 379.

30. Dismissal — Disobedience — Farm Servant.—A master *held* justified in dismissing a farm servant for refusing to remain at home on a Sunday to attend to the cattle. *Wilson* v. *Simson*, 1844, 6 D. 1256; 16 J. 549.

31. Dismissal—Disobedience—Gardener.—A gardener refused, on a message sent by his master through a servant, to work in a turnip-field, and was absent from his service one day without leave (which was his first fault). *Held* that the master was not entitled to dismiss him. *Thomson* v. *Douglas*, 1807, Hume 392.

32. Dismissal — Disobedience—Grieve.—*Held* that a grieve who refused to obey the orders of his master was not entitled to damages for wrongous dismissal. *Cobban* v. *Lawson*, 1868, 6 S. L. R. 60.

33. Dismissal—Disobedience — Tailor.—*Held* that a "general cutter" in a tailoring establishment, having been dismissed during the currency of his contract of service for disobedience to orders, had no claim to wages for the period of the contract yet to run, or to damages. *Selby* v. *Baldry*, 1867, 5 S. L. R. 64.

34. Dismissal—Drunkenness.—*Held* that a single instance of drunkenness, if of an aggravated character, will justify the dismissal of a servant. *Edwards* v. *Mackie*, 1848, 11 D. 67.

35. Dismissal — Inefficiency — Cook — Housekeeper.—A servant was engaged as cook and housekeeper, but intimated that she had not much skill as a cook, and must receive the assistance of an experienced kitchen-maid, which she did. She gave dissatisfaction as a cook, and was deprived of the keys as housekeeper. *Held* that she was dismissed when the keys were taken from her, and that the dismissal was not justifiable. *Gunn* v. *Ramsay*, 1801, Hume 384.

36. Dismissal—Insolence — Coachman.—*Held* that a coachman had been justifiably dismissed for insolence. *Elder* v. *Bennet*, 1802, Hume 386.

37. Dismissal — Insolence—Coachman—Duration of Service.—A coachman is not presumed to be a yearly servant. Circumstances in which *held* that a servant had been justifiably dismissed for insolence. *Scott* v. *M'Murdo*, 1869, 6 S. L. R. 301.

38. Dismissal—Intimidation.—A hatter entered into a contract with a workman to employ him for a year; but, in consequence of intimidation by a union of journeymen hatters, the master dismissed the workman within that period. *Held* that the defence of intimidation was not relevant. *Mennie* v. *Blair*, 1852, 14 D. 359; 1 Stuart 297.

39. Dismissal — Misconduct — Farm Servant.—In an action for wages, etc., by a farm servant who had been dismissed, *held* that he had been guilty of gross misconduct, and that his dismissal was justifiable. *Greig* v. *Sanderson*, 1864, 2 M. 1278; 36 J. 641.

40. Dismissal — Notice. — A railway guard held his situation on condition that he might be dismissed at pleasure of the company, and without reason assigned, on receiving a fortnight's warning, or a fortnight's wages. Having been dismissed on a charge made against him by an officer of the railway, which he alleged was unfounded, he raised an action of damages against the company and the informer. *Held* that he had no claim against the company. *Fosdick* v. *N. B. Rly. Co.*, 1850, 13 D. 281; 23 J. 118.

41. Dismissal—Notice.—In an action of damages raised against the son of an apothecary for his having illegally dismissed the pursuer from service without the master's sanction, the defender was assoilzied. *Burt* v. *M'Donald*, 1796, 3 Pat. 512.

42. Dismissal—Notice.—Damages awarded to a servant against his master for not having given him due warning to quit his place. *Anderson* v. *Wishart*, 1818, 1 Mur. 429.

43. Dismissal — Notice—Custom.—If a servant has been hired from Whitsunday to Martinmas, and is dismissed at Martinmas without warning, it is not relevant to bar her claim for wages during the subsequent term, that by local usage (unless the usage be uniform and notorious) no warning is given. *Morison* v. *Allardyce*, 1823, 2 S. 434.

44. Dismissal—Notice — Editor.—Letters addressed by the proprietors of a newspaper to an applicant for the situation of editor, offering him the office at £100 a year, *held* to constitute a yearly engagement; and having been dismissed on fifteen days' notice at the end of the second year, *held* that he was entitled to six months' salary, in addition to that due for the period of his service. *Campbell* v. *Fyfe*, 1851, 13 D. 1041; 23 J. 481.

45. Dismissal — Notice — Evidence — Admissibility.—In an action of damages by a servant against a master for not having given due warning to quit, it is *incompetent* to ask a witness whether a person who made an application to him for a servant, and to whom the pursuer had been recommended, afterwards informed him that the situation was filled up. *Anderson* v. *Wishart*, 1818, 1 Mur. 434.

46. Dismissal — Notice — Gamekeeper — Termination of Contract. — *Held* (1) that a gamekeeper, engaged at a certain sum per quarter, a house and firing, the keep of a cow summer and winter, a suit of clothes and a cart-load of potatoes, must, unless a special contract of different endurance be established, be presumed to have been hired by the year, and is not to be held as a monthly servant; (2) that, having been hired from Whitsunday to Whitsunday, he could not be dismissed between terms upon a month's warning. *Armstrong* v. *Bainbridge*, 1846, 9 D. 29, 1198; 19 J. 1.

47. Dismissal — Tutor. — A party employed as a tutor, claiming damages for wrongous dismissal, was *held* not entitled to them. *Matheson* v. *Mackinnon*, 1832, 10 S. 825.

48. Dismissal — Wages. — A society who unjustly dismissed a servant, *held* liable for wages. *Batchelor* v. *M'Gilvray*, 1831, 9 S. 549.

49. Employment — Constitution — Conditional Engagement.—In an action by a servant against a lady for wages and board wages, the latter admitted that she had agreed to engage the servant, but only on condition of producing a certificate of character from her last mistress, but she failed to do so. *Held* that the onus lay on the servant to show that the engagement was unconditional. *Forbes* v. *Milne*, 1827, 6 S. 75.

50. Employment — Constitution — Missive—Rei interventus.—An improbative missive binding a party to serve for five years *held* to be validated for that term *rei interventu* (engagement of another servant and alterations on the works). *Napier* v. *Dick*, 1805, Hume 388.

51. Employment—Constitution—Proof—Improbative Missive Letters not Followed by rei interventus—Engagement for More than a Year.—By missive-letters not holograph or tested a person agreed to act as salesman to a firm of warehousemen, and the latter agreed to accept his services in that capacity for a period of two years, the engagement to commence about a month after the date of the missives. On the day on which the missives were interchanged the salesman wrote a letter withdrawing from his engagement. *Held*, in an action at the instance of the warehousemen, concluding for implement of the contract, and alternatively for damages (1) that the missives were not documents *in re mercatoria*; and (2) that as a contract of service for any period exceeding a year can only be constituted by writing, and as the writing libelled on was not probative and had not been followed by *rei interventus*, the defender was entitled to resile. *Stewart, etc.* v. *M'Call*, 1869, 7 M. 544; 41 J. 287.

52. Employment — Constitution — Proof of—Admissibility of Evidence.—*Held* that it was incompetent to prove by parole an agreement, whereby a person was said to have been engaged to proceed to New Zealand as general servant and stockkeeper, the master engaging to pay the servant's passage, to lend him £100 to pay his creditors in this country, — the engagement being for twelve months certain, at £60 per annum of wages, but the servant being obliged to serve as much longer as should be necessary to repay the £100 out of his wages. *Question*: Can a contract of service for longer than one year be proved by parole to the extent of one year? *Currie* v. *M'Lean*, 1864, 2 M. 1076; 36 J. 526.

53. Employment — Constitution — Proof of — Writ or Oath. — A workman became bound by written contract to serve for seven years at 30s. a week. After serving for five years, during which he was paid the stipulated wages, his employers reduced them to 25s. a week. The workman some time afterwards left before the expiry of the seven years. *Held*, if the first contract was meant to be held as subsisting, notwithstanding the reduction of wages, the workman's consent to the change could only be proved by writ or oath. *Dumbarton Glass Co.* v. *Coatsworth*, 1847, 9 D. 732; 19 J. 316.

54. Employment — Constitution. — Circumstances in which *held* that employment had been proved. *White* v. *Caledonian Rly.*, 1869, 7 M. 583; 41 J. 314.

55. Employment—Constitution—Riding-Groom. — Verdict finding a contract of hire of a riding-groom or jockey in England for a year proved. *Jackson* v. *E. of Cassillis' Reps.*, 1834, 12 S. 568.

56. Employment — Constitution — Seaman. — A shipowner *assoilzied* from a claim made by a party for wages, as having been hired for a voyage, and unwarrantably

dismissed, in respect of the failure of the party to prove a concluded contract. *Thomson* v. *Izat*, 1831, 9 S. 598.

57. Employment—Constitution—Simultaneous Delivery of Letters.—A lady wrote to another to engage a servant, and thereafter not to do so. The two letters were delivered through the post office simultaneously to the servant. *Held* that there was no completed contract, and that the servant was not entitled to wages. *Countess of Dunmore* v. *Alexander*, 1830, 9 S. 190; 6 Fac. 122.

58. Employment — Constitution — Surveyor.—Road trustees *assoilzied* from a claim for an account of surveying a line of road, in respect of the land surveyor's failing to instruct employment by them. *Smith* v. *Road Trs.*, 1836, 14 S. 938; 11 Fac. 762.

59. Employment — Constitution — Termination — Missives.— An artificer sent an unsigned holograph offer of service for three years, to commence at a future period, which was not accepted in terms by the master. The master wrote a new offer, with some variations, and sent it to the artificer for signature, with a relative acceptance signed by himself. The artificer signed the new offer, but resiled a few weeks afterwards, before the period of service had arrived, or any *rei interventus* had followed. *Held* that the contract was not binding. *Paterson* v. *Edington*, 1830, 8 S. 931; 5 Fac. 757.

60. Employment—Termination—Break.—In December 1869 the manager of a bleach work wrote offering to undertake certain duties upon payment of salary at the rate of £120 per annum for three months, adding "if at the end of this time you are satisfied with me you are to give me an engagement to the end of 1870 and to pay me at the rate of £150 for the remaining nine months; should you not be satisfied with me our arrangement to terminate at the end of the three months." This offer was accepted. *Held* that the engagement was for one year unless the employers should take advantage of the break provided at the end of the three months and terminate the agreement. *Stewart* v. *Cochrane & Co.*, 1871, 9 S. L. R. 23.

61. Employment — Termination — Assumption of Partners.—A party who carried on business as a singer, made over his business and works to another, "his heirs or assignees," and bound himself to act as his manager in conducting the said works. *Held* that the assumption by the master of partners into the business did not infer a breach of contract on his part, so as to entitle the servant to quit his employment. *Harkins* v. *Smith*, 1841, 13 J. 381; 16 Fac. 938.

62. Employment — Termination — Contract. — Circumstances in which a superintendent of a silk manufactory failed to prove a contract of service for seven years. *Ivison* v. *Edinburgh Silk Yarn Co.*, 1846, 9 D. 1039.

63. Employment — Termination — Dissolution of Firm.—An agreement was entered into between a firm and their clerk, whereby the clerk was engaged for five years. The firm was dissolved by the death of one of the partners, and the surviving partner declined to continue the clerk's services. *Held* (1) that the contract being one of personal service to the company was terminated by its dissolution, and (2) that dissolution of the company by the death of a partner was not a breach of contract. *Hoey* v. *MacEwan & Auld*, 1867, 5 M. 814; 39 J. 450.

64. Employment — Termination — Farm Manager.—A grieve or farm overseer is held to be hired for a year; and a year's wages accordingly allowed, on his being improperly discharged. *Finlayson* v. *M'Kenzie*, 1829, 7 S. 717.

65. Employment—Termination—Gamekeeper.—In the case of a gamekeeper, *held* that the engagement was for a year, and that his remedy for improper dismissal was an action of damages and not a claim for wages. *Cameron* v. *Fletcher*, 1872, 10 M. 301; 44 J. 169.

66. Employment—Termination—Under-Gamekeeper.—*Held* that an under-gamekeeper was to be considered, in the absence of proof to the contrary, as a yearly servant. *Bentinck* v. *Macpherson*, 1869, 6 S. L. R. 376.

67. Employment — Termination — Gardener — Custom. — A proof allowed of an alleged custom, that gardeners are understood to be hired for a twelvemonth. *Mabon* v. *Elliot*, 1808, Hume 393.

68. Employment—Termination—Notice.—*Held* that a servant engaged from Whitsunday to Whitsunday, old style, had received sufficient notice that the engagement would not be renewed forty days before the expiry thereof, and that he was not entitled to notice forty days before the legal term of Whitsunday. *Cameron* v. *Scott*, 1870, 9 M. 233; 43 J. 114.

69. Employment—Termination—Notice.—A servant was engaged in February to serve from Whitsunday till Martinmas, and got arles, and on 4th March she intimated that she had changed her mind and would not enter, and on this being dissented from, threw back the arles and did not enter. *Held* that the servant was bound by the engagement, and that the rule as to forty days' notice did not apply. *Wallace* v. *Wishart*, 1800, Hume 383.

70. Employment—Termination—Notice.—A journeyman baker,—employed on weekly wages, with board and lodgings in his master's house, and to give one month's warning before leaving,—after twelve years' service, gave warning, but left in a fortnight. *Held* that he had not forfeited his right to wages, even for the last year, on the footing of being a yearly servant, but was entitled to wages for the whole period, under deduction of £5 as damages for loss of trade, owing to his desertion of service. *Gibson* v. *M'Naughton*, 1861, 23 D. 358; 33 J. 182.

71. Employment—Termination—Notice—"Apprentice."—*Held* that a workman, by the usage of his trade called an "apprentice," before leaving his employment was bound to give his master the notice usual in the trade or establishment. *Hamilton* v. *Outram*, 1855, 17 D. 798; 27 J. 414.

72. Employment — Termination — Partnership—Change In.—A written contract of service, not stamped nor tested, entered into by a minor with a party trading under the firm of a company in which there had been originally several partners, but of which he was now the sole partner, *held* binding. *Campbell* v. *Baird*, 1827, 7 S. 335.

73. Employment — Termination — Tacit Relocation.—*Held* that a manager of a farm, who was engaged on certain terms for a year, was entitled during a service of three subsequent years, by tacit relocation, to the same terms. *Tait* v. *Macintosh*, 1841, 16 Fac. 658; 13 J. 280.

74. Employment — Termination — Tacit Relocation.—A master having agreed to give his servant, in addition to wages, a present of £20 as an encouragement to assiduity, the contract was *held* to be renewed in all its parts by tacit relocation from year to year. *E. of Mansfield* v. *Scott*, 1833, 6 W. & S. 277. Affg. 1831, 9 S. 780.

75. Employment — Termination — Tacit Relocation—Gardener.—Where a gardener is originally engaged for a year, tacit relocation takes place at the end of that period, unless an express warning of forty days be given. *Maclean* v. *Fyfe*, 4 Feb. 1813, F. C.

76. Employment—Termination—Tutor.—The parent of a pupil wrote to a teacher offering him "bed and board, with £200 per annum, to be tutor," and contemplating a course of teaching and discipline. *Held* that the contract was for one year, and that the parent was not entitled to terminate it sooner without cause shown. *Moffat* v. *Shedden*, 1839, 1 D. 468; 14 Fac. 519.

77. Master—Duty—Character to Servant.—A master is not bound by law to give his servant a character. *Fell* v. *Lord Ashburton*, 12 Dec. 1809, F. C.

78. Master—Duty—Character to Servant.—Although law does not compel a master to give a servant a character, yet he is justified in giving a true one, even if it be prejudicial. *Christian* v. *Lord Kennedy*, 1818, 1 Mur. 427.

79. Master—Duty—Character to Servant.—*Held* that a servant was entitled to damages from his master for false imputation as to his character, given to a person about to hire the servant. *Anderson* v. *Wishart*, 1818, 1 Mur. 429 and 439.

80. Master—Duty—Livery—Ownership of Clothes.—If a master agree to furnish clothes to a servant out of livery, the clothes remain the property of the master. *Shiells* v. *Sir J. Dalzell*, 2 July 1825, F. C.; 4 S. 134.

81. Master — Liability — Retention of Servant under Engagement to another Master.—Damages *found* due by a party who retained a collier in his service after he knew that the collier was under a previous engagement with another. *Dickson* v. *Taylor*, 1816, 1 Mur. 141.

82. Master—Negligence—Injury to Servant—Attacked by Bull.—In an action of damages by a dairymaid against her master, on account of injuries received while employed in removing cows from a field where there was also a bull belonging to the defender, which attacked and trampled upon her, *held* that it was not proved that the bull was vicious, and therefore that the master was not liable in reparation. *Clark* v. *Armstrong*, 1862, 24 D. 1315; 34 J. 640.

83. Master—Negligence—Injury to Servant.—A workman injured while employed in work carried on under the personal superintendence of the master, *found* entitled to damages. *Finningham* v. *Peters*, 1861, 23 D. 260; 33 J. 119.

84. Master—Negligence—Injury to Servant — Contributory Negligence. — Where the death of a workman results from an accident occasioned partly by the fault of his employers, but where fault on the part of the deceased also contributes, not remotely, but directly, to the accident, the employers are not responsible. *M'Naughton* v. *Caledonian Rly. Co.*, 1858, 21 D. 160; 31 J. 94.

85. Master—Negligence—Injury to Servant — Fault of Fellow-Servant. — In an action of damages against a railway company, the pursuer alleged that when in the employment of the defenders as a labourer, he had been ordered to watch a point of the line by an inspector, who had charge of the men employed on that part of the line, and that when so engaged he had been injured through the fault of the inspector. Action *dismissed* as irrelevant, in respect that the pursuer's statements showed that he and the inspector stood in the relation of fellow-servants in a common work. *Macfarlane* v. *Caledonian Rly. Co.*, 1867, 6 M. 102; 40 J. 41.

86. Master—Negligence—Injury to Servant—Fault of Fellow-Servant.—A master *held* not liable to a servant for injuries received through the neglect of other servants of the same master. *Lennan* v. *Addie & Miller*, 1857, 21 D. 1382, footnote.

87. Master—Negligence—Injury to Servant — Fault of Fellow-Servant. — In an action of damages by a servant against his master (the lessee of a coal-pit), for an injury alleged to have been caused by the fault or negligence of a fellow-servant, *held* that the allegations in the summons amounted merely to a statement of an accident, and therefore were not relevant as a ground for an action of damages. *Question*, whether a master is liable for an injury caused to one servant by the fault or negligence of another.

Paterson v. *Monkland Iron Co.*, 1851, 13 D. 1270; 23 J. 598.

88. Master—Negligence—Injury to Servant—Fault of Fellow-Servant.—The pursuer in an action of damages against an employer, for injury caused by the alleged fault or negligence of a fellow-servant, *found* entitled to issues. *O'Byrne* v. *Burn*, 1854, 16 D. 1025; 26 J. 559.

89. Master—Negligence—Injury to Servant—Fault of Fellow-Servant—Scope of Employment.—*Held* that the defence of common employment did not apply to the case of a labourer ordered to do work out of the line of his ordinary avocation by a manager under instructions of his master. *Stark* v. *M'Laren*, 1871, 10 M. 31; 44 J. 56.

90. Master—Negligence—Injury to Servant—Fault of Fellow-Servant—Scaffolding.—A labourer in the employment of a builder was ordered by the foreman to carry stones on to a scaffolding after the foreman had been told of, and admitted, its insecurity. The labourer, though he thought the scaffold insecure, obeyed his orders, fell from the scaffolding, and was severely injured. *Held* that the master was responsible. *M'Aulay* v. *Brownlie*, 1860, 22 D. 975; 32 J. 415.

91. Master — Negligence — Injury to Servant—Fault of Fellow-Servant.—*Held* that a master is liable in damages to the representatives of a servant who died of injuries received in his service through the carelessness of a fellow-servant. *M'Naughton* v. *Caledonian Rly. Co.*, 1857, 19 D. 271; 29 J. 132.

92. Master — Negligence — Injury to Servant—Fault of Fellow-Servant—Sailor and Captain.—In an action of damages brought by a sailor against his employers the shipowners, on the ground of personal injury caused by the fault of the captain, *held* that the captain and he were *collaborateurs*, and that consequently the owners were not responsible. *Leddy* v. *Gibson & Co.*, 1873, 11 M. 304; 45 J. 212.

93. Master — Negligence — Injury to Servant — Fault of Fellow-Servant — Scaffolding.—A scaffold, intended to support two men, was erected under the superintendence of a foreman. Four days after it was put up it fell, and a workman who was on it was seriously injured. *Held* that the master was liable in damages. *Cook* v. *Duncan*, 1857, 20 D. 180; 30 J. 99.

94. Master — Negligence — Injury to Servant—Fault of Fellow-Servant—Independent Contractor and Employer's Workman.—A person employed a foreman and masons to build a house for him, paying their wages. He also entered into a contract with a joiner for the execution of the joiner work. In an action of damages brought by the joiner for injury sustained by him while working in the house, through the fault of the masons, *held* that the defender, being himself the master of the masons, was responsible for the damage caused by their fault, and that the pursuer was not their fellow-servant. *Gregory* v. *Hill*, 1869, 8 M. 282; 42 J. 132. Cf. *Woodhead* v. *Gartness Mineral Co.*, 1877, 4 R. 469; 14 L. R. 320.

95. Master — Negligence — Injury to Servant—Fault of Fellow-Servant.—In an action of damages against a master for injury sustained by a servant in the course of his employment, the court *repelled* the plea that "no action lies at the instance of a servant against his employer, founded on the alleged fault or negligence of a fellow-servant." *Gray* v. *Brassey*, 1852, 15 D. 135; 25 J. 101; 2 Stuart 63.

96. Master — Negligence — Injury to Servant—Fault of Fellow-Servant.—*Held* that the general rule of the law of Scotland is, that a master is liable in reparation for an injury sustained by his servant or workman, caused by the negligence or other culpable act of a fellow-servant or workman in the course of the work in which he is employed by the master. *Dixon* v. *Ranken*, 1852, 14 D 420; 24 J. 184; 1 Stuart 353.

97. Master — Negligence — Injury to Servant—Fault of Fellow-Servant—Lifting Heavy Weight.—The mother of an apprentice brought an action of damages against his master, on the allegation that her son had died in consequence of endeavouring to lift a heavy log of wood, in obedience to an order by a foreman, who, it was also alleged, had accompanied previous orders of the same kind with threats of personal violence. But it was not alleged that the master was cognisant of what occurred, or that the foreman was unfit for his duty. *Held* that the allegations were relevant to entitle the pursuer to an issue. *M'Millan* v. *M'Millan*, 1861, 23 D. 1082; 33 J. 546.

98. Master — Negligence — Fault of Fellow-Servant—Injury to Servant—Mine.—*Held* that a coalmaster was not liable for the fault or negligence of an engineman at the mouth of the pit, by which a collier who was being brought up the pit was killed. *Reid* v. *Bartonshill Coal Co.*, 1858, 20 D. (H. L.) 13; 3 Macq. 266; 30 J. 597. See also *M'Guire* v. *Bartonshill Rly. Co.*, 1858, 3 Macq. 300; 20 D. (H. L.) 13; 30 J. 597.

99. Master — Negligence — Injury to Servant—Fault of Fellow-Servant—Mine.—*Held* that the operation of blasting a rock was conducted without due precaution by one of the servants of the lessees of a quarry, and that the lessees were liable in damages to another of their servants for severe bodily injury thereby occasioned to him. *Sword* v. *Cameron*, 1839, 1 D. 439.

100. Master — Negligence — Injury to Servant—Fault of Fellow-Servant—Mine.—*Held* that a master was liable for injury to a collier occasioned by the fault of the underground manager of the pit. *Somerville* v. *Gray & Co.*, 1863, 1 M. 768; 35 J. 445.

101. Master — Negligence — Injury to Servant — Fault of Fellow-Servant —

Mine. — In an action by the widows and children of two miners, who had been killed by an explosion of fire-damp, against the coalmaster and the underground manager, *held* that the coalmaster was not but that the underground manager was liable in damages. *Question*, whether a master who appoints a general manager or overseer of works, to whom he delegates his entire functions and duty as master, is responsible for the acts or negligence of the person so appointed. *Wright* v. *Roxburgh & Morris*, 1864, 2 M. 748 ; 36 J. 371.

102. Master — Negligence — Injury to Servant—Fault of Fellow-Servant—Mine. —*Held* that a coalmaster was not liable in damages for injuries sustained by a miner in a coal-pit, through the fault of a sub-manager having the entire superintendence of the pit, under a general manager having the oversight of several pits belonging to the same coalmaster, the sub-manager and the miner being in the relation of fellow-servants. *Wilson* v. *Merry & Cuninghame*, 1868, 6 M. (H. L.) 84 ; 40 J. 486 ; L. R. 1 Sc. Ap. 326.

103. Master—Negligence—Injury to Servant—Fault of Fellow-Servant—Mine.—A miner having been killed in a coal-pit by an accident attributable to the neglect of the underground manager, damages were awarded against the coalmaster. *Hardie* v. *Addie & Co.*, 1858, 20 D. 553 ; 30 J. 247.

104. Master — Negligence — Injury to Servant—Dangerous Employment—Precaution.—A master *found* liable in damages for injuries sustained in his service by his servant from his failure to take proper precautions for the servant's protection in the performance of a dangerous work. *Pollock* v. *Cassidy*, 1870, 8 M. 615 ; 42 J. 303.

105. Master — Negligence — Injury to Servant—Dangerous Place.—In an action of damages against the proprietor of a work, the pursuers (the wife and children of the deceased) averred that a workman in the defender's employment had been killed by falling, after sunset, from a bridge over a lade within the works, which was not alleged to be dangerously narrow, but was unprotected by any kind of parapet, and unlighted by a lamp. *Held* that the master was not liable in reparation, in respect that (1) there was no duty or obligation at common law to fence or light the bridge ; and (2) nothing in the special contract between master and servant to create such an obligation. *Robertson* v. *Adamson*, 1862, 24 D. 1231 ; 34 J. 598.

106. Master — Negligence — Injury to Servant—Scaffolding.—Special case in which *held* that a scaffold which had given way while workmen were upon it was proved to have been insufficient and defective, and that the defect was a patent one, and that the contractor was liable in damages to an injured workman. *Scott* v. *Craig*, 1862, 24 D. 789 ; 34 J. 401.

107. Master — Negligence — Injury to Servant — Precautions. — Reparation to a servant injured when engaged in his master's work, *refused* when there had been no indications of danger suggesting precautions which were omitted, and no negligence or want of care on the part of the defender, or those for whom he was responsible. *M'Intyre* v. *Reilly*, 1859, 22 D. 347 ; 32 J. 143.

108. Master — Negligence — Injury to Servant—Fault of Third Party.—A railway servant employed in collecting accounts having been directed to assist the porters at a platform occupied partly by the railway company of which he was a servant, and partly by another railway company, and having sustained severe injury by the falling of an article which had been placed by the servants of the other company in an insecure position on the platform, *found* entitled to damages against the company of which he was a servant. *Observed*, that if a railway company left to the servants of a neighbouring company the duty of carrying and placing articles on that part of the platform occupied by the first company, and looked no more after these articles, they made these people their servants, and were liable for any accident resulting from their carelessness. *Hill* v. *Caledonian Rly. Co.*, 1855, 17 D. 569.

109. Master — Negligence — Injury to Servant—Fall of Scaffolding.—An action of damages by a labourer against his employer, for injury received by the fall of scaffolding, was rested on the allegation that the scaffolding was insufficient, and that this had been pointed out to the defender's manager. Action *held* relevant. *Lynch* v. *Haggart*, 1857, 19 D. 399, 593 ; 29 J. 183.

110. Master — Negligence — Injury to Servant through Falling down Shaft Elevator.—*Held* that the employers of a little girl, ten years of age, who had fallen down the shaft of an elevator and been severely injured, were not in fault, and consequently not liable in damages. *Brady* v. *Grimonds*, 1871, 9 S. L. R. 140.

111. Master — Negligence — Injury to Servant—Defective Machinery—Fault of Fellow-Servant—Manager.—In an action of damages for personal injury raised by a workman in a paper-work against his master, it was proved that the pursuer had been injured in consequence of the machine at which he was employed being in a defective state through the negligence of the manager and a mechanic employed in the works, and that there had been no personal negligence on the part of the master. *Held* that the master was not liable for the fault of those employed by him, seeing that he had taken reasonable care to employ competent workmen. *Balleny* v. *Cree*, 1873, 11 M. 626 ; 45 J. 396.

112. Master — Negligence — Injury to Servant — Defective Machinery. — In an action of damages against a contractor at the instance of a boy aged thirteen, who suffered bodily injury while employed turning switches on a tramway used in the construction of a

railway, it was averred that the accident causing the injury was the result of the defender's failure to furnish proper machinery for turning the switches, and to employ drivers of sober habits. *Held* that the action was relevant. *Donald* v. *Brand*, 1862, 24 D. 295; 34 J. 135.

113. Master — Negligence — Injury to Servant—Defective Plant—Fault of Fellow-Servant.—*Wilson* v. *Sneddons*, 1866, 4 M. 736; 38 J. 396.

114. Master — Negligence — Injury to Servant — Defective Machinery.—Damages awarded to a collier boy against the lessees of a coal-pit in which he was working, in consequence of bodily injury sustained by him from the use of insufficient machinery; and *held* that it is no defence to a party who uses insufficient machinery, by which bodily injury is inflicted upon another, that the latter was at the time in a place where he had no right to be, and where, if he had not been, no injury would have been inflicted on him. *Whitelaw* v. *Moffat*, 1849, 12 D. 434.

115. Master — Negligence — Injury to Servant—Defective Machinery.—*Held* that a master at common law does not warrant the sufficiency of his machinery to his workmen, and that it is necessary to aver and to prove *culpa* on his part to render him liable in damages to them for injuries sustained by its insufficiency. *Ovington & Others* v. *M'Vicar*, 1864, 2 M. 1066.

116. Master — Negligence — Injury to Servant—Defective Machinery—Coal-Pit.—In an action against the owners of a coal-pit by the representatives of a workman, who in descending the pit was killed by the scaffold and machinery giving way, *opinion*, that the pursuers were not bound to prove the specific cause of the accident, by showing the specific defect in the machinery, or particular neglect in the management by which the wrong was occasioned. *Macaulay* v. *Buist & Co.*, 1846, 9 D. 245; 19 J. 81.

117. Master — Negligence — Injury to Servant—Defective Machinery.—A master *held* responsible for the death of a workman, the accident causing death being due to the insufficiency of machinery provided by the master. *Mathieson* v. *Weems*, 1860, 4 S. L. R. 56; 1861, 23 D. (H. L.) 11.

118. Master — Negligence — Injury to Servant—Defective Machinery.—Damages awarded to a boy against his employer, a railway contractor, for injuries sustained in making a railway, it being held proved that the defective condition of a drag upon a waggon was the cause of the accident. *Matthews* v. *M'Donald, etc.*, 1865, 3 M. 506; 37 J. 241.

119. Master — Negligence — Injury to Servant—Unfenced Machinery.—*Held* that millowners were liable in damages in respect of injuries sustained by one of their workers, a girl of fourteen years of age, in consequence of machinery being unfenced. *Allans* v. *Wilson & Son*, 1866, 3 S. L. R. 93.

120. Master — Negligence — Injury to Servant—Unfenced Machinery.—The owner of machinery which is dangerous, if unfenced, is liable for the consequences of insufficient fencing; and it is no defence that he had appointed an overseer, who ought to have seen to the fencing of the machinery. *Darby* v. *Duncan & Co.*, 1861, 23 D. 529; 33 J. 206.

121. Master — Negligence — Injury to Servant — Unfenced Machinery. — A girl aged thirteen lost her right arm in the course of employment in a factory which made it necessary that she should put her arm within eight inches of a toothed wheel. *Held* that her employers were liable in damages. *Gemmills* v. *Gourock Ropework Co.*, 1861, 23 D. 425; 33 J. 216.

122. Master — Negligence — Injury to Servant — Unfenced Machinery. — Millowners *found* liable for an injury sustained by a boy in their employment in consequenec of unfenced machinery. *Traills* v. *Small & Boase*, 1873, 11 M. 888; 45 J. 540. Cf. *Gibb* v. *Crombie*, 1874, 2 R. 886.

123. Master — Negligence — Injury to Servant—Contributory Negligence—Mine.—A workman in a coal-pit injured by a fall from a ladder, caused by his own haste and carelessness in ascending, there being no proof of defect of construction or insufficiency which could be a source of danger to a person exercising proper caution, has no claim against his master for reparation. *O'Neill* v. *Wilson*, 1858, 20 D. 427.

124. Master — Negligence — Injury to Servant—Mine.—Miners left their work in a coal-pit to complain of the deficient ventilation of the mine. While being drawn up the shaft, one of them was killed by an accident arising from the unsafe state of the shaft. The jury found that the men had no proper cause for leaving. *Held* that this did not relieve the master from responsibility for the death of the workman. *Marshall* v. *Stewart*, 1855, 2 Macq. 30; 27 J. 321; 18 D. (H. L.) 7.

125. Master—Negligence—Mine — Volenti non fit injuria.—A collier sustained injury by the falling of the roof of the pit. The rule and practice of the colliery was that each workman should prop the roof of his own excavation, the master being bound to provide wood for the purpose. *Held* that, having proceeded to work without props, although aware of the danger, he was not entitled to damages in respect of the fall of the roof, merely because his employer had failed to supply timber. *M'Neill* v. *Wallace & Co.*, 1853, 15 D. 818; 25 J. 492; 2 Stuart 241. See also *Cook* v. *Bell*, 1857, 20 D. 137; 30 J. 75.

126. Master—Negligence—Injury to Servant—Volenti non fit injuria—Mine.—A coalmaster *held* not liable for injury to a miner who had knowingly gone to a dangerous part of the pit when an explosion of fire-damp took place. *Lawson* v. *Gray & Co.*, 1860, 22 D 710; 32 J. 274.

127. Master — Negligence — Injury to Servant—Mine—Violation of Rules. —*Held* that coalmasters had failed to provide a certain protection for their servants required by special rules of their colliery, approved and promulgated in terms of the Coal Mines Inspection Act, 1855, and that the death of a workman having been caused by this failure they were liable in damages. *Edgar* v. *Law & Brand*, 1871, 10 M. 236 ; 44 J. 60.

128. Master—Negligence—Injury to Servant—Mine—Independent Contractor.—In an action of damages at the instance of a miner against a coalmaster for injuries sustained in consequence of an explosion of fire-damp caused by defective ventilation, it was pleaded in defence that a contract had been entered into with a third party to attend to the workings of the pit, and that it was his duty to attend to the ventilation. *Held* that the coalmaster was responsible for the neglect or fault of the contractor. *Baird* v. *Addie*, 1854, 16 D. 490.

129. Master—Negligence—Injury to Servant—Railway.—In an action of damages against a railway company at the instance of the widow and children of an engine-driver who had been killed in the service of the company, averments that the accident was caused by neglect of officials when the line was under repair, which were *held* sufficient to entitle the pursuers to an issue. *Morton, etc.* v. *Edinburgh & Glasgow Rly. Co.*, 1864, 2 M. 589 ; 36 J. 287.

130. Master—Negligence—Injury to Servant—Dangerous Employment — Railway. —An action of damages by a boy aged fourteen, alleging that he had been employed by the defenders to do work on a railway unsuitable to his age and strength, in the course of which he received serious bodily injury, *held* relevant. *Niddrie* v. *Dean & Smith*, 1852, 1 Stuart 1034.

131. Master—Negligence—Injury to Servant — Railway — Non-Observance of Rule.—In an action of damages against a railway company at the instance of the widow and children of one of its servants, said to have been killed through the fault of the defenders or one of their servants, *direction* to a jury (*per* Lord Justice-Clerk Inglis) that it was not sufficient for the pursuers to rely upon the alleged non-observance of a rule in the company's regulations for the benefit of the company's servants. *Stewarts* v. *Scottish N.-E. Rly. Co.*, 1866, 1 S. L. R. 251.

132. Master—Negligence—Injury to Servant—Railway.—A fireman of a locomotive brought an action of damages against the railway company, his employers, on the ground that, while sitting on the pushing-frame of his engine, in the execution of his duty, sprinkling sand on the rails, the engine came in contact with a quantity of rubbish on the line, whereby his leg was broken; that the accident occurred in the dark, when he could not see the obstruction, and in a cutting where the line was unfenced. *Held* that the action was relevant. *Morris* v. *Monkland Rlys. Co.*, 1857, 19 D. 360 ; 29 J. 165.

133. Master—Negligence—Injury to Servant—Railway.—Averments in an action of damages against a railway company for injury sustained by the pursuer while in their service which were *held* relevant to entitle the pursuer to an issue. *Cray* v. *N. B. Rly. Co.*, 1863, 1 M. 670 ; 35 J. 383.

134. Master—Negligence—Injury to Servant—Volenti non fit injuria.—A workman is not entitled to damages for injuries where he knowingly exposes himself to danger. *Paterson* v. *Wallace*, 1855, 17 D. 623 ; 27 J. 254.

135. Master—Negligence—Injury to Servant—Volenti fit non injuria—Scope of Employment.—A workman ordered by an overseer to do what is clearly beyond the limits of the work for which he is engaged, and thereby exposes himself to danger, obeys at his own risk, and has no claim for damages against his master for injuries received in doing so. *Sutherland* v. *The Monkland Rlys. Co.*, 1857, 19 D. 1004 ; 29 J. 475.

136. Master—Negligence—Injury to Servant—Volenti non fit injuria.—In an action of damages at the instance of a labourer against his employers for bodily injury alleged to have been sustained through their furnishing him with a horse unfit for the work which he had to do with it, the pursuer alleged that the defenders were aware of the unfitness of the horse, had promised to furnish another, and had induced him to go on with the old horse in the meantime by promises of assistance, which they had failed to fulfil. *Held* that the pursuer's averments showed that he knew the unfitness of the horse, and the danger of continuing to work with it ; and therefore that he had no claim against his masters. *Crichton* v. *Keir & Crichton*, 1863, 1 M. 407 ; 35 J. 247.

137. Master—Negligence—Injury to Servant—Mine.—The representatives of a collier killed by accident in a coal-pit are entitled to damages, if the accident happens in consequence of the negligence of the master or those acting for him in delaying to remove the cause of danger or preventing the workman from exposing himself to it, and if it was not owing to the rashness of the deceased. *Paterson* v. *Wallace & Co.*, 1854, 17 D. (H. L.) 16 ; 1 Macq. 748 ; 26 J. 550.

138. Servant — Absence — Illness. — A master is not entitled to compensation for a period during which the servant was disabled from work by illness. *Maclean* v. *Fyfe*, 4 Feb. 1813, F. C.

139. Servant—Desertion—Enlistment. — *Held*, in a question between a master to whom a workman was under articles of agreement to work for eighteen years, and a military officer who had enlisted him, that the former was entitled to his services; and the same rule applied to a workman who was bound to give a month's premonition ; but *held* that the en-

listment was equivalent to a premonition to leave his service. *M'Donell* v. *Dixon*, 1 Mar. 1805, F. C.

140. Servant — Delict — Liability of Master.—A person having been killed by the overturn of a stage-coach, on which he was a passenger, caused by racing with a post-chaise, *held* that the proprietors of both were responsible for the acts of their servants. *Brown* v. *M'Gregor*, 26 Feb. 1813, F. C.

141. Servant — Delict — Liability of Master.—A horse having strayed, on two occasions, from a farm into an adjoining one, a lad in the service of the tenant of the latter laid hold of it, and rode it to the former with such violence and cruelty, that the horse was severely injured. *Held* that the master was not liable for the injury. *Dalrymple* v. *M'Gill*, 1804, Hume 387.

142. Servant — Delict — Liability of Master.—The servant of a manufacturing chemist purchased in the course of the business, about midnight, a horse which he immediately killed and boiled up before morning. It turned out that the horse had been stolen. *Held* that although there was no *mala fides* or actual dole, the proof evinced such want of due care and caution as to infer responsibility on the part of the chemist for the value of the horse. *Faulds* v. *Townsend*, 1861, 23 D. 437; 33 J. 224.

143. Servant — Delict — Liability of Master.—A master *held* responsible for his overseer, whom he had employed to cut trees on his own property, passing over the known fence of an adjoining proprietor, and there cutting trees, although it was alleged he did so without authority. *Hill* v. *Merricks*, 1813, Hume 397.

144. Servant — Delict — Liability of Master.—The proprietor of a land estate, residing at a distance from it, *held* not liable in damages to the widow and children of a person who was killed by the fall of a tree growing on the estate, and which his servants were cutting down without his orders. *Linwood* v. *Hathorn*, 1821, 1 Shaw's App. 20. Affg. 14 May 1817, F. C.

145. Servant — Delict — Liability of Master.—A master is not liable for an illegal act committed by his servant, beneficial to the master, but which he has prohibited, and which was done in his absence. *Waldie* v. *D. of Roxburgh*, 1825, 1 W. & S. 1. Affg. 1822, 1 S. 367.

146. Servant — Delict — Liability of Master — Deforcement. — *Held* that the captain of a king's ship, being at the time ashore, is not civilly liable for the delinquency of his officers and crew in committing a deforcement, by refusing to admit on board the ship a civil officer, to execute, against one of the men, diligence for debt. *Thorburn* v. *Ellis*, 24 May 1811, F. C.

147. Servant — Delict — Liability of Master—Excise Act.—A clerk to a distiller having sold a cask of whisky to a party who had not a licence to sell spirits, at the request of the purchaser sent it to him, with a permit obtained in the name of another party. *Held* that this amounted to an offence against the Excise Act, 2 Will. IV. c. 16, and that the employers were liable for the acts of their clerk, these having been done within the sphere of his employment. *Advocate-General* v. *Grants*, 1853, 15 D. 980.

148. Servant — Delict — Liability of Master—Fraud.—A bachelor residing in a town was in the custom of paying his domestic servant £1 per week for the purpose of providing butcher-meat and vegetables. The servant, after a number of ready-money purchases from a butcher, got from him a pass-book, and opened an account with him in her master's name. The butcher sent meat to the master for sixteen months, during the whole of which time the master was in ignorance of the existence of the account. *Held* that the master was not liable in payment of the account. *Mortimer* v. *Hamilton*, 1868, 7 M. 158; 41 J. 86.

149. Servant — Delict — Liability of Master.—A proprietor of an estate, who employed his servants to grub a quantity of brushwood and heath, which was distant about 400 feet from a forest, and separated by a stone wall 4½ feet high, *held* liable for damages to the forest by the servants having used fire, although specially prohibited to do so. *Keith* v. *Keir*, 10 June 1812, F. C.

150. Servant — Delict — Liability of Master.—*Opinion* by the court upon a case in Exchequer, that an information against brewers for retailing beer without a licence and certificate to do so, by means of their servant, was rightly dismissed, because the sale by the servant was without the knowledge of the masters, and not within the scope of the servant's duty. *The Queen* v. *Gilroys*, 1866, 4 M. 656; 38 J. 275.

151. Servant—Duty—Breach of Contract of Service—Servant Carrying on Business on his Own Account.—*Held* that it was a breach of a contract of service for a servant (1) to abstract time from his master's affairs and devote it to his own; (2) to carry on the same business as his master with the effect of injury to his master's interest. *Cameron & Co.* v. *Gibb*, 1867, 3 S. L. R. 282.

152. Servant—Duty—Enforcement of—Imprisonment.—An engineer engaged as a boilermaker having failed to enter upon his service, the master presented a petition to the magistrates, praying them to ordain him to find caution to do so, under the pain of imprisonment. *Held* that the petition was competent, except in so far as it prayed for imprisonment, which was not a competent remedy. *Tulk, Ley, & Co.* v. *Anderson*, 1843, 5 D. 1096; 15 J. 437.

153. Servant—Duties—Enforcement of — Imprisonment. — *Held* that a summary warrant is competent to compel fulfilment of

an engagement of service. *Raeburn* v. *Reid*, 1 June 1824, F. C.; 3 S. 104. *Gentle* v. *M'Lellan & Co.*, 1825, 4 S. 163. Cf. *Lees* v. *Grangemouth Coal Co.*, 1846, 18 J. 273.

154. Servant—Duties—Enforcement of—Imprisonment.—It is incompetent, after the expiration of a written agreement of service, to compel a workman, by summary imprisonment, to work for a certain number of days, on an allegation that he had been absent for a corresponding time during the currency of the agreement. *Observed*, that as the period of service had expired, the case was distinguishable from *Raeburn* v. *Reid*. *Campbell* v. *Anderson*, 1826, 4 S. 471.

155. Servant — Duty—Factory Worker.—The proprietor of two spinning-mills, who hired his workers from year to year, directed a female worker in the middle of a term, who had for some years been employed at one of the mills, to work at the other, which was a half of a mile farther from her home; and there was no established practice of transferring workers from one mill to the other at his discretion. *Held* that although the kind of work and rate of wages at both mills were the same, and the proprietor offered to cause her victuals to be carried to the other mill for her use, she was entitled to refuse to do so. *Anderson* v. *Moon*, 1837, 15 S. 412; 12 Fac. 352.

156. Servant—Duty—Farm Manager.—A person engaged as a manager of a farm which the landlord expected to get into his own hands, but which he did not, *held* not bound to act in a different capacity, and found entitled to the stipulated wages. *Stuart* v. *Richardson*, 1806, Hume 390.

157. Servant—Duty—Farm Manager.—A farm overseer having engaged servants in name of his master, *held* not liable for their wages. *Nabonie* v. *Scott*, 1815, Hume 353.

158. Servant — Duty — Fraud — Bank Manager.—The acts of the manager of a bank fall under the rule, that a servant who aids in the commission of a fraud cannot escape liability on the ground that he acted under instructions. *Cullen* v. *Thomson & Kerr*, 1862, 24 D. (H. L.) 10; 34 J. 728.

159. Servant—Negligence—Liability of Master.—A master is liable to repair the damage occasioned by the negligence of his servant in the performance of a contract. *Anderson* v. *Brownlee*, 1822, 1 S. 474.

160. Servant—Negligence—Liability of Master. — Circumstances in which road trustees consented to a verdict against them in favour of the widow of a carter who had lost his life through the misconduct of their servant, who neglected to take proper precautions for the safety of the public, though he knew that the road was in a dangerous state. *Aitken* v. *Douglas*, 1836, 14 S. 204.

161. Servant—Negligence—Liability of Master.—A master who entrusted the charge of his cart and horse to his servant, *held* liable for an injury done to a child in consequence of the negligence of the servant. *Baird* v. *Hamilton*, 1826, 4 S. 790; 1 Fac. 742.

162. Servant—Negligence—Liability of Master.—A master having sent his servant with a horse to be sold at a fair, and the servant having, on the journey, placed the horse in a stable, in the knowledge that it was diseased with glanders, and the horses in the stable having been thereby infected with the disease, and died,—*held* that a claim of damages was relevant against the master, although his personal knowledge of the horse being diseased was not alleged. *Baird* v. *Graham*, 1852, 14 D. 615; 24 J. 313; 1 Stuart 578.

163. Servant—Negligence—Liability of Master.—A collector of statute labour money *held* responsible for the proceedings of an officer employed under him. *Cleland* v. *Weir*, 1835, 13 S. 1143; 10 Fac. 101.

164. Servant—Negligence—Liability of Master.—A master found liable for an injury caused by the careless driving of his servant. *Fraser* v. *Dunlop*, 1822, 1 S. 258.

165. Servant—Negligence—Liability of Master.—On the trial of an issue, whether A. F. died in consequence of injuries sustained from an unfenced shaft in the mashhouse of the defenders' brewery, through the fault of the defenders, the judge directed the jury that the act of the defenders' servants in allowing A. F. to come within the mashhouse "would not affect the defenders, if the jury were satisfied on the evidence that their doing so was in contravention of a direct order of the defenders." *Held* that this direction was wrong in law, and exception thereto allowed. *Fraser* v. *Younger & Sons*, 1867, 5 M. 861; 39 J. 494.

166. Servant—Negligence—Liability of Master.—A master found liable in damages for injury done to another, through the fault and negligence of his servant having the charge of his horse and cart. *M'Laren* v. *Rae*, 1827, 4 Mur. 381.

167. Servant—Negligence—Liability of Master.—To render a master liable for injury by the act of his servant, the act must have been in the course of his duty, and from want of skill or attention, and not from criminal conduct. *M'Laren* v. *Rae*, 1827, 4 Mur. 384. *Miller* v. *Harvie*, 1827, 4 Mur. 388.

168. Servant—Negligence—Liability of Master.—A waggoner employed by public carriers, who did not undertake to carry goods from intermediate places, allowed a trunk to be put into the waggon on the road, and it was lost. *Held* that his employers were not responsible for it. *Howie & Co.* v. *Lovell*, 1826, 4 S. 752; 1 Fac. 721.

169. Servant — Powers—Draughtsman—Ownership of Sketches.—*Held* that books in which the draughtsman of an engineering firm made sketches, from which finished drawings were afterwards made of machinery constructed by his employers, but which contained no

original designs by himself, belonged not to the draughtsman, but to his employers; and that as he had authority to purchase the books at his employers' expense, it made no difference that he had in point of fact purchased them at his own. *Rollo* v. *Thomson*, 1857, 19 D. 994; 29 J. 462.

170. Servant—Powers—Injury to Person Asked by Manager to Assist in Lifting Weight—Liability of Master.—A claim for damages for bodily injury found relevant at the instance of a party who was not in the defender's employment, but who, when passing along the high road, came, at the request of the defender's manager, to assist his servants in moving a heavy weight, and sustained injuries in so doing. *Little* v. *Neilson*, 1855, 17 D. 310; 27 J. 135.

171. Servant—Powers—Manager—Admissibility of Evidence.—*Held* that where the power of a manager was fixed by contract, no general evidence to show the practice as to the nomination of inferior servants was competent. *Gye & Co.* v. *Hallam*, 1832, 10 S. 512.

172. Servant—Powers—Power to Bind Master.—A master having paid an account of articles furnished on the order of his servant, and for which credit had been given, *held* liable for a further account of articles furnished on the order of his servant. *Dewar* v. *Nairne*, 1804, Hume 340.

173. Servant—Powers—Power to Bind Master—Settled Accounts.—An arrangement was entered into by a firm of contractors with a tradesman that the latter should supply their workmen with goods or advances in cash upon the order of the firm. Orders on behalf of the firm were signed by two persons in their employment, and the accounts were periodically settled by these persons for the partners, who did not personally examine them. *Held* that the accounts could not be opened up on an averment that one of the persons so acting for the partners had acted without their authority, and had embezzled various sums of money advanced by the tradesman. *Weatherhead* v. *Graingers*, 1868, 6 S. L. R. 76.

174. Servant—Powers—Power to Bind Master—Coal Manager.—Direction to a jury that there was not implied, in the appointment of a coal manager, power to enter into a contract of a peculiar description for the supply of coal to a gas company, without the express sanction of his employer; that there was no evidence of the employer having sanctioned or homologated the contract; and that he was not barred by personal exception from challenging it. *South Metropolitan Gas Co.* v. *M. of Lothian*, 1838, M'F. 13.

175. Servant—Skill—Proof of—Admissibility.—Evidence of skill is *incompetent* in a question as to service, where, by the regulations of a corporation, a party claiming admission must have served an apprenticeship of seven years. *Spence* v. *Howden*, 1819, 2 Mur. 169.

176. Service—Loss of—Damages.—When a servant was injured by the fault of A, *question*, whether an action would lie at the instance of the master against A for damages for loss of the servant's services. *Allan* v. *Barclay*, 1864, 2 M. 873; 36 J. 436.

177. Wages—Amount—Clerk.—An agent *found* liable in £50 per annum, as a fair remuneration to a clerk. *Sinclair* v. *Erskine*, 1831, 9 S. 487.

178. Wages—Amount—Clerk—No Specific Salary.—A salary of £30 was offered to a clerk by an agent in place of full payment for writings, but not accepted by the clerk, and no specific sum was agreed upon. *Held* that the rate of payment was to be regulated by the principle recognised by the parties in payments already made. *Stewart* v. *Clyne*, 1835, 2 S. & M'L. 45. Affg. 9 S. 382; 11 S. 727.

179. Wages — Clerk — Inefficiency. — General allegations by a writer of incapacity and negligence on the part of his clerk, not complained of while the clerk was in his service, *held* not a relevant defence against the clerk's claim for salary. *Fraser* v. *Lang*, 1831, 9 S. 418.

180. Wages — Coopers — Contract — Custom.—Coopers agreed to work "for one year at 1s. 4d. per barrel," the wood being undressed; or otherwise, at "days' wages equal to the average amount of their piecework when otherwise employed." Their employer proposed to them to work with dressed wood at 8½d. or 9d. per barrel, which they refused. *Held* that they were entitled to enforce the alternative part of the agreement, although it was alleged that by the practice of the trade working with dressed wood at 8½d. or 9d. was equivalent to working with undressed at 1s. 4d. *Grieve* v. *Gordon*, 1821, 1 S. 39.

181. Wages—Deductions—Debts Due by Workmen.—Manufacturers are not entitled to compensate wages due to their workmen with debts incurred by the workmen for furnishings at stores kept by the manufacturer, though such debts were voluntarily contracted after the engagement of the workers. *Monteith & Co.* v. *Blackie*, 1827, 5 S. 280; 2 Fac. 170.

182. Wages—Extra Services—Manager of Railway Company—Relevancy.—Action by a salaried manager of a railway company for remuneration for extra services said to have been rendered by him during a long period of years, *dismissed* as irrelevant, there being no specific averment (1) of the services he was engaged to perform; (2) of the extra services performed by him; and (3) of an agreement to remunerate him for such extra services. *Latham* v. *Edinburgh & Glasgow Rly. Co.*, 1866, 4 M. 1084; 38 J. 564.

183. Wages — Extra Work. — *Held* that a clerk was not entitled to remuneration for extra work, he having contracted to give his whole attention to the business

of his master, and the work for which a claim was made falling within the contract of service. *Money* v. *Hannan & Kerr*, 1867, 5 S. L. R. 32.

184. Wages — Farm Manager — Inefficiency.—In an action by a manager of a farm for payment of four years' wages, a defence that damage had been incurred by his neglect and misconduct, which was not found fault with at the time, *repelled*. *Tait* v. *Macintosh*, 1841, 16 Fac. 658; 13 J. 280. See also *Logan* v. *Stephen*, 1850, 13 D. 262; 23 J. 89.

185. Wages — Forfeiture—Disobedience.—A servant was engaged on wages at the rate of £50 per annum for no definite time, but until either party should give a month's warning, under condition that, if the servant deserted, she should forfeit a month's wages. The servant was guilty of disobedience and insolence, and deserted the service. *Held* that the disobedience and insolence took the case from under the stipulation of the agreement, and that the servant therefore did not simply forfeit a month's wages, but the whole wages from the immediately preceding term day. *Silvie* v. *Stewart*, 1830, 8 S. 1010.

186. Wages—Forfeiture—Disobedience—Drunkenness — Shipmaster. — A shipmaster *held* to have forfeited his wages by taking spirits on board his vessel, contrary to the owner's express orders, and indulging in drunkenness, though the ship completed her voyage in safety. *M'Kellar* v. *Macfarlane*, 1852, 15 D. 246; 25 J. 156; 2 Stuart 123.

187. Wages—Forfeiture—Seaman.—*Held* that a party who was hired to take charge personally of a vessel forfeited his wages by failure to do so, although he employed a substitute; but that he was entitled to reimbursement for the expense of employing the substitute, as *in rem versum* of the owners. *Campbell* v. *Price*, 1831, 9 S. 264.

188. Wages — Implied Contract. — The court *dismissed* a claim on the sequestrated estate of a company by a son of one of the partners, for arrears of salary as a servant in the company's employment. *Cowan* v. *M'Micken*, 1846, 19 J. 91.

189. Wages — Implied Contract. — A woman who, without any express contract, worked as a domestic servant for several years for a man who died, *held* entitled to three years' wages from his representatives. *Adam* v. *Peter*, 1842, 4 D. 599; 14 J. 240.

190. Wages—Implied Contract.—Where services are rendered, the presumption of law, in the absence of circumstances sufficient to exclude it, is that wages are due. *Peter* v. *Rennie's Reps.*, 1842, 14 J. 240.

191. Wages — Implied Contract. — A woman, during two years, performed domestic services for and attended on her next-door neighbour, an elderly man of filthy habits, and afflicted with a disease which rendered such attendance peculiarly disagreeable. It did not appear whether she had received any remuneration during his lifetime. Other persons were in use to assist him in the same manner. On his death, she brought an action for payment of wages. *Held* that no contract of service having been proved, the claim could not be sustained. *Ritchie* v. *Ferguson*, 1849, 12 D. 119; 21 J. 610.

192. Wages—Implied Contract.—An old woman having gone to live with a relation without any agreement or stipulation as to service or wages, and having for several years acted as servant, *held* that she was entitled to wages, and that the right thereto could not be barred except by proving a contract, to the effect that no wages should be claimable. *Anderson* v. *Halley*, 1847, 9 D. 1222; 19 J. 532.

193. Wages—Implied Contract.—A girl in destitute circumstances, ten years old, resided with her uncle until she was twenty-five, and acted as his servant during that time. *Held*, in an action by her for wages during six years, that she was entitled to £4 yearly. *M'Naughton* v. *M'Naughton*, 1813, Hume 396.

194. Wages — Implied Contract. — A granddaughter, when thirteen years of age, went, on the departure to America of her father, to reside with her grandfather and grandmother, acted as their only servant for eleven years, and never got any wages. *Held* that she was entitled to wages for the last three years, and to mournings; but, *quoad ultra*, that her claim was prescribed. *Shepherd* v. *Meldrum*, 1812, Hume 394.

195. Wages — Implied Contract — Subcontract.—A road contractor *held* liable for the wages of workmen hired by a person acting ostensibly as his overseer, although the contractor averred that that person was a subcontractor, but the subcontract was not known to the workmen. *Glennie* v. *M'Phail*, 1829, 3 W. & S. 839. Affg. 3 S. 574.

196. Wages — Kind — Potatoes — Farm Servant.—By an agreement between a master and a farm servant, the latter was to receive a certain sum of money wages, and an allowance of nine bolls of potatoes. The potato crop of that year utterly failed on the farm; and the price of potatoes rose extremely high. The servant having insisted on receiving the average market price of potatoes during that season, *held* that as this was a contract, not for mercantile speculation, but for sustenance, 12s. per boll was reasonably exigible under the contract. *Wilkie* v. *Bethune*, 1848, 11 D. 132; 21 J. 23.

197. "Wages" — Meaning. — An agreement to leave on payment of "wages," *held* to mean money wages only. *Cooper* v. *Henderson*, 1825, 3 S. 619.

198. Wages—Payments to Account—Proof of—Parole Evidence.—An action for payment of £32 as the balance of wages payable weekly at the rate of 9s. or 9s. 6d. per week, was met by an allegation that the defender advanced money from time to time to account of wages, and to enable the pursuer to

make disbursements on the defender's behalf, and that, on a correct accounting, only £26 was due. *Held* that the defender was entitled to a proof of his averments *prout de jure*. *Brown* v. *Mason*, 1856, 19 D. 137; 29 J. 65.

199. Wages—Truck Act.—*Held* that the granting by the managing partner of a company to their workmen of orders upon a storekeeper for furnishings to account of wages was a contravention of the Truck Act, 1 and 2 Will. IV. c. 37, whether the company was interested in the store or not, and that the storekeeper was not entitled to recover the price of goods so furnished from the company. *Finlayson* v. *Braidbar Quarry Co.*, 1864, 2 M. 1297; 36 J. 647.

MESSENGER-AT-ARMS

CAUTIONER FOR, see title *Caution*.
RELIEF AGAINST, see title *Negligence*.

1. Diligence—Execution of.—*Held* incompetent for a messenger to execute diligence for his own behoof and that of another party on a bill on which he was an indorser. *Dalgleish* v. *Scott*, 1822, 1 S. 506.

2. Diligence—Messenger—Execution of.—Where diligence was at the instance of A and B, *held* that the person imprisoned under it was not entitled to be liberated on the ground that the messenger indorsed upon the warrant a certificate that it was at the instance of A. *Wardrop* v. *Potter*, 1846, 8 D. 526; 18 J. 256.

3. Disobedience — Fine. — A messenger having disobeyed instructions to use arrestments for a debt due by a party who was his cautioner, *found* liable in a fine, and in the expenses of a complaint to the Lyon Court against him. *Clyne* v. *Murray*, 1831, 9 S. 338; 6 Fac. 240.

4. Execution of Service—Warrant.—A messenger's execution of service bore that he had "passed and in Her Majesty's name and authority," etc. In fact his only warrant was an order of the court. The court *commented* on the irregularity but *allowed* the execution to stand. *M'Intosh*, 1870, 8 S. L. R. 50.

5. Fees—Agreement with Law Agent.—An agreement between a law agent and a messenger-at-arms, by which the latter was to act in the employment of the former for a fixed yearly salary, the agent drawing the fees and emoluments, *held* to be *pactum illicitum*, and action refused for alleged breach thereof. *Henderson* v. *M'Kay*, 1832, 11 S. 225.

6. Fees — Exacting from Debtor. — A messenger may not take payment of his fees from a debtor whom he apprehends as letters of caption, and is liable in damages if he does. *Paterson* v. *Philip*, 1811, Hume 278.

7. Fees — Exacting from Debtor — Suspension.—A messenger who exacted from a party, apprehended by him on a caption, bills for the debt, including fees to himself, suspended for three months. *M'Lachlan* v. *Black*, 1821, 1 S. 217.

8. Practising in Sheriff Court.—A messenger cannot be a procurator in a Sheriff-Court. *Bowhill* v. *Sheriff of Berwickshire*, 2 June 1825, F. C.; 4 S. 61.

MINES AND MINERALS

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1. Fire in Colliery—Liability.—A fire having broken out in a colliery, caused by calcined ironstone having fallen from the surface through sits or fissures in the strata, the party engaged in calcining the ironstone *found* liable in the expense incurred in extinguishing the fire. *Rankin* v. *Dixon & Co.*, 1847, 9 D. 1048.

2. Lease—Assignation—Assent of Landlord—Reasons for Refusing Assent.—By a lease a mineral field was let to tenants "and their heirs and successors, or to their assignees and subtenants; but under this condition always, that if the tenants shall desire to assign this lease, or to subset the premises hereby let, the assignation or the subtack shall be, and shall only be, with the written consent of the proprietor or his successor." *Held* that the landlord was entitled to withhold his consent without assigning any reason, or having any

reason assigned by him subjected to the review or control of the court. *Observations* on the case of *Wight* v. *E. of Hopetoun*, 1855, 17 D. 364. *Question*, whether a mineral lease for thirty years is *sua natura* assignable. *D. of Portland* v. *Baird & Co.*, 1865, 4 M. 10; 38 J. 13.

3. Lease—Assignation—Construction.—The tacksmen of coal-works, who were also tacksmen of salt-works, sublet the coal-works, binding the subtenant to supply the salt-works with suitable coal at a specified price, and to be delivered at the works. The salt-works were also sublet, and the obligation undertaken by the subtenant of the coal-works was assigned to the subtenant of the salt-works, with power to enforce implement thereof, but without recourse on the principal tacksmen. The assignation described the obligation as one to "regularly supply" the salt-works with coal; while, by the minute of agreement by which the coal-works were sublet, the obligation was only to "supply." *Held* (1) that there was no such misdescription of the obligation actually undertaken as to entitle the assignee to object that the obligation assigned to him was not the obligation he expected to receive; and (2) there having been a failure on the part of the subtenants of the coal-works to implement their obligation, that there were no relevant grounds for an action of damages at the instance of the subtenants of the salt-works against the principal tacksmen in respect of such failure. *Croker* v. *Stevenston Colliery Co.*, 1856, 18 D. 496; 28 J. 185.

4. Lease — Constitution — Acquiescence.—Tenants of a slate quarry, A, had possessed and wrought another quarry, B, for five years, though it was not included in the lease, as their predecessors in the quarry A had done before them. The landlord let B to a separate tenant. *Held* that the lessees of A were entitled to retain possession of B. *Stewart* v. *Bell*, 1790, 3 Pat. 158.

5. Lease — Constitution — Missives. — After missives of sale of lands were exchanged, the purchaser proceeded to enter into missives for a lease of the minerals. The purchaser failed to implement the conditions of sale, and afterwards both parties renounced the transaction. Thereafter the property was sold to a second purchaser, who got a disposition containing an assignation by the first purchaser of the missive of lease. *Held* that there never had been a completed contract of lease, and that the personal obligation to grant the lease and the real right to the lands were not so combined in the person of the second purchaser as to entitle him to compel the lessors to enter into a lease in terms of the missives. *Weir* v. *Dunlop & Co.*, 1861, 23 D. 1293; 33 J. 652.

6. Lease—Constitution — Missives—Rei interventus.—An iron company and a landlord entered into an informal "general agreement as to lease of minerals," by which "twelve months to be allowed to prove the field, and twelve months additional to sink pits and erect machinery," before the payment of the rent was to commence. The field was entered upon, and bores made, the result of which was not communicated to the landlord, nor was any intimation of intended renunciation made till more than six months after the commencement of the third year. *Held* (1) that the possession of the field for the purpose of boring was under the missive, and formed *rei interventus*; (2) that the company was liable in a year's rent, alleged sterility being no defence where no notice had been given. *Sinclair* v. *Mossend Iron Co.*, 1854, 17 D. 258; 27 J. 105.

7. Lease—Constitution—Trial Lease—Notice of Abandonment.—A mineral contract allowed eighteen months for trial, after which it was to become a lease for nineteen years, if notice of abandonment had not been given. It also gave power of abandonment at any time, in certain events, on three months' notice, and referred all disputes to arbitration, but contained a clause authorising registration for summary diligence. *Held* that after the trial period, without notice of abandonment, the landlord might competently charge the tenant for rents for which he denied liability, on the ground that he had given notice of abandonment after the eighteen months; but circumstances in which process was sisted to allow an investigation under the contract into the state of the minerals. *Rankin* v. *Marshall*, 1860, 22 D. 351; 32 J. 157.

8. Lease—Construction—"Great Chows and Panwood."—Under a lease of lime-works, by which the tenants were entitled, at certain rates, to get from the pits on the estate "great chows and panwood," *held*, with reference to the other terms in the lease, to mean "great coal, chows, and panwood," and that the tenants were bound to take the whole coal required for the lime-works from the pits on the estate, and not to go to other pits, provided the supply was as regular as the nature of the collieries would permit. *Wight* v. *Dicksons*, 1813, 1 Dow 141.

9. Lease—Construction—Quarry—Working "Regularly and to the Dip of the Stone."—A party held a lease of a quarry to be worked "regularly, and to the dip of the stone." A bill of suspension *passed* as to his right to increase the breadth of the quarry. *Ferguson* v. *Galloway*, 1821, 1 S. 11.

10. Lease — Construction — Rent — Royalty.—Where two coal-fields were let by separate leases, and power was given to the lessees of the second field to work their coal by means of pits sunk in the first field, *held*, construing a clause in the second lease, that the landlord having (as he was entitled) elected to take payment of the stipulated lordship under the first lease, but of the fixed rent under the second, had right to payment of the lordship in full, under deduction only of the actual output from the second field. *Steuart* v. *M'Andrew & Co.*, 1850, 13 D. 434.

11. Lease — Construction — Reservation of Minerals—Interdict.—Under a clause in a

lease there was reserved to the landlord "the whole coal, lime, whin and freestone, marl, mines, and metals of every description." After having let two acres of the clay under the soil of one of the fields to another party for the manufacture of tiles, and the agricultural tenant had received payment of the surface damage, the landlord proposed, after the clay had been wrought out of the two acres, to take another acre of the clay. Against this the agricultural tenant presented a note of suspension and interdict; but the court, while they passed the note, *refused* the interdict, in respect that more inconvenience would result from granting the interdict than refusing it. *Walker* v. *Christie*, 1849, 11 D. 373; 21 J. 104.

12. Lease—Construction—Reservations.—By a lease a tenant was entitled to work the whole coal within the barony, excepting that part of the coal which lies within the parks, gardens, and enclosures of said barony, which he was not to work without consent. *Held* that this reservation did not entitle the lessee to sink pits and work coal within these grounds. *E. of Wemyss* v. *Sir A. Hope*, 1796, 3 Pat. 487.

13. Lease—Construction—Surface-Damage—Smoke.—*Held* that a clause in a mineral lease, by which the lessee became bound to pay "all damage that should be done to the surface, or grounds and buildings thereon, by the working of the minerals in virtue thereof," did not comprehend damage occasioned by the smoke or vapour emitted in the process of calcining ironstone. *Galbraith's Tr.* v. *Eglinton Iron Co., etc.*, 1868, 7 M. 167; 41 J. 93.

14. Lease — Construction — Working of Minerals—Communication with Adjoining Coal-Field.—Terms of lease under which *held* (1) that a landlord was entitled to cause his tenants in a mineral lease to close a communication opened by them, without his consent, with a neighbouring mine of which they were also tenants; (2) that the tenants were bound to give the landlord reasonable satisfaction for any advantage they had derived from the communication they had opened. *Wauchope* v. *Hope*, 1774, 2 Pat. 286 and 338. See also *Wauchope* v. *E. of Abercorn*, 1780, 2 Pat. 519.

15. Lease—Construction—Working of Minerals—Communication of Level.—By a clause in a lease of coal it was agreed that either party was to have the power of communicating the level of the said coal to any neighbouring coal-works. *Held* that the right did not cease or determine with the lease, but continued so long as the lessee continued to possess a right and interest in the neighbouring coal-work. *E. of Abercorn* v. *Wallace*, 1764, 6 Pat. 757.

16. Lease — Joint-Tenants — Adjacent Proprietors. — Two parties having entered into a contract of partnership for working coal, under which a permission in general terms was granted to work coals in the lands of one of them by means of pits sunk in the lands of the other, and having thereafter entered into another contract prorogating the whole terms of the first contract, but declaring that the coal in the lands of the first party should be worked only to the east of a certain point, *held* that the company had no right to work beyond that point. *Cunningham* v. *Warner*, 1824, 2 Shaw's App. 225. Revg. 2 S. 246.

17. Lease—Missives—"Usual and Necessary Clauses."—In a minute between a proprietor and his mineral tenant, both parties bound themselves, when required, to execute a formal tack "containing all clauses usual and necessary." *Held* that the tenant was entitled in a formal tack to have a clause inserted empowering him, at the end of the lease, to remove buildings and machinery erected by him, in the event of their not being taken by the landlord at a valuation. *Wilson* v. *Douglas*, 1868, 7 M. 112.

18. Lease — Reduction — Working not Profitable—Quarry.—*Held* that a tenant was not entitled to reduce a lease of a quarry on the ground that it could not be worked to profit, even if no rent were to be paid. *Observations* on sterility as a ground for reducing agricultural and mineral leases. *Gowans* v. *Christie*, 1873, 11 M. (H. L.) 1; 45 J. 167; L. R. 2 Sc. App. 273.

19. Lease—Restriction—Verbal Agreement to Waive—Acquiescence.—*Held* competent to remit to probation averments of verbal agreement by a landlord to waive a restriction in a lease, followed by actings by the tenant and acquiescence by the landlord. *Wark* v. *Bargaddie Coal Co.*, 1859, 21 D. (H. L.) 1; 3 Macq. 467; 31 J. 323, 767.

20. Lease — Termination — Exhaustion of Coal.—The tenant of a coal-field, though never previously worked, *held* entitled to be liberated on the ground of sterility; and the landlord *held* liable in the expense of a judicial survey, not having been satisfied with less expensive evidence of the exhaustion of the coal. *Murdoch* v. *Fullerton*, 1829, 7 S. 404.

21. Lease—Termination—Exhaustion of Coal—Report by Arbiters—Conflicting Reports.—A lease of coal was declared to become void from the first term after nominees, mutually chosen, should report that, by unforeseen occurrences, etc., the coal could no longer be wrought to advantage. Nominees, mutually chosen, gave opposite reports. *Held* that the tenant was not entitled, in an action of declarator for voiding the lease, to a remit to the jury court to prove that the coal could not be wrought to advantage, and the landlord assoilzied from the declarator. *Dixon* v. *Campbell*, 1830, 8 S. 970.

22. Lease—Termination—Exhaustion of Coal—Not Workable Profitably.—Note of suspension of a charge for rent of a coal-field, on the ground that the coal was unworkable to a profit, *refused*—the tenants having continued in possession till the end of the term for which the rent was payable, and there being in the lease no provision upon the subject. *Bargaddie Coal Co.* v. *Wark*, 1860, 23 D. 44; 33 J. 19.

23. Lease—Termination—Working not Profitable—Clause of Reference—Arrears of Rent.—A mineral lease contained a provision that the lease should take end "when the coals are worked out or found unworkable to profit on examination by competent persons, or an oversman if they differ in opinion." *Held* that it was not a relevant defence to an action for arrears of rent to allege that the coal had been worked out or could not have been worked to profit, it being the plain duty of the tenant, if this state of matters arose, to take the initiative, and have the fact ascertained in the manner stipulated. *Thomson* v. *Gordon*, 1869, 7 M. 687; 41 J. 347.

24. Lease—Termination—Working not Profitable—Fall in Market.—A tenant of coal having right to abandon, in case of unforeseen accidents in the workings rendering them unproductive to advantage, *held* not entitled to do so in respect of a fall in the market. *Dixon* v. *Campbell*, 1824, 2 Shaw's App. 175.

25. Lease—Termination—Working not Profitable.—A lease of ironstone for thirty years, with breaks in favour of the tenants every five years, stipulated that the tenants might work on trial for two years, paying royalties but no fixed rent, but that after the expiry of the years of trial the tenant should pay a fixed rent, or, in the landlord's option, certain lordships. The tenants, on the expiry of the two years of trial, obtained two additional trial years, and at the end of these they paid the fixed rent for six years. They then refused to continue further payments, on the ground that the ironstone was not, and never had been, sufficient to pay the expense of working. *Held* that they were bound to continue to pay the rent until the occurrence of the specified break in their favour. *Fleeming* v. *Baird & Co.*, 1871, 9 M. 730; 43 J. 377.

26. Lease—Termination—Working not Profitable—Report.—*Held*, under a lease which provided that the minerals let might be given up upon the report of an engineer named in the lease, that they had become unworkable to profit, that it was a condition of taking benefit under the provision that there should be a final award by the referee. *Wylie & Hill* v. *Belch*, 1867, 4 S. L. R. 29.

27. Lease—Termination—Joint-Tenancy—Bankruptcy of One Tenant.—A lease of coal was granted to "A and B and their respective heirs and successors," secluding assignees and subtenants, under the condition, "that in the event of the bankruptcy of the said tenants, this lease shall, in the option of the proprietor, become void and null." A died (it was alleged) in insolvent circumstances, and thereafter B became bankrupt, and executed a renunciation of the lease. *Held* in a question with the landlord, that A never having been bankrupt, the right of his representatives to the lease was not irritated by the bankruptcy of B, and that they were entitled to possession of the subjects let. *Young* v. *Gerard*, 1843, 6 D. 347; 16 J. 184.

28. Lease—Termination—Lease of Surface.—A landlord let minerals, and, by separate lease, and for a longer period, the surface, to the same tenant, who erected various buildings, chiefly occupied for mining operations. *Held* that at the expiry of the mineral lease the landlord was not entitled summarily to eject the tenant from these buildings; but action reserved to compel the tenant to remove from such as could be fairly shown to fall within the mineral lease. *Oswald* v. *Pearson*, 1858, 20 D. 440.

29. Ownership—Minerals under Road.—*Held* that road trustees had no right to minerals under their roads, nor to stop their being worked so long as the surface of the road was uninjured. *Waddell* v. *E. of Buchan, etc.*, 1868, 6 M. 690; 40 J. 357.

30. Ownership—Coal—Construction of Titles—Reservation—Working.—*Harvie* v. *Stewart*, 1870, 9 M. 129; 43 J. 73.

31. Ownership—Coal.—*Held* that a proprietor of feus in which there was either a reservation, or no mention made of the coal, had no right thereto; his superior having an express grant of the coal in his charter. *Anstruther* v. *Anstruther*, 1796, 3 Pat. 483.

32. Ownership—Barony Feu—Reservation of Coal.—In a feu of part of a barony the right to coal was reserved. Upon the superior's attainder, the vassal obtained a charter from the Crown under the Clan Act. The Crown sold the barony to a third party, and disponed the lands, "with coals and coalheughs of the same," etc. *Held* that the right to the coals was not in the vassal, but in the Crown's disponee. *Mitchell* v. *York Buildings Co.*, 1777, 6 Pat. 795.

33. Ownership—Barony Feu—Reservation of Coal.—A superior conveyed part of his barony under a reservation of coal. Upon his attainder his estates vested in the Crown. The vassal obtained a charter (under the Clan Act) from the Crown, which, in the mandamus, conveyed the coal. Infeftment followed upon this charter, but not possession of the coal by working. The Crown sold the superiority along with the rest of the forfeited estate, and by charter conveyed the coal of the vassal's lands. Upon this conveyance, possession and working of the coal followed. The right to the coal *held* to be in the Crown's disponees, and not in the vassal. *Cadells* v. *Anderson*, 1803, 4 Pat. 532.

34. Pottery—Right to Use Clay.—Under a lease of a pottery, with the privilege of digging clay for the purpose of the pottery, the tenant has no right to use the clay for making bricks, excepting so far as required for the use of the pottery; and therefore, where the tenant had unwarrantably manufactured a quantity of the clay into bricks, he was *found* liable to his landlord in the value of the clay. *Gordon* v. *Suttie*, 1837, 15 S. 549.

35. Quarry—Removal of Stones—Interdict.—The tacksmen of a quarry were *held* not entitled to an interdict against the sale or removal, by a canal company, of part of the stones composing the quarry, although their landlord was debarred from opening any new quarry within the grounds let to them, the operation being in implement of an agreement entered into by the landlord with the canal company prior to the tack, and being necessary for the cutting of a tunnel under the canal, for the purpose of the tacksmen's ulterior workings; and the canal company being obliged to pay a lordship for the stones excavated, as well as to be at the expense of the excavation. *Fraser* v. *Union Canal Co.*, 1830, 9 S. 46.

36. Removing — Warning — Quarry.—*Observed*, that warning with a view to removal from a stone or lime quarry is not requisite in terms of the statute or Act of Sederunt unless let *in cumulo* with the lands. *Udney* v. *Brown*, 1802, Hume 566.

37. Rent—Communication between Coal-Fields.—Circumstances in which a party holding in lease two fields of coal at some distance from each other, together with a right to the use of a level belonging to the landlord, for the purpose of working these fields, was *found* liable to pay the landlord a consideration for the benefit derived by him, in consequence of carrying the level through certain intermediate fields of his own, in order to make the communication to the upper coal-field. *Sir C. Halkett* v. *E. of Elgin*, 1835, 1 S. & M'L. 629.

38. Rent—Retention—Illiquid Claim.—Circumstances in which the tenant of a stone quarry was *held* not entitled to plead retention of rent to compensate an illiquid claim of damage; and the amount of rent made up from the tenant's books, in a certain proportion to the gross output, in terms of the lease, and not impugned, *held* to be a liquid claim of rent. *Johnston* v. *Inglis*, 1832, 10 S. 260; 7 Fac. 205.

39. Rent—Royalty—Period at which Ascertained—Quarry.—*Question*, whether the tenants of a quarry were entitled to charge themselves with the lordship at the rates payable at the date of the tack, or at the time when the stones were quarried. *Sir T. G. Carmichael* v. *Tait*, 1823, 2 S. 485.

40. Rent — Royalty — Construction of Lease.—The tenant of a colliery was taken bound to pay a fixed rent, or in place thereof, at the option of the landlord, the price of a certain proportion of the coals output and sold as lordship, "computing the said lordship at the actual selling price at the hill." *Held* that these words included the general market price of coal sold at the hill wholesale and retail, as a basis of computation of the stipulated lordship, but that the price of coals sold for delivery elsewhere than at the pit was excluded. *Guthrie* v. *Cochran*, 1846, 19 J. 69.

41. Rent—Royalty—Output.—In a lease of coal and other minerals, it was stipulated that the tenant should furnish fortnightly, from his books, check-bills or accounts, showing the amount of output and sales, so that the landlord might be enabled to make his election of a fixed rent or of a lordship on the sales. *Held* (1) that these check-bills ought to show, not only the output, but the different kinds and the prices of the coal sold; (2) that the landlord, although he had not required these bills fortnightly for a period of time, was not thereby precluded from afterwards demanding them for that period. *Adam* v. *Sir W. Napier*, 1843, 5 D. 736; 15 J. 333.

42. Rent—Royalty—Interdict.—A party having a reserved right to a tenth of the gross output beyond a fixed quantity of the coal of certain lands, the court *granted* an interdict against the proprietor raising the coal by pits situated on other lands. *Dixons* v. *Buchanan*, 1825, 4 S. 355; 1 Fac. 212.

43. Reservation — Construction — Freestone.—A reservation by the superior in a feu-charter of the "haill mines and minerals of whatever nature and quality," does not comprehend a quarry of freestone useful for building. *Menzies* v. *E. of Breadalbane*, 1822, 2 Shaw's App. 225. Affg. 10 June 1818, F. C. Followed in *D. of Hamilton* v. *Bentley*, 1841, 3 D. 1121; 16 Fac. 1191.

44. Reservation — Onus probandi. — A was superior of certain lands, which had originally been feued out by his ancestors to different vassals, but without any distinct specification of boundaries. In some of the grants the minerals were reserved to the superior, but in others they were not reserved. The *dominium utile* of the whole lands having come to be vested in B, a question arose as to the boundaries of the parcels in which the minerals had been reserved, and, A having raised an action of declarator to have these boundaries fixed, the court *held* that, in the first instance, the onus lay upon him to prove to which lands the reservation of minerals applied. *Held* that A had sufficiently discharged the onus. *D. of Hamilton* v. *Graham*, 1872, 10 S. L. R. 61.

45. Reservation—Rights of Superior.—A B feued certain lands "reserving all and sundry the coal and limestone within the bounds of the lands so as it shall be lawful to A B to set down coal-pits, shanks, and sinks, and win coal and limestone within the bounds of the lands or any part thereof." *Held* that the strata of coal and limestone were excepted from the conveyance to the vassal, and that the superior, as absolute proprietor of these strata, was entitled to form in them roads for the underground carriage of minerals between mines in other properties. *D. of Hamilton* v. *Graham*, 1871, 9 M. (H. L.) 98; 43 J. 491; L. R. 2 Sc. App. 166.

46. Reservation—Damage Sustained by Vassal through Working of Coal—Retention of Feu-Duty.—A vassal holding under a reservation of coal, etc., *held* not entitled to retain feu-duties payable to his superior

on account of damage sustained by the working of coal by the superior's disponee in the coal. *Simson* v. *Ker, etc.*, 1792, 3 Pat. 238.

47. Reservation — Conveyance of Excepted Minerals to Vassal.—The omission of an exception of coal, metals, and minerals for upwards of seventy years, in charters by progress to a feu-right, which had been originally granted subject to such an exception, *held* not to be a competent or habile mode of conveying the excepted minerals to the vassal: therefore *held* that the superior had right to recur to the original feu-charter as showing the measure of the feu, and was entitled in giving an entry to insert a reservation in terms of the original feu-right. *Hutton* v. *Macfarlane*, 1863, 2 M. 79; 36 J. 33.

48. Reservation—Feu to Third Party—Injury to Feuar—Title to Sue.—A lease of minerals in certain lands having been granted, with power to char and calcine (which power was exercised), a feu of a portion of the lands was some years thereafter granted to a third party for erection of a dwelling-house, under reservation of minerals. In an action of damages by the feuar against the mineral lessees and the lessor, *held* that the feuar's right to sue was not excluded by the reservation in his charter; nor by the terms of the mineral lease anterior to his feu-right. *M'Callum* v. *Forth Iron Co.*, 1861, 23 D. 729; 33 J. 371.

49. Reservation—For First Time Inserted in Precept of clare constat—Effect of.—A was infeft upon a feu-contract by which certain lands were conveyed to him without reservation of mines and minerals. Upon A's death his son B was infeft in the lands upon a precept of *clare constat*, which contained an express exception and reservation of the mines and minerals to the superior. Upon B's death, his son C, having been infeft in the said lands, sold them. Subsequently D, having served heir in special in the mines and minerals to A, brought an action of declarator of his right to them against the superior and the proprietors of the *dominium utile* of the lands, on the ground that they still remained *in hæreditate jacente* of A. *Held* that the exception and reservation of mines and minerals in the precept of *clare constat* was inept, and did not limit the precept as a warrant for infeftment in the fee of the lands, and therefore that there was nothing *in hæreditate jacente* of A which D by service to him could take up. *Boyd* v. *Bruce, etc.*, 1872, 11 M. 243; 45 J. 153.

50. Reservation — Sale of Superiority to Vassal where Minerals had been Reserved in the Feu-Charter.—In 1753 the trustees of an entailer granted a feu-charter reserving to the entailer and his heirs the mines and minerals, etc. The heir in possession in 1811 appointed commissioners, and gave them authority to sell the superiorities of his lands under the Act 20 Geo. II. c. 51, which they did by a disposition which narrated their authority to sell the superiorities, and disponed the lands themselves, with all right, title, and interest in them or the proprietor. *Held* that this deed did not convey the minerals, which had been created a separate tenement. *Opinions*, that if the disposition had conveyed the minerals, the heir of entail's right to challenge would not have been cut off by the negative prescription, and that the vassal would not have acquired right to the minerals by the positive prescription, the nullity of the conveyance as a conveyance of anything but the bare superiority appearing *ex facie* of the deed. *Fleeming* v. *Howden*, 1868, 6 M. 782; 40 J. 401.

51. Reservation — Vassal's Charter of Renewal — Effect of. — A vassal had, for upwards of a century, held his lands under titles, with coal and limestone, etc. On a renewal of the investiture in 1788, a reservation of coal and limestone in favour of the superior was inserted in the vassal's charter of renewal. The reservation was inserted in the subsequent titles, but there was no evidence of any transaction having taken place between the superior and the vassal in relation thereto, and the coal and limestone were never wrought by either superior or vassal. *Held*, in a declarator and reduction at the instance of the vassal, that the reservation in favour of the superior was ineffectual, and that the coal, etc., belonged to the vassal. *Graham* v. *D. of Hamilton*, 1842, 1 D. 482.

52. Reservation — Construction of Feu-Contract—Blackband Ironstone.—*Held* that a clause in a feu-contract, reserving to the superior liberty to search and dig for stone quarries and for coal in the lands feued, and to win coals and stones therein, did not comprehend a reservation of blackband ironstone. *Forth & Clyde Navigation Co.* v. *Wilson & Co.*, 1848, 11 D. 122; 21 J. 21.

53. Reservation — Construction of Feu-Contract.—The dispositive clause of a feu-contract, dated 1653, gave an unlimited right to the lands. At the end of the *tenendas* there was a clause reserving to the superior right to "win coals and coalheughs" within the lands. The reservation was not mentioned in the precept of sasine, and did not enter the record until forty-five years afterwards, in 1698, when there was inserted in a precept of *clare constat* by the superior the reservation, with the addition of a right "to set down shanks within any part of the lands," and expressing the obligation to pay damages in different terms. In a precept of *clare constat* in 1750, this altered clause of reservation was transferred from the *tenendas* to the dispositive clause, and it was so inserted in all the subsequent writs flowing from the superior. The reservation was also to be found in all the writs to the *dominium utile* by the vassals *inter se* from the year 1795, and it was in the titles under which the present vassal held. *Held* (1) that the clause in favour of the

superior in the original feu-charter was an effectual reservation of the right to the coals; and (2) that as the clause of reservation occurred in the present vassal's own titles, he had no title to sue a reduction of the writs flowing from the superior containing the reservation. *Bain* v. *D. of Hamilton*, 1865, 3 M. 821; 37 J. 424.

54. Sale—Warrandice—Failure to Give Possession—Rights Acquired by Railway Company.—The proprietor of lands sold the minerals under an obligation of absolute warrandice. Previous to the sale, a railway company obtained an Act authorising them to form their line through the lands; and subsequently to the sale, but before the purchaser had got any feudal right, the railway company acquired a portion of the surface for their line. The purchaser then brought an action against the seller of the minerals concluding for implement and damages. *Held* that the right acquired by the railway company could not be limited by any personal contract entered into between the mineral owner and the purchaser; that the mineral owner could not make the rights acquired by the purchaser effectual to him against the railway company; but that the purchaser was entitled to damages. *Russel and Others* v. *Malcolm and Others*, 1853, 15 D. 436; 25 J. 258; 2 Stuart 246.

55. Support—Railway—Reservation of Right to Work Minerals.—A proprietor sold land for a railway, reserving the minerals and liberty to work them. *Held* that the conveyance of surface implied right to adequate subjacent and adjacent support, and that the owner of the minerals was not entitled to work them to the endangering of the railway. *Caledonian Rly. Co.* v. *Sprot*, 1856, 19 D. (H. L.) 3; 2 Macq. 449; 28 J. 486. *Caledonian Rly. Co.* v. *Belhaven*, 1857, 19 D. (H. L.) 5; 29 J. 380; 3 Macq. 56.

56. Support—Surface.—A superior and his mineral tenant *held* liable for damage to lands and houses caused by working minerals without leaving sufficient support to the surface, although the vassal's right appeared to be limited to "damage sustained through leading or setting down shanks." *Bain* v. *D. of Hamilton, etc.*, 1867, 6 M. 1; 40 J. 4.

57. Support — Surface — Abstraction of Water—Construction of Lease.—A proprietor granted a feu of a piece of land, reserving the minerals, which he afterwards let to a third party. At the date of the feu-right the greater part of a seam of coal below the ground feued had been worked out, and the waste filled with water, which supported the roof. The tenants under the mineral lease pumped out the water, preparatory to working the minerals, and thereby caused a sit of the ground, and consequent injury to buildings on the surface. The mineral lease did not stipulate that the tenants should take any precautions to prevent such injury arising. *Held* that the withdrawal of the water being necessary to the working of the minerals, must have been in the contemplation of both parties when the minerals were let: that the neglect of the precautions which ought to have been taken was the mutual neglect of landlord and tenant; and that for the damage thence arising they were both equally responsible. *Bald* v. *Alloa Colliery Co.*, 1854, 16 D. 870; 26 J. 437.

58. Support—Strata—Working of Minerals—Construction of Lease.—A mineral lease obliged the tenant to work the minerals in a workmanlike manner, but empowered him to work the coal "either by stoop and room, or long-wall manner or otherwise, as he should find it for his advantage." Having worked it in such a manner as to bring down the superincumbent strata, an action of damages was brought against him at the instance of the landlord. The case having gone to trial, the pursuer called on the presiding judge to direct the jury (1) that the lease did not, in law, entitle the tenant so to work as to destroy the support of the superincumbent strata, at least not if the tenants elected to work by stoop and room; and (2) that no practice could be held to control or affect the terms of the lease, or the legal obligations of the parties, unless such practice be reasonable in itself, and was general at the date of the lease in question, and that the reasonableness of any such practice was a question for the court. The presiding judge having refused to state these propositions to the jury, except with qualifications and with reference to the evidence, the pursuer excepted. Exception *disallowed*. *Muirhead* v. *Tennant*, 1854, 16 D. 1106; 26 J. 604.

59. Support—Working of Coal—"Stoop and Room"—Removal of Pillars. — The proprietor of a coal-field conveyed to a company of alum manufacturers for sixty-three years the whole ore in his coal-pits and coal-wastes, from which alum could be manufactured. The coal-field was let to tenants, who were authorised to work the coal in a fair and regular manner, but so as not to injure the interests of the alum company. The coals were wrought by stoop and room, *i.e.* leaving pillars of coal to support the roof. *Held* that the alum company was entitled to prevent the landlord, or his tenants in the coal, from removing the pillars, in so far as necessary to support the roof, though all the solid coal should be wrought out. *Hurlet Alum Co.* v. *E. of Glasgow*, 1850, 7 Bell 100; 22 J. 487. Affg. 12 D. 704; 22 J. 324.

60. Support—Subsidence of Ground—Injury to Feuar — Liability — Construction of Lease.—A proprietor let the minerals under his estate, with power to sink pits, etc., for working them, and thereafter, during the currency of the lease, granted a feu of a piece of land, reserving the minerals, he paying all damage the feuar should sustain by the working of them; but declaring that, should the minerals be let by him, recourse for damage should be had against the lessee, and not against him, further than that he should be bound to oblige his tenants to settle

the damage. The feuar, in terms of an obligation in the feu-disposition, erected houses on his feu, and these having been injured by the working of the minerals, raised an action of damages against a singular successor of the proprietor, and also against the mineral tenants. *Held* that the proviso in the feu-disposition saving the proprietor from liability for damage to the feuar applied only to future leases, and not to the existing lease of the minerals, and that both the proprietor (or his singular successor) and the mineral tenants were liable for the damage which had arisen. *Opinions*, that the liability of the proprietor was *ex contractu*, and that of the tenants *ex delicto*. *Hamilton* v. *Turner & Others*, 1867, 5 M. 1086; 39 J. 621.

61. Support — Surface Damages — Consequential Damage—Construction of Lease.—The lessee under a mineral lease was prohibited sinking pits or making any surface operations in fields adjoining the mansion-house of the estate. He had unreserved power to work the minerals on every other part of the estate, but on condition of paying "all surface damages whatever occasioned by these operations." In working the minerals in the direction of the mansion-house, the underground operations occasioned a sit, which affected the stability of certain offices; and the smoke and ashes from an engine erected at the mouth of the pit, but beyond the specified limits, rendered a washing-house, bleaching-green, and laundry adjoining the mansion-house, unfit for use. *Held* (1) that surface damages comprehended damages occasioned by underground as well as by surface operations; (2) that injury to buildings by a sit was a relevant claim as surface damages under the lease; (3) that injury to the use of the bleaching-green, washing-house, and laundry by the smoke and ashes of an engine was not a relevant claim for surface damage; and *observed*, that such injury was of the nature of injury to the amenity of the mansion-house, which could only be protected by special provision. *Oswald* v. *Gordon*, 1853, 16 D. 70; 26 J. 45.

62. Support—Vassal's Right to Demand—Agreement to Feu Land.—A superior agreed to feu land, reserving the minerals. *Held* that he was not bound to insert in the feu-contract an obligation to support the roof in the event of his working the minerals, or pay damages in the event of failure to do so. *Steuart* v. *Dixon*, 1857, 19 D. 1071; 29 J. 484.

63. Statute — Construction — Mines Regulation and Inspection Act, 1860.—*Opinion* (*per* Lord Chelmsford), that a breach of the Mines Regulation and Inspection Act, 1860, infers no civil liabilities other than the penalties in the Act, and cannot confer a right of action which would not otherwise have existed. *Wilson* v. *Merry & Cuninghame*, 1868, 6 M. (H. L.) 84; 40 J. 486; L. R. 1 Sc. App. 326.

64. Statute — Construction — Mines Regulation and Inspection Act, 1860.—*Held* that the 12th general rule contained in s. 10 of the Mines Regulation and Inspection Act, 1860, obliges the owner of a coal mine not only to provide an adequate brake to the engine, but also to see that it is kept in proper working order, and that, though pumping gear may serve the purpose of a brake, it is not a "brake" in the sense of the rule. *Held* that the owner of a coal mine, who, in terms of ss. 11 and 13 of the Mines Regulation and Inspection Act, 1860, had established certain special rules, in which the duties of a "bottomer" were defined, had thereby undertaken not to work the pit without a bottomer. *Nimmo* v. *Clark & Wilson*, 1872, 10 M. 477; 44 J. 267.

65. Working—Adjacent Coal-Fields—Obligation to Leave Barrier.—A tenant of two adjacent fields of coal is not entitled to communicate the drain or level of the one to the other, but is bound to leave a barrier or march, to prevent the water of the superior field of coal from flowing down on the inferior. *E. of Wemyss* v. *Trs. of Sir Archibald Hope*, 7 Feb. 1809, F. C.

66. Working — Adjacent Coal-Field — Barrier Flooding.—A lease of all the coals within certain lands was granted, without any stipulation as to leaving a barrier between them and the coal of adjoining lands. On the contrary, power was given to the tenants to erect engines on pits to draw the water from the coal on any of the adjoining lands of which the tenants might happen to be proprietors or lessees. The tenants worked out the whole of the coal, whereby the water in the adjoining lands descended into and drowned the coal-field let to them. *Held*, in an action brought after the lapse of twenty years from the termination of the lease (and after a report by a person of skill), that the tenants were not bound to draw off the water and erect a barrier, failing which, to pay damages. *Lady M. Crawfurd* v. *Dickson*, 1826, 2 W. & S. 354. Affg. 2 S. 667.

67. Working — Blasting — Flooding Neighbouring Mine—Interdict.—Where a mineral tenant sank a pit near his march and exploded large charges of gunpowder with a view of getting rid of the water, and these explosions were followed by a rush of water in the coal-fields of the lower heritor, *held* that the lower heritor was entitled to interdict. *Durham* v. *Hood*, 1871, 9 M. 474; 43 J. 300.

68. Working—Construction of Lease—Restrictions on Carrying Workings near Houses.—A lease of minerals provided that no underground workings should be carried nearer to the mansion-house, offices, garden, and steading, than certain specified distances, *held* (1) that the measurement fell to be made from the outside of the underground foundation walls of the buildings, which extended beyond the walls as seen above ground; (2) that a kitchen court and offices therein formed part of the mansion-house; (3) that the term "garden" did not include a strip of border ground and line of trees surrounding the garden wall; (4) that the term "offices" did not include a dovecot

and pond. *Gillespie, etc.* v. *Russel, etc.*, 1871, 9 M. (H. L.) 131 ; 43 J. 432.

69. Working—Construction of Lease—Lessees' Right to Use Surface for Carriage and Storage of Minerals Raised from Adjoining Lands.—The mineral tenants of the lands of M had by their lease power to make use of any pits they might sink in the lands of M for winning and carrying away the coal, limestone, and fireclay in the adjoining lands. The proprietors of M raised this action for the purpose of preventing the mineral tenants from using the roads on the lands of M for carrying materials not raised from pits in M to and from their works on adjoining lands, and from storing minerals and making other uses of the lands for the purposes of these works. *Held* that the lease did not confer on the mineral tenants any power to use the lands in question for the purposes complained of. *Mungle* v. *Young*, 1872, 10 M. 901 ; 44 J. 499.

70. Working—Forming Roads.—Under a reserved right to coal, with the privilege of transporting, etc., and doing everything necessary thereanent, the party in right of the coal is not entitled to take materials out of the lands for the purpose of forming the roads required for the transportation of the coal. *Harrowar's Trs.* v. *Sir J. D. Erskine*, 1827, 5 S. 307 ; 2 Fac. 193.

71. Working — Use of Road. — Mineral tenants acquired right from a proprietor to use a road which was the only access to his mansion-house. *Held* that the mineral tenants were not entitled to use the road in a manner inconsistent with its use as the access to the mansion-house ; and therefore that they were not entitled to lay down iron plates or rails along the road. *Galbraith's Tr.* v. *Eglinton Iron Co., etc.*, 1868, 7 M. 167 ; 41 J. 93.

72. Working — Damage to Surface — Interdict.—Interdict by a vassal against his superior working minerals under his house to the danger thereof *refused* in respect of the terms of the feu-contract. *Buchanan & Henderson & Dimmack* v. *Andrew*, 1873, 11 M. (H. L.) 13 ; 45 J. 172 ; L. R. 2 Sc. App. 286.

73. Working—Drainage.—A party who had a reserved right of coal in an estate, carried an existing level under the bed of a stream into adjoining lands (to the coal of which he had also right), so as to drain the coal of these lands, brought the water thereof within the estate by means of a steam engine, and there raised it and threw it on part of the surface of the estate. *Held* that he was not entitled to do so. *Turner* v. *Ballendene*, 7 W. & S. 163. Affg. 10 S. 415.

74. Working—Discharge of Water into Adjacent Property—Interdict. — On the application of an adjoining proprietor, a note of suspension and interdict against a lessee of the adjacent mineral-field piercing a slip-dyke within his own mineral-fields, so as to discharge water into the mines of the complainers, *passed*, and interim interdict continued. *Baird* v. *Monklands Iron and Steel Co.*, 1862, 24 D. 1418 ; 34 J. 688.

75. Working — Discharge of Water — Interdict.—The proprietor of lands on one side of a burn sought to interdict a mining company — who occupied the ground on the other side for mining purposes, and one of whose levels driven underground discharged the water therein collected into the burn—from driving another level which would have the effect of discharging the water into another stream flowing through a different valley. *Held* that the party seeking the interdict had not averred on record facts relevant in law to entitle him to interdict. *Irving* v. *Leadhills Mining Co.*, 1856, 18 D. 833 ; 28 J. 382.

76. Working—Influx of Water.—A thick wall left in working coal divided two collieries which were on different levels. The wall, consisting of porous coal, did not prevent the water from flowing down from the upper to the lower. *Held* that the proprietor of the latter was entitled to carry out operations, the object of which was to prevent influx of the water from the upper colliery. *Wauchope* v. *E. of Abercorn, etc.*, 1780, 2 Pat. 519. Affg. M. 15530.

77. Working—Influx of Water—Barrier.—Proprietors of coals are not obliged to leave a barrier at their march unworked as a protection to neighbouring coal-works against being inundated with water. *Harvey* v. *Wardrop*, 1824, 3 S. 322.

78. Working—Influx of Water—Road.—Road trustees being empowered by statute to conduct surface water from the roads to adjoining land, constructed a watercourse from a road into a disused quarry. This channel having been used for upwards of sixty years, mineral tenants of the lands, who found that the water got into their workings, obstructed it. *Held* that they could not do so legally. *Baird* v. *Stratton*, 1873, 11 S. L. R. 22.

79. Working—Minerals under Railway — Interdict. — Interdict *granted* against a proprietor or his tenants working minerals under a railway, or nearer than sixty feet on each side from the centre of the line, on caution by the railway company for all damage and expenses of process. *Caledonian Rly. Co.* v. *Buchanan*, 1855, 17 D. 996 ; 27 J. 504.

80. Working—Negligence—Liability of Tenant for Acts of Contractor.—Tenants of ironstone *held* liable to the proprietor in damages for the negligent working of the ironstone by a party with whom they had contracted to do the work. *Nisbett* v. *Dixon & Co.*, 1852, 24 J. 605 ; 1 Stuart 1002.

81. Working—Obligation to Pay Damage —Liability of Singular Successors.—A feu-disposition, conveying a coal-field to three parties, contained a condition that they and their heirs and disponees should pay, jointly and severally, all damage that might be occasioned in working the coal to the lands in which it was situated, and that this condition

should be engrossed in all future dispositions, under pain of nullity. *Held* that singular successors were liable each for the damage occasioned by his own workings, and not for damage occasioned by the workings of former proprietors. *Baird's Trs.* v. *Mitchell*, 1851, 13 D. 982; 23 J. 445.

82. Working—Power of Tenant—Accumulated Water.—*Held* that water which accumulates in a mine as the result of mining operations is the property of the mineral tenant, and that he may convey it where he pleases, so that a neighbour who has for some time got the benefit of the water so pumped has no right to insist that the water when pumped to the surface shall continue to be sent in its natural direction towards a river. *Blair* v. *Hunter, Finlay, & Co.*, 1870, 9 M. 204; 43 J. 169.

83. Working — Surface Damage — Construction of Lease.—By the terms of a lease of iron ore and stone, the tenants were bound "to pay all surface damages which may be sustained by the tenants (agricultural) or the proprietor, by or through their working of the said ironstone or iron ore." The lease having, before the natural expiry, terminated, under a clause in it to that effect, by the mines becoming unworkable to profit, *held* that the tenants were liable to the proprietor in such damages as he could instruct to have been done to the property by their operations, though they had annually settled with the agricultural tenant for the damage thereby done to him. *Ogilvy* v. *Devon Iron Co.*, 1845, 8 D. 241; 18 J. 108.

84. Working—Sinking Pits on Adjoining Lands.—A party reserved a right of lordship in the coal of lands, and it was implied, from the terms of the reservation in the titles of the disponee, that the coal should be worked by pits situated on the lands themselves. *Held* that the disponer was not entitled to work them by pits situated on other lands; and that it was not relevant in the circumstances to offer to allow the party to have an overseer at these pits. *Dixons* v. *Buchanan*, 1829, 7 S. 324; 4 Fac. 437.

85. Working—Right to Sink Pit in Adjoining Feu.—A superior, proprietor of a field of coal, in feuing the *solum*, reserved a power to work the coal by sinking pits in the respective feus. *Held* that he was entitled to sink a pit in one feu in order to work coal under another. *Davidson* v. *D. of Hamilton*, 1822, 1 S. 411.

86. Working—Use of Passages—Interdict.—Pending an action of declarator by a vassal against his superior, to have it found that the latter was not entitled to use underground passages for the conveyance of minerals from under adjoining lands, the pursuer presented an application for interim interdict. Application *refused*, but a reasonable wayleave fixed *ad interim*. *Graham* v. *D. of Hamilton*, 1868, 6 M. 965; 40 J. 555.

87. Working—Trespass by Colliers.—A landlord having in a lease reserved the right to work coal, etc., on payment of damages occasioned by his operations, *held* that the tenant was not entitled to damages for injury by unauthorised trespasses by the colliers. *Young* v. *Colt's Trs.*, 1832, 10 S. 666.

NEGLIGENCE

(See also *Reparation*)

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1. Animal—Bull.—In an action against the owner of a bull for damages for injuries received in an attack by the bull, *held* that as it was not proved that the bull was vicious the owner was not liable. *Clark* v. *Armstrong*, 1862, 24 D. 1315; 34 J. 640.

2. Animal—Dog—Bite.—Damages found due by the proprietor of a watch-dog accustomed to be chained, which, when loose, had bitten a passenger who had formerly provoked

him when confined. *Brown & Co.* v. *Stewart*, 1824, 3 S. 187.

3. Animal — Dog — Sheep-Worrying. A number of sheep, which were in a field belonging to the owner, were destroyed by a dog, which was allowed to go about loose. *Held* that the owner of the dog was not liable for the value of the sheep destroyed, in respect it was not known to him that the dog had ever previously shown any propensity to attack sheep. *Orr* v. *Fleming & Forrester*, 1855, 18 D. (H. L.) 21; 2 Macq. 14; 27 J. 364.

4. Animal — Dog — Sheep-Worrying. — The owner of a dog which was proved to have worried sheep *held* liable in damages on the ground of *culpa*, in respect that he had previously received intimation that the dog had on a former occasion worried sheep, and that he had thereafter allowed the dog to go at large. *Question*, whether under the Statute 26 and 27 Vict. c. 100, the fact of a dog having worried sheep on a single occasion is of itself sufficient to infer *culpa* and consequent liability on the part of its owner. *M'Intyre* v. *Carmichael*, 1870, 8 M. 570; 42 J. 271.

5. Contributory—Child.—*Question* as to the age at which a person can be guilty of contributory negligence. *Traills* v. *Small & Boase*, 1873, 11 M. 888; 45 J. 540.

6. Contributory — Workman Injured while Executing Repairs on Ship.—*Held* that a workman, employed in executing repairs on board a steamer, who had gone into the inside of a paddle-wheel shortly before he knew the steamer was to sail, and without giving intimation to the engineer, was himself to blame for injuries sustained by the wheel being set in motion, and was not entitled to recover damages from the owner of the steamer. *M'William* v. *Watson*, 1866, 1 S. L. R. 246; 38 J. 365.

7. Fire — Colliery — Calcined Ironstone Falling.—A fire having broken out in a colliery, caused by calcined ironstone having fallen from the surface through sits or fissures in the strata, the party engaged in calcining the ironstone found liable in the expense incurred in extinguishing the fire. *Rankin* v. *Dixon*, 1847, 9 D. 1048.

8. Gun—Negligence of Boy—Liability of Father.—A gamekeeper brought an action against a pupil and his father for the value of a dog said to have been shot at by the pupil, and rendered useless. *Held* that no liability attached to the senior defender on the ground of culpable negligence on his part in putting into the hands of his son a loaded gun. *Davie* v. *Wilson*, 1854, 16 D. 956; 26 J. 499.

9. Independent Contractor.—The lessees of a shale-pit had contracted with a contractor to work the shale for them on being paid a contract price per ton on the output delivered at the pit-head. The contractor was to supply necessary furnishings, maintain the machinery and fittings, etc., and pay the wages of the men employed by him. Further, he was to be liable for all accidents, and was to satisfy himself before commencing work that the shaft and all the fittings were safe, and it was specially contracted that he and the lessees were not to interfere with one another's workmen. *Held* that the lessees were not liable for injury sustained in the contractor's service by workmen employed by him through the inefficiency of plant. *Shaw* v. *The West Calder Oil Co.*, 1872, 9 S. L. R. 254.

10. Independent Contractor — Subcontractor.—Where a person contracts with one man to do a piece of work, and the latter subcontracts with another, the subcontractor alone is liable for any damage committed in the course of the work by him. *M'Lean* v. *Russell, MacNee, & Co.*, 1850, 12 D. 887; 22 J. 394.

11. Independent Contractor—Hatchway Left Open—Injury to Workman.—A workman in the employment of marine-engine makers suffered injury by falling down a hatch, alleged to have been left open through the carelessness of a workman in the service of the builders of the vessel. Action of damages at the instance of the person injured sent to trial against the builders of the vessel. *M'Credie* v. *Denny*, 1865, 3 M. 539; 37 J. 277.

12. Independent Contractor — Liability for Contractors.—*Held* (1) that a company, who employed qualified persons to construct a building for them, was not liable for personal injury caused by reason of its insufficient construction; and (2) that it made no difference that the proprietors were represented at the building by an inspector, because he was there to look after the interests of the proprietors, and not to discharge for them any duty to others. *Braidwoods* v. *Bonnington Sugar Refining Co.*, 1866, 2 S. L. R. 152.

13. Keeper of Register of Inhibitions—Erroneous Recording.—Letters of inhibition against three defenders were entered in the minute-book of the register of a county, as directed against one of the defenders only. *Held* that although they were correctly recorded in the register itself, the inhibition had not been duly recorded against the two defenders whose names were omitted, and was void in so far as it might affect them, and that the keeper of the register was liable for the consequences. *Park* v. *Wood's Trs.*, 1838, 16 S. 1363; 13 Fac. 878.

14. Keeper of Register of Inhibitions—Failure to Register—Invalid Inhibition— An inhibition not having been duly recorded and being therefore ineffectual, the inhibiting creditor sued the keeper of the register of inhibitions for damages to the extent of the debt contained in the inhibition. *Opinions*, that a plea in defence to the effect that the inhibition owing to defects in it was null when presented to be recorded was irrelevant. *Davidson* v. *Mackenzie*, 1856, 19 D. 226; 29 J. 113.

15. Messenger—Apprehension of Debtor. —A debtor who was apprehended on diligence

was, at his own request, carried to an ale-house and there detained till measures were taken to accomplish his liberation. *Held* that the messenger was not liable in damages. *Forbes* v. *Alison*, 31 Jan. 1823, F. C.; 2 S. 169. See *Garden* v. *M'Call*, 1826, 5 S. 123. *Orr* v. *Currie*, 1839, 1 D. 551; 14 Fac. 624.

16. Messenger — Arrest of Ship. — A messenger found liable in damages for having irregularly arrested a ship. *Kennedy* v. *M'Kinnon*, 13 Dec. 1821, F. C.; 1 S. 210.

17. Messenger — Blank in Execution not Filled in Summons.—A messenger, according to common form, returned an execution, bearing that he had cited a defender to appear, "place and time specified in the summons," which was, as usual, blank in the day of compearance, and the summons having been called without the blank being filled up, the Lord Ordinary dismissed it. *Held* that the messenger (who declined authorising the Lord Ordinary's interlocutor to be reclaimed against) was not responsible for the expenses incurred by reclaiming. *Wilsons* v. *Mackay*, 1831, 9 S. 288; 6 Fac. 196.

18. Messenger—Delay in Apprehending. —A messenger was employed to apprehend a drum-major on a caption for debt, and he did so while he was on parade on the Green of Glasgow, but was induced to let him continue with the regiment till his return to barracks, when he promised to deliver himself up; but he failed to do so, and the messenger was excluded from the barracks by the soldiers. *Held* that, by letting him go after apprehension, the messenger was liable for the debt. *M'Kinley* v. *Hall*, 1809, Hume 348.

19. Messenger — Delay in Executing Diligence.—Upon 11th November an Edinburgh agent sent to a messenger in the country an extract registered protest upon a bill, with instructions immediately to charge the debtor. The messenger gave the charge upon the 13th of November, but did not transmit the protest and his execution so as to be in the agent's hands before the 21st, by which time the days of charge had expired; and on the 22nd, before further diligence could be used, the debtor took refuge in the sanctuary. *Held* that the messenger and his cautioners were liable for the debt. *Glen* v. *Black*, 1841, 4 D. 36.

20. Messenger — Delay in Executing Diligence.—Under instructions to a messenger to put diligence for a debt "into immediate execution, unless the money is remitted at your sight," *held* that the delay of a single day given to the debtor to procure the assistance of friends to pay the debt, in which he failed, rendered the messenger liable in payment of it. *Wilson & Co.* v. *Snody*, 31 Jan. 1817, F. C.

21. Messenger — Delay in Executing Diligence.—A messenger *held* not liable in damages for failing duly to execute diligence. *Winterbottom* v. *Wright*, 1823, 2 S. 542.

22. Messenger — Delay in Executing Warrant.—A messenger who was instructed forthwith to imprison a messenger on a caption in case a sist should arrive, and unduly delayed to do so, and a sist having arrived, *held* liable in payment of the debt. *King* v. *Stevenson*, 1807, Hume 344.

23. Messenger — Delegating Duties — Embezzlement.—A person acting in the joint characters of agent and messenger, *held* liable to his employer in a sum recovered and embezzled by another messenger, to whom he committed the duty assigned to himself. *Hamilton* v. *Fraser*, 14 Feb. 1817, F. C.

24. Messenger—Diligence for Excessive Sum.—A messenger-at-arms is not liable in damages for executing diligence for a sum larger than was due, unless he ought to have been cognisant of the overcharge. *Henderson* v. *Rollo*, 1871, 10 M. 104; 44 J. 73.

25. Messenger — Diligence on Bill.—Damages awarded against *inter alias* a messenger for executing diligence against a son on a bill accepted by his father. *Hamilton* v. *Anderson*, 1830, 5 Mur. 312.

26. Messenger — Discretion — Instructions.—A messenger entrusted with the execution of diligence is not entitled to exercise any discretion, but is bound to obey the instructions of his employer; and he is liable to his employer if the result of using his discretion is that a debt cannot be recovered. *Miller*, 10 July 1810, F. C.

27. Messenger — Discretion — Instructions.—A law agent sent diligence to a messenger, "in order that you may forthwith execute the same, unless the cash is paid or good security found that the contents of the decree will be paid in three or four months." The messenger having gone to the debtor, who promised to pay or find security within a few days, and the messenger in consequence did not apprehend her, and intimated this immediately to his employer, *held* that the letter gave a discretionary power to the messenger, which he duly exercised, and that he was not liable for the debt. *Cullen* v. *Smith & Thomson*, 1847, 9 D. 606, 613; 19 J. 243.

28. Messenger—Employer's Liability.—*Question*, how far a creditor or his agent, employing a messenger-at-arms, is liable for the illegal and unauthorised acts of the messenger. *Menzies* v. *Stevenson & Co.*, 1839, M'F. 281.

29. Messenger—Erroneous Charge.—A messenger *held* liable for part of a bill for giving an erroneous charge. *Robertson* v. *Ogilvie*, 1836, 15 S. 43.

30. Messenger—Erroneous Execution.—A messenger who omitted, in one of the executions of a summons, to name all the defenders called in the summons, he and his cautioners *held* liable in the expenses occasioned by the erroneous execution. *Clason* v. *Black*, 1842, 4 D. 743.

31. Messenger—Erroneous Execution.—A messenger and his cautioners *held* liable for

the expense of discussing a preliminary defence to the execution by him of a summons which was found to be irregular (they and the messenger having received notice of the objection and allowed the discussion to go on), and also of the expense of an inhibition on the dependence. *Collier* v. *Wilson*, 1836, 15 S. 195 ; 12 Fac. 193.

32. Messenger—Error in Caption.—A messenger was instructed to execute a caption against a person described as residing at a particular place, but who in fact did not reside there, of which he informed the creditor, and offered to send the caption to a messenger near the place of the debtor's actual residence. *Held* that he was not liable for the debt. *Ferrier* v. *Aitken*, 1823, 2 S. 601.

33. Messenger—Error in Memorandum.—A messenger employed to imprison a debtor, omitted, in a memorandum which he indorsed upon the warrant, to specify the name of one of the parties at whose instance the debtor was incarcerated. *Held* that as the memorandum formed no part of the diligence, the messenger was not liable to the creditor for the expenses of a suspension awarded against the debtor, from whom he could not recover them. *Potter* v. *Muirhead*, 1847, 9 D. 519 ; 19 J. 513.

34. Messenger — Executing Diligence after Sist.—In an action of damages for illegal poinding and sale of goods against the messenger who executed the diligence after a sist obtained by the debtor, *held* (1) that the pursuer must show that the messenger knew of the sist ; but (2) that he need not set forth that the sist had been exhibited to the messenger. *Ritchie* v. *Dunbar*, 1849, 11 D. 882. In a similar action, *held* that the service of a summons of multiplepoinding was not equivalent to a sist of diligence, and that an action against the messenger was therefore irrelevant. *Hendry* v. *Brown*, 1851, 13 D. 1046 ; 23 J. 484.

35. Messenger — Failure to Execute Diligence.—A messenger having neglected to execute a poinding, *observed*, that the general rule was, that the amount of the debt is the measure of the damage, and the rule is to be adhered to, unless it be clearly made out that no damage had been sustained. *Chatto & Co.* v. *Marshall*, 17 Jan. 1811, F. C. See *Cullen* v. *Dykes*, 1852, 24 J. 177 ; 1 Stuart 327.

36. Messenger—False Execution—Sist of Action.—A party who was incarcerated on diligence proceeding on an assignation to a debt, brought a suspension and liberation, and a reduction, on the grounds that the debt had been extinguished prior to the assignation, and that the messenger's execution was false. In the reduction certification *contra non producta* passed as to the execution (which the messenger and his cautioners did not attempt to maintain), while defences were ordered as to the alleged extinction of the debt, but no further procedure took place ; and in the suspension and liberation the letters were suspended *simpliciter*, in respect of the decree of certification. *Held*, in an action of damages by the creditor against the messenger and his cautioners, that he was not entitled at once to decree for the debt, but that the action fell to be sisted till the reduction was finally disposed of. *Robertson* v. *Ogilvie*, 1834, 12 S. 580.

37. Messenger — Liberating Debtor. — The holder of a bill employed a messenger to execute a caption against the acceptor ; and the messenger, after he had apprehended him, liberated him on a party verbally agreeing to pay the debt. The holder made no complaint as to this, but recovered the contents from an indorser, to whom he assigned the diligence. *Held* that the indorser was not entitled to insist in an action of relief against the messenger. *Steel* v. *Grant*, 9 June 1814, F. C.

38. Notary.—*Question*, whether bank agents drawing a part of the remuneration to a notary for protesting bills, could claim damages from the notary on account of a blunder. *Murray & Son* v. *Taylor*, 1828, 6 S. 802.

39. Property — Dangerous Condition — Bursting of Dam—Injury to Neighbour.—The proprietor of a mill having let it with permission to the tenant to erect a dam for collecting water, subject to payment of any damages which the adjacent owners or their tenants might sustain, *held* that the proprietor was not liable for damage caused to them by the bursting of the dam. *Henderson* v. *Sir M. Stewart*, 1818, Hume 522 ; 15 S. 868, footnote.

40. Property — Dangerous Condition — Common Stair — Banister Wanting — Injury to Child—Liability of Proprietor—Contributory Negligence. — A child was killed by falling through the railing of a common stair where one of the banisters was wanting. *Held* that the proprietor of the property was liable in damages to the father of the child. *Observations re* contributory negligence. *M'Martin* v. *Hannay* 1872, 10 M. 411 ; 44 J. 230.

41. Property — Dangerous Condition — Flooding.—In an action against a railway company for damage occasioned by a flood, *question*, whether it was sufficient for the pursuer to prove that the loss had been sustained in consequence of the construction of the railway, without raising any question as to the sufficiency of the railway works for carrying off the water. *Samuel* v. *Edinburgh & Glasgow Rly. Co.*, 1850, 13 D. 312 ; 23 J. 125.

42. Property — Dangerous Condition — Injury to Neighbour.—A chimney-can, owing to insufficient workmanship in putting it up, fell seventeen days afterwards. Fragments fell through the skylight of an adjoining china shop, and did damage to the stock. *Held* that the proprietor of the property from which the can fell, and not the master workman whose servants had put it up, was liable to the china merchant for the injury

caused by the accident. *Cleghorn* v. *Spittal's Trs.*, 1856, 18 D. 664; 28 J. 287.

43. Property — Dangerous Condition — Tenement — Defective Waterpipe — Injury to Property Beneath.—*Held* that the proprietor of a flat in the possession of a tenant was liable to the occupant of a shop beneath for damage caused by the negligence of such proprietor in allowing a water-pipe in his flat to be in a defective and insufficient state. *Opinions*, that the proprietor would not have been liable unless *culpa* on his part had been established. *Campbell* v. *Kennedy*, 1864, 3 M. 121; 37 J. 62.

44. Property — Dangerous Condition — Tenement — Overflow of Water. — In an action by the occupant of a street flat of a house against the landlord for damage caused by an overflow of water from a water-closet in the upper flat, used by a tenant, *held* that he was not liable for the damage, supposing the water-closet to be properly constructed, and no fault or negligence imputable to him. *Weston* v. *Corporation of Tailors*, 1839, 1 D. 1218; 14 Fac. 1232.

45. Property — Dangerous Place — Fencing.—A horse having been killed by falling during the night into an old ironstone pit, which lay within a yard of the public highway, and was insufficiently fenced, *held* that an action lay directly against a judicial factor on the estate in which the pit was situated, without calling the tenant to whom the minerals were let, though it was alleged he had formerly worked the pit for several years, and might still be using it, for anything known to the judicial factor. *Mack* v. *Allan*, 1832, 10 S. 349; 7 Fac. 262.

46. Property — Dangerous Place — Fencing.—The proprietor of lands, in which a coal-pit adjacent to a footpath not sufficiently fenced was situated, *found* liable in damages to the father of a young woman who fell into the pit and was killed. *Hislop* v. *Durham*, 1842, 4 D. 1168.

47. Property — Dangerous Place — Fencing.—A workman employed in a building for whose use an opening was made in a wall, *held* not liable in damages to a person who fell through it and sustained bodily injury for not fencing it. *Smith* v. *Milne*, 1814, 2 Dow 390. Revg. 8 Mar. 1810, F. C.

48. Property — Dangerous Place — Fencing.—Damages *held* due by the proprietor of a house building, for an injury occasioned to a party by its not being properly fenced. *Chapman* v. *Parlane*, 1825, 3 S. 585.

49. Property — Dangerous Place — Fencing—Child.—A child, two years of age, having strayed on a railway, fell into an adjoining water-course and was drowned. *Held* that although the place where the accident occurred was not fenced, the railway company were not responsible for the death of the child. *Davidson* v. *Monkland Rlys. Co.*, 1855, 17 D. 1038; 27 J. 541.

50. Property—Dangerous Place—Fencing—Proximity to Public Road.—A proprietor of a coal-pit about four feet distant from a public road after it was abandoned, left it unenclosed, and a person, in a dark night, while passing along the road, fell into the pit and perished. *Held* that the proprietor was liable in damages. *Black* v. *Cadell*, 9 Feb. 1804, F. C.; 5 Pat. App. 567. Affg. 9 Feb. 1804, F. C.

51. Property—Muir-Burning.—*Held* that muir-burning being a lawful act, the proprietor of the lands where it took place was not liable for injury caused by the extension of the fire to adjoining lands, unless *culpa* on his part were averred and proved. *Observations* on the different degrees of *culpa*. *Mackintosh* v. *Mackintosh*, 1864, 2 M. 1357; 36 J. 678.

52. Property—Operations on—Injury to Neighbouring Property.—Where a house has been injured by operations on a contiguous house, the proprietor of the former is entitled to damages, although the operations have been legally executed. *Douglas* v. *Monteith*, 1826, 4 Mur. 130. *Callender* v. *Eddington*, 1826, 4 Mur. 108.

53. Property—Operations on—Injury to Neighbouring Property.—The proprietors of feuing ground, who had originally formed a common sewer for the use of the houses to be built on the ground feued out by them, having allowed a greater quantity of sewage water to be conveyed into the sewer than it could adequately carry, *held* liable in reparation for the injury thereby occasioned. *Governors of Heriot's Hospital* v. *Dicksons*, 1830, 4 W. & S. 1. Affg. 5 S. 94.

54. Property—Operations on—Injury to Neighbouring Property.—A proprietor *held* liable for damage sustained by his neighbour in consequence of operations on his own property. *Robertson* v. *Hamilton's Trs.*, 1825, 4 S. 6.

55. Property—Operations on—Injury to Neighbouring Property.—*Held* (1) that a proprietor of lands situated nearly a mile from a railway has at common law a right to sue for damages for injury done to his property in consequence of the operations of the railway company; (2) that railway companies are bound so to construct their works as to protect proprietors of lands on a lower level, not only from the effects of ordinary floods, but also of extraordinary falls of rain, unless these are such as could not be reasonably anticipated. *Potter* v. *Hamilton & Strathaven Rly. Co.*, 1864, 3 M. 83; 37 J. 48.

56. Property—Operations on—Injury to Neighbouring Property—Quarry—Fall of Débris.—Circumstances in which, although premises sustained considerable injury from the descent of débris and water from the fall of a hill or brae where there was a working quarry, the court *held* that there was not sufficient evidence to establish that the injury was occasioned by any wrongful working of

the quarry. *Thomson* v. *Gray*, 1842, 5 D. 377; 15 J. 156.

57. Property — Stream — Flooding — Choked Grating — Bursting of Covered Stream in a Town Owing to Flood — Damnum fatale.—Part of the *solum* of a stream, flowing through a town and used as a sewer, was acquired by a railway company, who under an agreement with the magistrates arched it over with a culvert, the mouth of which, at its upper extremity, projected a few feet beyond the boundary of the railway company and into the property of the town, where it was covered by a grating erected by the company with the acquiescence of the magistrates. In a flood of unprecedented violence the grating became choked, and in consequence the stream overflowed, causing injury to an adjacent proprietor, who raised an action of damages against the magistrates as representing the town. *Held* that the defenders were not liable. *Pirie & Sons* v. *Mags. of Aberdeen*, 1871, 9 M. 412; 43 J. 190.

58. Railway—Collision—Guard of one Company and Pointsman of another having Common Use of Line.—*Held* that a railway company was liable in damages for injuries caused by the fault of a pointsman in their employment to the guard of a train belonging to another company while passing over a portion of the line of the former company. *Calder* v. *Caledonian Rly. Co.*, 1871, 9 M. 833; 43 J. 465.

59. Railway—Failure to Fence—Running Down.—Cattle having strayed upon a railway from a farm not immediately adjoining to it but separated therefrom by other fields occupied by different tenants, and having got upon the railway through these fields, were killed by a locomotive engine passing along the line. In an action for damages against the railway company, *held* that they were not liable for the loss of the cattle. *Monklands Rly. Co.* v. *Waddell*, 1861, 23 D. 1167; 33 J. 586.

60. Railway—Level-Crossing—Running Down.—Under various statutes, a railway company, whose line intersected a statute labour road, were bound to place gates and gatekeepers at the crossing to guard against accidents. They failed to do so; and a woman crossing the railway by a footpath forming part of the road, was seriously injured by a waggon descending the incline formed by the railway at the point of intersection. *Held* (1) that it was not relevant to show, in defence against an action of damages at the woman's instance, that it would have been possible for her to cross the railway in the same manner as she had done even although gates had been put on at the crossing, as required by the statutes; (2) that the waggon by which the woman was struck must be presumed to belong to and to be in the use of the company, as it bore their plate. *Gilchrist* v. *Ballochney Rly. Co.*, 1850, 12 D. 979; 22 J. 431.

61. Railway—Level-Crossing—Running Down — Injury to Child — Contributory Negligence.—A railway was intersected at a curve of the line by a level-crossing. A child of six years and seven months came, in full daylight, to the crossing, and waited a minute or two until a down train had passed, when she immediately proceeded to run across the line, and was knocked down and killed by an up train. No watchman was stationed at the crossing, nor were the trains slowed there. A rule of the company required engine-drivers to sound the whistle as they approached the crossing. The proof was conflicting as to whether the whistle was or was not sounded on the occasion of the accident. *Held* that the company were not liable in damages. *Grant* v. *Caledonian Rly. Co.*, 1870, 9 M. 258; 43 J. 115.

62. Railway—Running Down—Fencing.—In an action of damages by a boy whose leg had been injured by a waggon on a private railway, it was alleged that the line was not properly fenced, and that it was the duty of the proprietor to have it fenced; that the person in charge of a horse drawing the waggon at the time was not at his post, and that it was the duty of the proprietor, and more particularly of a contractor for the hauling of the waggons, to see that it was safely conducted. The owner contended that any issue against him should be confined to the alleged failure to fence; the contractor, that the allegation that there had been failure to fence freed him from liability. *Held* that the pursuer was entitled to a general issue against both owner and contractor, whatever circumstances might emerge at the trial calling for special ruling. *Brownlie* v. *Tennant*, 1854, 16 D. 998; 26 J. 517.

63. Railway—Running Down—Private Line.—A workman in the employment of a railway company was killed, when employed at the junction of a private line, by the descent of a waggon down an incline on the private line. In an action of damages by his widow against the railway company, and against the proprietor of the private line, allegations of carelessness and want of proper precautions in the descent of waggons down the incline, which held relevant as against the proprietor of the private line, but not as against the railway company. *Question* whether, if the Railways Clauses Act, 8 and 9 Vict. c. 33, s. 69, had been founded on, the railway company would have been liable, in respect proper arrangements for the safety of their workmen had not been made. *M'Laren* v. *Snowdowne*, 1861, 23 D. 962; 33 J. 483.

64. Railway—Shunting.—A drover in the employment of a cattle-dealer was engaged along with a railway company's servants in trucking his master's cattle at a cattle-siding, when an engine, driven by one of the company's servants, entered the siding, pushing before it some waggons, the foremost of which came into collision with the truck at which the drover was engaged, whereby he was injured. *Held* (1) that the drover was not at the time

working in the employment of the railway company, but in that of his master; (2) that the engine ought to have been stopped in time to prevent the collision; (3) that it was not proved that sufficient warning was given of the approach of the engine and waggons to enable the drover to get out of the way; (4) that no blame was imputable to the drover, and therefore that the railway company were liable in damages. *Wyllie* v. *Caledonian Rly. Co.*, 1871, 9 M. 463; 43 J. 220.

65. Railway—Sparks from Engine.—If a railway company take every reasonable precaution which science can suggest, they are not responsible for injury done by sparks, which in spite of such precautions may escape from one of their locomotives. *Murdoch* v. *Glasgow & S.-W. Rly. Co.*, 1870, 8 M. 768; 42 J. 418.

66. Road — Dangerous Condition. — Verdict against road trustees for damages, in favour of the widow of a carter who had lost his life through the misconduct of a servant in their employment, who neglected to take proper precaution for the safety of the public, though he knew that the road was in a dangerous state. *Aitken* v. *Douglas*, 1836, 14 S. 204.

67. Road — Dangerous Condition. — Damages claimed against road trustees in respect of injuries sustained by a party who had fallen over an embankment on a road; but verdict for the defenders, the road having been rendered impassable by an operation of nature, and shut up by the trustees. *Crombie* v. *Balfour*, 1838, M'F. 155.

68. Road—Dangerous Condition.—*Held*, in an action of relief by coach proprietors against road trustees, that stones were improperly allowed to remain on a road, whereby the coach was overturned. *Mackay* v. *Waddell*, 1820, 2 Mur. 201.

69. Road—Dangerous Condition—Action against Clerk of Trustees.—Where the roads in a county were divided into districts, under the management of separate bodies of trustees, who had each their clerk or treasurer, *held* that an action of reparation for injury sustained within one of these districts, in consequence of unfenced road, was incompetently directed against the clerk of the general meeting of road trustees for the county. *Revey* v. *Murdoch*, 1841, 3 D. 888; 16 Fac. 934.

70. Road — Dangerous Condition — Liability of Road Surveyor.—*Held* that a road surveyor appointed by the trustees of a turnpike road, to whom the only duties expressly assigned were, to see that the contractors for supplying road metal duly fulfilled their contract, and that the surfacemen spread the metal properly, and kept the surface of the road in order, was not liable, either at common law or under the General Turnpike Act, in damages for injuries sustained by a person at a dangerous and unfenced part of the road, which had been in the same state before the surveyor's appointment. *Kinloch* v. *Clark*, 1865, 4 M. 107; 38 J. 65.

71. Road—Dangerous Condition—Failure to Shut up Old Road.—Road trustees are liable in damages for not shutting up an old road, if injury is thereby sustained; but if the party injured has been acting carelessly and irregularly, he is not entitled to damages. *M'Lachlan* v. *Wigtonshire Road Trs.*, 1827, 4 Mur. 216.

72. Road — Dangerous Condition — Obstruction—Independent Contractor.—Road trustees directed an operation to be made on a road, in the course of which a large heap of stones was laid down partly on the footpath and partly on the carriage road, where they were left all night, without any precaution being taken to warn travellers. A gig was overturned by these stones in the dark, and a person driving it was seriously injured, and his son, a boy of ten years of age, killed. The road trustees alleged, in defence, that they had no personal knowledge of the obstruction, and that they had employed a contractor who was habit and repute competent for the operation, and who had been specially charged to be careful. *Held* that they were not liable. *Findlater* v. *Duncan*, 1839, 1 Robin. 911. Revg. 15 S. 1304; 16 S. 1150. *Followed* in *Ainslie* v. *Stewart*, 1839, 2 D. 141; 15 Fac. 62; and *New Clyde Shipping Co.* v. *Clyde Trs.*, 1842, 4 D. 1521.

73. Road—Dangerous Condition—Fencing—Repairing.—Road trustees subjected in damages in respect of injuries sustained by parties being overturned in a gig, at a part of the road under repair, and not properly fenced. *Watson* v. *Scott*, 1838, M'F. 140.

74. Road — Dangerous Condition — Repairing.—In repairing a road, trustees are bound to use the utmost caution, and to employ careful workmen; but travellers must use reasonable care, otherwise they cannot recover damages for injury suffered. *Millar* v. *Road Trs.*, 1828, 4 Mur. 563 and 568.

75. Road—Dangerous Condition—Statutory Reconstitution of Trust.—A party, in November 1829, raised an action, alleging that, in May of that year, he had, by the negligence of road trustees, sustained an injury on a road, and concluding for damages against the road trustees; but the Act constituting the trust was repealed, and a new one, differing in many particulars, was passed in June of the same year, and he did not specify which set of trustees he concluded against nor set forth distinctly the grounds of action. The court *dismissed* the action. *Coldstream* v. *Threshie*, 1832, 10 S. 356.

76. Road—Dangerous Operation—Malice. —In an action of damages by the proprietors of a steam-coach for injury done in consequence, as was alleged, of certain operations by the trustees on the road on which it ran, *held* not necessary to insert malice in the issue, and that the intent to injure might be proved under an issue whether the defenders performed the operations wrongfully. *Dauney* v. *Maxwell*, 1836, 14 S. 1037; 11 Fac. 860.

77. Road—Drawbridge—Raising without Warning—Injury to Traveller.—A canal company found liable in damages for personal injury sustained by a woman who was crossing one of the drawbridges over the canal when the bridge was raised, without warning, by the bridge-keeper in the service of the canal company. *Hunter* v. *Edinburgh & Glasgow Union Canal Co.*, 1836, 14 S. 717; 11 Fac. Appx. 19.

78. Road—Failure to Keep in Repair.—In an action raised by a proprietor against the trustees under a local Road Act, concluding (1) for declarator that the trustees were bound to keep a road in repair; (2) that they had failed to do so, and (3) for damages, *held* (1) that by the statute the duty of the trustees was to meet together at certain times, and to exercise their discretion as to the money to be raised and the roads to be repaired; (2) that by the statute the conduct of the trustees in the exercise of their discretion was not subject to the review of the Court of Session; and therefore (3) that the action was incompetent. *Beckett* v. *Campbell & Hutcheson*, 1866, 4 M. (H. L.) 6; 38 J. 229. Affg. 2 M. 482; 36 J. 230.

79. Road—Running Down—Ownership of Horse.—An action of damages against a railway company went to trial on the issue, whether a horse and van "belonging to the defenders" did, through the fault of the defenders, "injure the pursuer." The verdict was for the pursuer. It appeared in evidence, that although the van was the defenders', the horse was the property of a contractor, and that the driver was the contractor's servant; but it was not established that the contractor and railway company stood towards each other in the relation of master and servant. *Held* that it was not proved that the horse "belonged" to the defenders, and new trial granted. *Shiells* v. *Edinburgh & Glasgow Rly. Co.*, 1856, 18 D. 1199; 28 J. 539.

80. Road—Street—Footpath—Liability of Magistrates.—*Question*, whether it is the duty of the magistrates of a burgh to see that all thoroughfares within the burgh, whether streets or mere footpaths, are safe, and whether the neglect of that duty, whereby an accident has occurred, will found a claim of damages against them. *Kerr* v. *Mags. of Stirling*, 1858, 21 D. 169; 31 J. 100.

81. Road—Street—Levelling—Act of Parliament.—An Act of Parliament was passed for carrying into effect certain improvements in the city of Edinburgh, and *inter alia* for levelling a street which was in the line thereof. By an operation on this street the pavement was lowered in front of one of the shops. *Held* that a claim for damages at the instance of the proprietor of the shop was competent against the commissioners under the Act, although there was no provision in it for compensation in such a case, and the alleged damage was consequential on the operation authorised by it. *Strachan* v. *Budges*, 1837, 15 S. 637; 12 Fac. 602.

82. Road—Street—Obstruction—Pavement—Relevancy—Competency.—In an action of damages at the instance of a burgess against the magistrates and town council of a royal burgh, as representing the community, for injury sustained in consequence of their alleged neglect to remove a large stone which obstructed the pavement of a public street, it was pleaded in defence, that the action should have been directed against the individuals who had been guilty of the alleged neglect, and that it was incompetent as laid against the community. *Held* that the action was relevant. *Dargie* v. *Mags. of Forfar*, 1855, 17 D. 730; 27 J. 311; 1856, 18 D. 343; 28 J. 178.

83. Seller and Purchaser—Druggist—Poison.—In an action of damages against a druggist for supplying a deadly poison in place of a salutary medicine, whereby the pursuer's health was injured, *held* competent to the defender to maintain that he had only undertaken to procure the medicine from another party. *Dalziel* v. *Osborne*, 1857, 20 D. 55; 30 J. 32.

84. Sheriff-Clerk—Defective Precept—Expense of Suspension.—A substitute sheriff-clerk issued a defective precept, a charge on which was suspended. The charger litigated the question for a considerable time (during which the suspender became insolvent), without intimating the defect to the substitute clerk or his principal; but at last intimated to the clerk, who thereafter aided in carrying on the suspension to a judgment, which found the precept null, and suspended *simpliciter*. *Held*, in an action of relief against the clerk, that he was not liable for the debt in the decree, and that he was only liable for such part of the expenses in the suspension as were incurred after intimation to him of the defect. *Henderson* v. *Drysdale*, 1831, 9 S. 536.

85. Sheriff-Officer—Delay in Executing Charge.—A sheriff-officer liberated from liability for delay in execution of charge by the actings of his employer. *Couper* v. *Bain*, 1868, 7 M. 102; 41 J. 39.

86. Sheriff-Officer—Erroneous Charge.—A debtor who had been imprisoned obtained suspension and liberation in consequence of an error in the charge by the officer, and brought an action of damages against the creditor, which he afterwards abandoned. *Held*, in an action of relief by the creditor against the officer and his cautioners, that they were liable to the creditor in relief of the expenses of the suspension and action of damages. *Brock & Ferguson* v. *Kemp*, 1844, 6 D. 709; 16 J. 330.

87. Tradesman—Defective Work—Repetition of Costs.—A party employed a tradesman to lay leaden pipes to convey water to his house, and made various partial payments after the supply of water had proved insufficient. He employed another person to lift and relay the pipes, which he averred were insufficient, without intimation to the

first tradesman to attend. An action having been raised against the tradesman, the court *ordered* issues to try the question. *M'Donald* v. *Mackie & Co.*, 1831, 5 W. & S. 462. Revg. 8 S. 686.

88. Tradesman — Goods Spoiled while being "Finished."—Goods were sent to a finisher to be finished by a process admittedly delicate and attended with some amount of risk. They were returned injured. *Held* that the finisher by accepting the employment undertook to perform the work without injury to the goods, and that he could only exonerate himself by proving that the injury was due to some defect in the goods or incapacity to undergo the process. *Hinshaw, etc.* v. *Adam, etc.*, 1870, 8 M. 933; 42 J. 547.

89. Trespasser—Escape of Steam from Unfenced Pipe.—A girl ten years of age was killed by an escape of steam from an unfenced pipe situated on a manufacturer's ground. She was not in his service, and had no right to be on his ground. *Held* that her father had no claim for damages. *Ferguson* v. *Laidlaw*, 1871, 43 J. 305.

90. Trespasser — Explosion — Contributory Negligence. — In an action of damages for injuries sustained by the pursuer from an explosion of nitro-glycerine on the defender's premises, it appeared from a proof that the pursuer, a lad of sixteen years of age, had, along with others, after climbing a fence, trespassed on a field belonging to the defender, and entered an open hut where a tin can which had contained nitro-glycerine was lying; that the defender had previously given instructions to have the nitro-glycerine destroyed, and that the can had been emptied of as much of its contents as would pour from it, but an explosion was caused by one of the pursuer's companions striking the can with a hammer. *Held* that the defender had used reasonable precautions against accident, and was not liable in damages. *Question* as to trespass and contributory negligence. *Galloway* v. *King*, 1872, 10 M. 788; 44 J. 449.

91. Trespasser—Fall of Pile of Battens.—Battens were stored in piles, in what was proved to be the usual manner, on an unfenced piece of ground adjoining a roadway along a canal harbour, long used for that purpose, and open to the public. Some of the battens fell from the top of a pile and killed a boy ten years of age, who was between two of the piles, and who had no business on the premises. *Held* that the owner of the battens, who rented the ground on which they were stored, was not liable in damages to the father of the boy. *Balfour* v. *Baird & Brown*, 1857, 20 D. 238; 30 J. 124.

92. Trespasser—Unfenced Machinery—Contributory Negligence.—A boy nine years old carried gunpowder to works where he was not employed, to his father, who was a miner there. Having been sent a message by one of the workmen, in passing over a shaft "he laid hold of the winding-chain," and was killed by being drawn into the machinery, which, it was alleged, was not sufficiently protected. *Held* that the father had no claim of damages against his master, the boy having been in a place where he had no occasion to be, and the death having been caused by his own reckless act in taking hold of the winding-chain. *Lumsden* v. *Russel*, 1856, 18 D. 468; 28 J. 181.

93. Trespasser — Fencing — Unfenced Shaft—Ambiguous Charge—New Trial.—On the trial of an issue, whether A died in consequence of injuries sustained from an unfenced shaft in the mash-house of the defenders' brewery, through the fault of the defenders, the presiding judge directed the jury, that if they were satisfied on the evidence that A "ought not to have been in the mash-house" on the occasion in question, the defenders were entitled to a verdict. *Held* that as the direction might refer either to fault in A in having gone into the mash-house, or to fault in the defenders or their servants in having allowed her to go there, or to fault on both sides, the direction was ambiguous, and exception thereto allowed. *Fraser* v. *Younger & Sons*, 1867, 5 M. 861; 39 J. 494.

NEGOTIABLE INSTRUMENT

Document of Title, see title *Sale*.

1. Delivery Note.—A delivery note "to the order of" the vendee is not such a document as will, by endorsement of the vendee, transfer a right of property to the transferee and bar the vendor from maintaining against him defences good against the original holder. *M'Ewan* v. *Smith*, 1849, 6 Bell 340; 21 J. 369. Affg. 9 D. 434; 19 J. 173.

2. Iron Warrant.—A warrant by which an ironmaster undertook to deliver a quantity of iron to the party lodging the warrant with him, *held* not to be a negotiable instrument of mercantile usage; but on the specialty that the ironmaster had in a correspondence recognised the transferee of the warrant as the party to whom he was to make delivery, he was *held* to be barred from stating a defence good against the original holder of the warrant. *Dixon* v. *Bovill*, 1856, 19 D. (H. L.) 9; 3 Macq. 1; 28 J. 684.

[In *Dimmack* v. *Dixon*, 1856, 18 D. 428; 28 J. 362, which was decided before the decision of the House of Lords in *Dixon* v. *Bovill*, the view of the nature of such documents taken in that case by the Court of Session, but which was disapproved in the House of Lords, was applied.]

3. Letter of Credit.—*Question*, whether a letter of credit addressed by one bank to another was a negotiable instrument. *Struthers* v. *Commercial Bank*, 1842, 4 D. 460; 14 J. 194.

4. Obligatory Letter.—An obligatory letter undertaking to deliver certain articles to the

order of the vendee issued by the vendor is not privileged and transmissible by blank endorsation. *Commercial Bank* v. *Kennard*, 1859, 21 D. 864.

NOBILE OFFICIUM

CORRECTION OF DEED, see title *Writ*.
CUSTODY OF CHILDREN, see title *Parent and Child*.
JUDICIAL FACTOR, see that title.
TRUST, see that title.

1. Access to Papers—Order on Trustees.—The trustees of a deceased heir of entail held possession of the key of the charter-room of what was formerly his residence, but now that of A, the next heir of entail. A had in a previous action resisted the petition of an opposing claimant to get access to the documents in this room, but now sought to get the keys for himself. The court *refused* to order the trustees to give up the key, but suggested the appointment by the parties of some one to inventory and separate the documents. *Breadalbane* v. *Breadalbane's Trs.*, 1869, 7 S. L. R. 40.

2. Change of Name — Authority. — A writer to the signet obtained the royal licence to assume an additional surname. Having prayed the court to sanction his using it in all legal acts and needs and judicial proceedings, the petition was withdrawn as unnecessary. *Young*, 1835, 13 S. 262.

3. Charities—Jurisdiction over.—*Observed*, that the Court of Session, as the Supreme Court of Equity in Scotland, has jurisdiction over all charities, in so far as to declare the powers of the administrators, to correct all abuses, and to enforce the will of the founder. *Ross* v. *Governors of Heriot's Hospital*, 1843, 5 D. 589 ; 15 J. 298. See 5 Bell 37 ; 18 J. 386.

4. Deed — Warrant to Deliver.—On the petition of the Lord Advocate as prosecutor of an indictment charging fraudulent bankruptcy, warrant *granted* to the Clerk of the Bills to deliver up to the Crown Agent a petition for sequestration and interlocutor thereon. *Lord Advocate*, 1863, 1 M. 973 ; 35 J. 568.

5. Deed in Chancery—Warrant to Transmit.—Documents lodged in Chancery *allowed* to be delivered up, to be produced as evidence in a court of law in England, on caution being found to return them within a specified time. *Bloxam* v. *Lord Clerk Register*, 1825, 3 S. 428. But a similar application *refused*. *Birtwhistle* v. *Lord Clerk Register*, 1825, 3 S. 602.

6. Deed in Chancery—Warrant to Transmit. — A specification of letters-patent for Scotland having been enrolled in Chancery, a petition to have it delivered up, to be produced in Parliament, on occasion of applying for an extension of the term of the patent, *refused*, because of the danger to the public records, and because certified extracts of recorded deeds are probative by the law of Scotland. *Morton* v. *Lord Clerk Register*, 1831, 10 S. 162.

7. Deed in Chancery—Warrant to Transmit.—Authority *granted* to transmit a royal warrant for letters-patent from the records of Chancery to the Home Secretary's office, to have a misnomer therein corrected. *Whitside*, 1836, 14 S. 450.

8. Extracted Process—Warrant to Exhibit. — Authority *granted* to the Deputy Keeper of the Records to take from the Register Office documents forming part of an extracted process, and exhibit at an examination of witnesses to be held in Edinburgh, under a commission granted by an English court. *Shedden*, 1860, 24 D. 1446 ; 34 J. 715.

9. Extracted Process—Warrant to Transmit—Authority.—The warrant of a Lord Ordinary is not a sufficient authority to the Lord Clerk Register to transmit to the court the grounds and warrants of an extracted decree. *Simpson*, 1829, 7 S. 374.

10. Extracted Process — Warrant to Transmit. — A pursuer obtained decree of adjudication while the action stood on summons and defences, reserving all objections *contra executionem*, so as to have a *pari passu* preference. The decree was extracted, and the extractors refused to return the process. *Held* that the decree was interim, and could be extracted only as such ; and warrant *granted* to the Keeper of the Records to transmit the process to the clerk of process, so that the action might be proceeded with in common form. *Freen* v. *Beveridge*, 1833, 11 S. 711.

11. Extracted Process — Warrant to Transmit—Account of Expenses.—Authority to transmit accounts of expenses forming part of the record of an extracted process to a pending action in a sheriff court, where they were required as evidence, *refused*, reserving to the petitioner to obtain a certified copy. *Meikleham*, 1839, 2 D. 165. *Anderson, Child, & Child*, 1827, 5 S. 543. *Munro*, 1828, 7 S. 52.

12. Extracted Process — Warrant to Transmit.—The court *refused* to grant warrant for taking an extracted process, or a particular step of the process, furth of Scotland, for production before a foreign tribunal. *Power*, 1859, 21 D. 782 ; 31 J. 417.

13. Extracted Process — Warrant to Transmit.—Warrant *granted* to the Deputy Keeper of the Records to take to England a production in an extracted process, and documents forming "Extractor's Warrants" in an old factory, for exhibition at a trial ; but authority to take out of the country documents forming part of the extracted process *refused*. *Shedden*, 1860, 24 D. 1446 ; 34 J. 715.

14. Fixing of the Market Cross of Burgh —Citation.—The court, on the application of the Sheriff of Zetland and the Magistrates of Lerwick, appointed a certain place in the burgh as the market cross thereof and on the legal place for edictal citations. *Maconochie*, 1838, 14 Fac. 252.

15. Public Officer—Interim Appointment.—During the vacancy between the death of a sheriff and commissary, and the appointment of his successor, authority *granted* (on the application of the commissary-clerk) to the sheriff-substitute and commissary-depute to act as commissary *ad interim*. *Gracie*, 1840, 2 D. 839.

16. Public Officer—Interim Appointment.—A commissary-clerk, who by indisposition was rendered unfit for fulfilling his duties, and who had no power in his commission to appoint a depute or assistant, presented an application for the appointment of a person to exercise the office. The court (after intimation of the petition to the Crown officers and the sheriff of the county), in respect of the emergency, *appointed* a commissary-clerk *ad interim*. *Harper*, 1853, 15 D. 970; 2 Stuart 600.

17. Public Officer—Interim Appointment.—On the death of the Director of Chancery, the court made an interim appointment of a director until the completion of a permanent appointment. *Dundas*, 1837, 15 S. 398.

18. Public Officer—Interim Appointment.—Authority *granted* to a party, on the death of the Keeper of the Register of Abbreviates of Adjudications, to discharge the duties of the office *ad interim*. *M'Kenzie*, 1846, 19 J. 90.

19. Public Officer—Interim Appointment.—A keeper of a county register of sasines having become insane, the court, on the motion of the Lord Advocate, *appointed* an interim keeper. *Lord Advocate*, 1860, 22 D. 555.

20. Public Officer—Interim Appointment.—An interim appointment made to the office of Lyon King-at-Arms on the Lord Advocate's application. *Lord Advocate*, 1866, 1 S. L. R. 193.

21. Public Officer—Interim Appointment.—On a summary petition presented in consequence of the sudden death of the sheriff-clerk of Edinburgh, the court *appointed* a party to perform the duties of the office *ad interim*, with power to levy the fees, he being always accountable therefor. *Speirs*, 1842, 5 D. 388.

22. Public Prosecutor—Interim Appointment.—A change of ministry having occurred, and the Lord Advocate having not yet been sworn in to office, the court *appointed* a member of the bar *pro re nata* counsel for Her Majesty in the High Court of Justiciary. *Lord Advocate* v. *Campbell*, 1868, 1 Coup. 182.

23. Public Records—Delivery of Deed.—A registered deed given out on receipt of the Crown Agent, with a view to the investigation of an alleged forgery of one of the names thereon. *King's Advocate*, 1831, 9 S. 387.

24. Public Records — Restoring Mutilated Deed.—The court remitted to the Depute Clerk Register to take steps for restoring a mutilated deed. *Jeffreys*, 1827, 5 S. 334.

25. Public Records—Warrant to Mark—Challenged Deed—Prohibition of New Sasine.—A party borrowed up from a depending process a disposition which, though produced, was not delivered, and passed infeftment on it in favour of his son, the disponee, who was abroad, and recorded the infeftment. Warrant *granted* (without delaying till intimation should be made to the son) authorising the Keepers of the Register of Sasines to mark on the margin of the register that the sasine was judicially challenged, and prohibiting the notary from expeding any new sasine. *Gray*, 1838, 1 D. 227.

26. Public Records—Warrant to Deliver Deed—Form of Petition.—For the form of a petition by the Lord Advocate for warrant for delivery of a bond registered in the Books of Council and Session, to enable him to investigate a charge of forgery, see *Lord Advocate*, 1861, 33 J. 224.

27. Public Records — Warrant to Transmit Deed. — Authority *granted* to deliver up a bond recorded in the Books of Council and Session, to be transmitted to Jamaica, to be there produced in an action; but an extract to be deposited in its place, and bond granted for its restitution within one year. *Cunninghame*, 1821, 1 S. 98.

28. Public Records — Warrant to Transmit Deed. — The court *refused* to authorise a deed, recorded in the Books of Session, to be delivered on receipt, for the purpose of being produced on a trial in England; but *allowed* it to be carried to the trial by an officer of court. *Annandale*, 1828, 6 S. 657.

29. Public Records — Warrant to Transmit Deed.—A party having raised a reduction of a recorded deed on the ground of vitiation, the court *refused* to order it to be produced in process, but *ordained* the Depute Clerk Register to attend and exhibit it at all necessary diets. *Gaywood*, 1828, 6 S. 363.

30. Public Records — Warrant to Transmit Deed.—In an action of reduction (not reduction-improbation) founded on defects in the writing of the original deed, the production is sufficiently satisfied by an extract; and the court will only authorise the transmission of the original from the records, when required, in the course of the cause, *in modum probationis*. *Alison*, 1829, 7 S. 552; 4 Fac. 801.

31. Public Records — Warrant to Transmit Deed. — Warrant *granted* to the Lord Clerk Register to deliver two deeds to the clerk of a process, that he might exhibit them to witnesses to be examined in the country, and the clerk *ordained* forthwith thereafter to return the deeds to the record. *Mansfield* v. *Stuart*, 1840, 2 D. 1235.

32. Public Records—Warrant to Transmit Deed.—After a settlement had been recorded in the Register of Deeds, the court

granted warrant to transmit it to the Stamp Office to get it duly stamped, on caution to return it to the register. *Laidlaw*, 1840, 15 Fac. 356.

33. Public Records—Warrant to Transmit Deed.—The court *authorised* a deed which was recorded in the Books of Council and Session, to be delivered, in order to be produced in an Indian court, on caution to return it within six months. *Duncan*, 1842, 4 D. 1517.

34. Public Records—Warrant to Transmit Deed.—The court *refused* to order a recorded deed to be delivered up to be produced at a trial in England, but authorised it to be given to one of the clerks of court to be exhibited at the trial. *Malcolm*, 1847, 19 J. 483.

35. Public Records—Warrant to Transmit Deed—Entail.—An excambion having been effected of portions of an entailed estate lying in two counties, the court *granted* warrant to the Keeper of the Records of the county in which the smaller portion of the lands lay, after recording the contract in the books kept by him, to transmit it to the Keeper of the Records of the county in which the rest of the lands lay, to be by him recorded and retained. *Oswald*, 1848, 10 D. 678; 19 J. 678.

36. Public Records—Warrant to Transmit Deed.—The court will not grant a warrant on the Lord Clerk Register and his deputes to transmit deeds which have been recorded to the clerk to a process eight days before a trial, holding that the rule requiring production of documents previous to the trial would be satisfied by the production of extracts. Where it was important that witnesses should see the deed, they might be taken to the Register House. *Maclean* v. *Maclean's Trs.*, 1861, 23 D. 1262; 33 J. 480.

Observed, that when Keepers of Registers produce deeds under an order by the court, they should produce with them a relative signed inventory. *Morris* v. *Brymer*, 1854, 16 D. 869; 26 J. 417.

37. Public Records—Warrant to Transmit Deed.—On the petition of the sole beneficiary under a deed recorded in the Books of Council and Session, the court *granted* warrant to the Deputy Clerk Register to deliver up the deed to him, in order that he might produce it in an English court, on caution, with sufficient security to return it within six months—an extract of the deed having been previously lodged in its stead. *Dunlop* v. *Deputy Clerk Register*, 1861, 24 D. 107; 34 J. 51.

38. Public Records—Warrant to Transmit Deed.—Warrant *granted* to the Deputy Keeper of the Records to take a deed recorded in the Books of Council and Session to England for exhibition at a trial, on the petition of a party who was challenging the same as a forgery in the English action. *Bayley*, 1862, 24 D. 1024; 34 J. 514.

39. Public Records—Warrant to Transmit Deed.—A petition by the granter and grantee of a deed for warrant to the Lord Clerk Register to deliver it up, in order that it might be produced in evidence at a trial in Dublin, *granted*, on caution being found to return it within six months, and an extract thereof, duly authenticated, being deposited in its stead. *Jolly*, 1864, 2 M. 1288; 36 J. 644.

40. Public Records—Warrant to Transmit Deed.—Petition for warrant to the Lord Clerk Register, or other officer of records, to exhibit in the Court of Chancery in England, for the purposes of a suit depending there, certain deeds recorded in the Books of Council and Session, *refused* after communication with the Vice-Chancellor, as the court's control over the deeds could not be insured in the event of their being sent to England. *Young*, 1866, 4 M. 344; 38 J. 254.

41. Public Records—Warrant to Transmit Deed.—A petition for warrant to obtain delivery from the sheriff-clerk of a deed recorded in the Sheriff Court Books in order that it might be produced in the Supreme Court of New York, *refused*, as the court was not satisfied that by the law of New York exhibition of the original was indispensable, and that a duly authenticated copy would not be competent evidence if the principal could not be procured. *Western Bank & Liquidators*, 1868, 6 M. 656; 40 J. 336.

42. Public Records—Warrant to Transmit Deed.—Warrant *granted* by the court to transmit a contract of marriage, registered in the Sheriff Court Books of Aberdeen, by registered post letter, to the Clerk of Court in the petition, that he might present the same at the office of the Inland Revenue in Edinburgh for the purpose of having an additional stamp impressed upon it, and thereafter retransmit it to Aberdeen. *Gordon*, 1871, 8 S. L. R. 445.

43. Recording in Register of Tailzies—Authority—Petition.—Form of procedure in an application for recording in the Register of Tailzies two deeds already recorded in the Books of Council and Session, and in the custody of the keepers thereof. *Fletcher & Others*, 1866, 3 S. L. R. 99.

44. Recording Inventory—Authority.—Warrant *granted*, in peculiar circumstances, to record an inventory under the Act 1695, c. 24, after the *annus deliberandi* had expired, reserving all objections to the competency. *Finlayson*, 1838, 16 S. 1270.

45. Recording Inventory—Authority.—Authority given to record inventories made up by an heir entering *cum beneficio*, where, from particular circumstances, the recording had been prevented till after the lapse of year and day. *Bell*, 17 Nov. 1818, F. C.; 1830, 8 S. 839.

Circumstances in which authority was given to record inventories at the distance of ten years after the predecessor's death, reserving to all parties having interest the right of objecting to the effect thereof. *Anderson* v. *Bank of Scotland*, 1838, 1 D. 268.

46. Remedy of Proceedings for Adoption of Statute in Burgh.—Certain proceedings taken by the householders of Lasswade in the adoption of the General Police Act were set aside by the court as irregular; but the resolution to adopt the Act, and the interlocutors of the sheriff finding that it was a populous place and fixing the boundaries, stood untouched. Some of the householders petitioned the court, in the exercise of its *nobile officium*, to remedy the defect by ordering a meeting to be called to elect commissioners to carry the Act into operation. The court *refused* the petition, as sufficient cause had not been shown. *Tod* v. *Anderson*, 1869, 7 M. 412; 41 J. 231. [See General Police and Improvement Act, 1862, Amendment Act, 1877 (40 and 41 Vict. c. 22), s. 4.]

47. Warrant to Act as Notary and Town-Clerk.—The sheriff-clerk *authorised* to act as town-clerk for a burgh in the county in expeding and recording infeftments in burgage property where the infeftment was to be given to the wife of the town-clerk. *Tait*, 1848, 10 D. 1365; 20 J. 476.

48. Warrant to Serve Summons.—Warrant *granted* to have a summons served in Orkney by a sheriff-officer, there being no messenger-at-arms within the county. *Opinion*, that this being an exercise of the *nobile officium* of the court the warrant must be signed in the Inner House. *Cooper*, 1854, 16 D. 1104; 26 J. 596.

But the court *refused* to authorise a sheriff-officer to execute a decree of the Court of Session in Orkney. *Miller's Trs.*, 1856, 19 D. 139; 29 J. 59.

49. Warrant to Execute Arrestments.—The court *granted* authority to a sheriff-officer to execute arrestments in Orkney and in Lewis, as there was no messenger-at-arms resident there. *Kennedy*, 1862, 24 D. 1131; 34 J. 564. *Schweitzer*, 1868, 7 M. 24; 41 J. 18.

50. Warrant to Serve Summons.—An application by manuscript note with a signeted summons, for warrant to serve the summons in Stornoway by a sheriff-officer, *granted*, and the warrant written upon the summons. *Macleod*, 1863, 2 M. 223; 36 J. 112. *Cheyne* v. *Stuart*, 1864, 2 M. 1332; 36 J. 663.

51. Warrant to Serve Summons.—Authority *granted* for service of a summons in Mull in winter by a sheriff-officer. *Muir*, 1868, 5 S. L. R. 154.

NUISANCE

Public Health, see that title.
Water Pollution, see title *Water*.

1. Abatement — Road — Jurisdiction.—Proceedings under s. 2 of the Nuisance Removal Act, 11 and 12 Vict. c. 123, were taken against the proprietor of the *solum* of a road forming the access to ground belonging also to him, let on long leases for building, and against his tenant. The sheriff made an order on the proprietor to reconstruct and remodel the road or street and drains opposite one of these lots, in order to abate an alleged nuisance arising from the state of the drains. *Held* that this order was *ultra vires* of the sheriff, and the order *reduced*, in respect the proceedings directed by the second section of the Act do not apply to the abatement of nuisances on roads. *Dunbar* v. *Levack*, 1858, 20 D. 538; 30 J. 286.

2. Abatement—Smoke—"Factory"—Act 20 and 21 Vict. c. 73.—*Held* that a chemical work is subject to the provisions of the Act 20 and 21 Vict. c. 73, "for the abatement of the nuisances arising from the smoke of furnaces in Scotland," being a "factory" in the sense of the Act. *Ward & Co.* v. *Lang*, 1863, 1 M. 724; 35 J. 408. Cf. *Monteith & Co.* v. *Lang*, 1865, 3 M. 726; 37 J. 265. See *Todd & Higginbotham* v. *Lang*, 1853, 16 D. 126; 26 J. 62.

3. Acquiescence — Saltworks.—Saltworks situated at a distance from a large town, and acquiesced in for twenty years, and where there were other saltworks in the near neighbourhood belonging to the complainer, *found* not to be a nuisance. *Colville* v. *Middleton*, 27 May 1817, F. C.

4. Brick-Kiln.—*Observed*, that a brick-kiln is not necessarily a nuisance, and that the question whether it is so must depend on the special circumstances of the case. *Donald* v. *Humphrey*, 1839, 1 D. 1184; 14 Fac. 1206.

5. Burial-Ground.—In a process of interdict against the proprietors of an episcopal chapel, which adjoined a villa belonging to the pursuer, to have them prohibited from converting the ground around it into a place of interment, the Lord Ordinary *refused* the interdict, considering that, under the circumstances, there was no reason to think it would be a nuisance; but the court *remitted* to the jury court. *Swan* v. *Haliburton*, 1830, 8 S. 637.

6. Cholera Hospital.—*Held* that a cholera hospital is not a nuisance at common law, and interdict *refused*, the hospital being (of consent) restricted to a limited locality. *Mutter* v. *Fife*, 1848, 11 D. 211, 303; 21 J. 51, 91.

7. Chimney-Stalk—Erection of.—On the application of the magistrates of Edinburgh, interim interdict *granted* (in view of certain Acts of Parliament) against the erection of a chimney-stalk in connection with a steam-engine in an area between Princes and Market Streets, Edinburgh. *Mags. of Edinburgh* v. *Edinburgh, Leith, & Granton Rly. Co.*, 1847, 19 J. 421.

8. Church—Erected on Background of Private House.—*Question*, whether the erection of a church on the background of a house in one of the streets of Edinburgh could be considered a nuisance to the neighbouring proprietors. *Cuming* v. *Stuart*, 1850, 12 D. 1258; 22 J. 584.

9. Contra bonos mores—Public Memorial.—A monument to the memory of parties called the Martyrs to Political Reform in 1793–94, who had been convicted of sedition and

transported, proposed to be erected in a burial-ground, *held*, in a question with parties whose relatives were there buried, not liable to be interdicted as a nuisance. *Paterson* v. *Beattie*, 1845, 7 D. 561 ; 17 J. 276.

10. Dangerous Occupation — Smithy — Thatched Houses.—A party *interdicted* from using a thatched house as a smithy in the neighbourhood of thatched houses and the sheriff-clerk's office in Lanark. *Vary* v. *Thomson, etc.*, 2 July 1805, F. C. ; M. "Public Police" App. No. 4.

11. Essentials of Nuisance.—In a question of nuisance, the first point is, whether the product of the work is noxious or unwholesome ; and the second, whether, if not absolutely noxious, it renders the enjoyment of life really uncomfortable. *Hart* v. *Taylor*, 1827, 4 Mur. 313.

12. Farina Manufactory.—Circumstances in which a farina manufactory was *held* to be a nuisance to a neighbour, in respect both of the discharges therefrom into a stream bounding his property and of occasional and temporary annoyance from the smell of the settling tanks. *Robertson* v. *Stewarts & Livingstone*, 1872, 11 M. 189 ; 45 J. 115.

13. Iron Manufactory. — Interdict *granted* against an iron manufactory, erected at the South Back of the Canongate, Edinburgh, as a nuisance. *Thomson*, 15 Dec. 1807, F. C. ; M. "Public Police" App. No. 5.

14. Landlord and Tenant—Lease—Coal Charring.—*Held* that a landlord who had let his coal with exclusive privileges to a tenant, was entitled to prohibit charring coal, in respect there was no permission to that effect in the lease. *Heriot* v. *Faulds*, 31 Jan. 1804, F. C. ; M. 15255.

15. Landlord and Tenant—Soil-Pipe.—A complaint by a landlord against his tenant for using a sink-pipe in the kitchen as a soil-pipe, and thereby creating a nuisance, *dismissed*, in respect that there was no proof of the sink-pipe being employed in an unusual or improper manner ; and the nuisance arose from defective construction. *Mowbray* v. *Ewbank*, 1833, 11 S. 714.

16. Local Authority — Powers of — Nuisance Removal Act (19 and 20 Vict. c. 103), s. 7.—*Held*, under s. 7 of the Nuisance Removal Act, that a local authority has not power to declare what is to be considered a nuisance. A warrant for removal of a pig-sty, under the Nuisance Removal Act (19 and 20 Vict. c. 103), s. 7, *reduced*, in respect the statute only authorises the removal as nuisances of animals kept so as to be injurious to health, and the interlocutor of the justices did not find that the pig was so kept. *M'Creadie* v. *M'Broom, etc.*, 1860, 22 D. 405 ; 32 J. 184.

17. Noxious Vapour — Acquiescence.—Circumstances in which it was *found* that a manufactory of black ash was not a nuisance. *Hart* v. *Taylor*, 1827, 4 Mur. 307.

18. Noxious Vapour — Candlemaking.—In a process of suspension and interdict against a manufactory of candles proposed to be carried on, which was complained of as likely to prove a nuisance, the court, before answer as to allowing an experiment, *ordered* a specific statement of the apparatus and method of working which was proposed to be used, and which was said to be capable of being worked without being a nuisance. Thereafter leave *granted* to make an experiment for a limited time, to ascertain whether it would occasion a nuisance or not ; and, on the report of a person of skill, interdict *refused*. *Arnot* v. *Brown*, 1852, 15 D. (H. L.) 10 ; 1 Macq. 229 ; 24 J. 421 ; 1 Stuart 694.

19. Noxious Vapour — Dung—Depôt.—The court *refused* a bill of suspension and interdict against depositing town dung in a spot where it was anticipated it would form a nuisance, *reserving* to the party to complain should a nuisance actually be created ; and thereafter *passed* a bill, and *granted* interdict in the meanwhile against depositing dung for any longer period than twenty-four hours. *Scott* v. *Leith Commrs. of Police*, 1830, 8 S. 845 ; 1835, 13 S. 646.

20. Noxious Vapour — Gluework — Extension.—Although a gluework had existed for many years in a district of Glasgow, where there had been for time immemorial various kinds of nauseous manufactories, and such a work is not necessarily hurtful to the health of the neighbouring inhabitants, yet *held* that, as it renders the enjoyment of life and property uncomfortable, and is prejudicial to the value of adjacent dwelling-houses, it could not be enlarged nor brought nearer the dwelling-houses and streets than it had formerly been. *Charity* v. *Riddell*, 5 July 1808, F. C. ; M. "Public Police" App. No. 6. Cf. *Glasgow Waterworks Co.* v. *Aird*, 20 Dec. 1814, F. C.

21. Noxious Vapour — Prussian Blue Factory—Adjacent Town—Title to Object.—The preparation of blood as an ingredient in the manufacture of Prussian blue, carried on within 300 yards of a town, and adjacent to busy thoroughfares, *prohibited* at the instance of a proprietor in the town ; and *observed*, that parties coming to the nuisance could not complain, but that the procurator-fiscal might do so. *Jamieson* v. *Hillcoats*, 24 June 1800, F. C. ; M. "Property" App. No. 4.

22. Noxious Vapour—Soap Manufactory.—Roasting the black ashes of soap in a place which had long been used as a soap manufactory, is no additional nuisance so as to entitle the neighbours to complain. *Balleny* v. *Comb*, 3 Feb. 1813, F. C.

23. Noxious Vapour—Soda and Bleaching Powder Factory.—Circumstances in which a manufactory of soda and bleaching powder was found to be a nuisance. *Arrott* v. *Whyte*, 1826, 4 Mur. 149 ; 1827, 5 S. 517.

24. Noxious Vapour—Statute—Construction — Railway — Issue.—In an action of damages against a railway company for an

alleged nuisance caused by works established and carried on by them for hardening rails, *held* that the defenders were not protected against the claim by s. 16 of the Railway Clauses Act (8 and 9 Vict. c. 33), authorising the company, on paying compensation in manner therein provided, to construct houses, machinery, apparatus, etc., and to do "all other acts necessary for making, maintaining, altering or repairing, and using the railway." Therefore objections to a proposed issue (1) that the pursuers were not entitled to any issue; (2) that, at all events, the word "wrongfully" should be inserted, *repelled.* Terms of issue *adjusted. Cooper & Wood* v. *N. B. Rly. Co.*, 1863, 1 M. 499; 35 J. 295; 1863, 2 M. 117; 36 J. 169.

25. Noxious Vapour—Tripe Shop.—An establishment for preparing tripe on the ground floor of a tenement, within burgh, *found* to be a nuisance, although not injurious to the health of those employed nor to many of the neighbours. *Farquhar* v. *Watson*, 19 Jan. 1813, F. C.

26. Noxious Vapour — Whale-Blubber Boiling.—Interdict *granted* against erecting buildings for the purpose of boiling whale-blubber at the end of a town, though there were other existing works of annoyance, such as tanneries, dunghills, distilleries, etc. *Dowie* v. *Oliphant*, 11 Dec. 1813, F. C. *Trotter* v. *Farnie*, 1831, 5 W. & S. 649. Affg. 9 S. 144; 6 Fac. 101. *Remitted*, 1832, 10 S. 423; 7 Fac. 309.

27. Nuisance Created by Operations Authorised by Statute — Removal. — A riparian proprietor on the Clyde raised an action against the Clyde Navigation Trustees, in which he, *inter alia*, complained of nuisance caused by the defenders laying down soil dredged by them from the bed of the river *ex adverso* of the pursuer's lands in such a way as to prevent the free influx of the tide, and so cause offensive accumulations of filth and mud. *Held* that, as the Clyde Navigation Acts did not impose any burden of preventing the nuisance which was the necessary result of the operations authorised, the defenders were under no such obligation. *Lord Blantyre* v. *Clyde Navigation Trs.*, 1871, 9 M. (H. L.) 6; 43 J. 250.

28. Nuisances Removal (Scotland) Act, 1856, 19 and 20 Vict. c. 103—Complaint—Jurisdiction—Relevancy.—Upon a petition and appeal against a conviction and the imposition of a penalty by a local magistrate for contravention of the Nuisances Removal Act, s. 18, *held* (1) that the concurrence of the procurator-fiscal is not necessary in a complaint under that Act, although concluding for a penalty, and, failing payment thereof, for imprisonment; (2) that by the Nuisances Removal Act, the sheriff, local magistrates, and justices of the peace have a concurrent jurisdiction conferred upon them to try complaints under the Act, and that the omission in s. 45 thereof to extend the executive provisions of the statute to magistrates and justices of the peace is supplied by s. 447 of the General Police Act; and (3) that the penalties enacted by the Nuisances Removal Act are directed not only against the exposure for sale of meat unfit for human food, but also against keeping the same with the intent that it should be used for human food. *Kennedy* v. *Cadenhead*, 1867, 6 M. 179; 40 J. 104.

29. Offence to Sight.—The dressing or manufacturing of ox or buffalo hides into buff leather, and hanging the skins to dry within thirty feet of the roadside, in a country situation, is a nuisance, unless there is a wall sufficiently high to shut them out from the view of the road. *Scott* v. *Cox*, 5 July 1810, F. C.

30. Prescription — Sewage Pits. — *Held*, in a question with a party who had come to the place, that he was not entitled to complain of the proprietors on the banks of a stream called the Foul Burn, by which the fuilzie of the city of Edinburgh is carried to the sea, collecting the contents in pits for the purpose of manure, they having been in the habit of doing so for more than fifty years. *Duncan* v. *E. of Moray*, 9 June 1809, F. C.

31. Printing Machinery — Tenement. — *Held*, under special circumstances, that a printing establishment on one of the floors of a tenement was a nuisance. *Robertson* v. *Campbell & Pillans*, 2 Mar. 1802, F. C.; M. "Public Police" App. No. 3. Cf. *Neilson* v. *Waterstone*, 1823, 2 S. 259 (Tailor's workshop).

32. Printing Machinery — Tenement. — Interim interdict *granted* in favour of a tenant of an upper floor, against the use, by his landlord, of a steam-engine, boiler, and machinery, for a printing establishment on the lower floor, subject to an experiment being made, under judicial inspection, as to whether they might be used without causing injury or discomfort. *Johnstone* v. *Constable*, 1841, 3 D. 1263.

33. Process—Abatement—Smoke—7 and 8 Geo. IV. c. 43.—Procedure under the Act 7 and 8 Geo. IV. c. 43 (Local and Personal), for the abatement of nuisance from smoke in Glasgow. *Young* v. *Laing*, 1864, 2 M. 667.

34. Process—Competency—Intention to Create Nuisance.—An action resting on an allegation that a party intended to create a nuisance, and concluding for interdict, *held* competent; but all questions as to relevancy *reserved* till a condescendence was lodged. *Alison* v. *Watt*, 1829, 7 S. 786; 4 Fac. 1068.

35. Process — Defender — Superior and Vassal—Who may Object.—The superior and proprietor of a vacant piece of ground on which a nuisance existed, caused by an offensive open drain into which the sewage matter from the houses of his feuars in the vicinity was discharged, being in the occupancy and possession of the piece of ground, *held* liable, in an action at the instance of an inhabitant of the neighbourhood, to remove the nuisance. *Opinion* expressed, that the pursuer would not have been barred from insisting in the action, even if the sewage from the tenement occupied by him had con-

tributed to the nuisance. *Mackay* v. *Greenhill*, 1858, 20 D. 1251; 30 J. 746.

36. Process — Expenses — Nuisances Removal (Scotland) Act, 1856, 19 and 20 Vict. c. 103.—Justices of the peace, upon a summary complaint under the Nuisances Removal Act (1856), decerned against the respondent, with expenses. *Held* that although the Nuisances Removal Act did not confer power on the justices to award expenses, the amendment thereof contained in Part vii. of the General Police Act (25 and 26 Vict. c. 101), which Part was not limited to places adopting the Act (s. 447), authorised justices to award expenses. *Legerwood* v. *M'Kenna*, 1868, 7 M. 261; 41 J. 159.

37. Process—Landlord Defending Action along with Tenant—Decree.—An action was brought by A against B, a neighbouring proprietor, and C, his tenant, for declarator that they were not entitled to carry on at the premises occupied by C a manufacture whereby a nuisance to the pursuer was created. B, in the missives of lease between him and C, had stipulated that C should "not erect any buildings or others at the farina works carried on by him without the express permission of the proprietor in writing, and should not have anything about said premises that should be a nuisance to the property or to the public." *Held* that as B did not prevent the use of the water and the erection of buildings, etc., by C, and as he had appeared and defended the action on grounds implying the assertion of more serious rights than those claimed by the tenant, the findings as to nuisance and expenses must be directed against him as well as the tenant. *Robertson* v. *Stewarts & Livingstone*, 1872, 11 M. 189; 45 J. 115.

38. Process—Review—Reclaiming Note —Nuisance Removal (Scotland) Act (19 and 20 Vict. c. 103).—*Question* as to due service of an appeal under Nuisance Removal (Scotland) Act (19 and 20 Vict. c. 103), ss. 45, 50. *Macdougall* v. *D. of Argyll*, 1864, 3 M. 248; 37 J. 118.

39. Proof—Date to which Referable.—In a question of nuisance, evidence may be given of the state of the works subsequent to the date of the summons. *Arrott* v. *Whyte*, 1826, 4 Mur. 154.

40. Proof—Issue—Date to which Referable.—In an action for abatement of a manufacturing nuisance, *held* that the pursuers, who sued as residenters merely, were not bound to take an issue as at the date of closing the record, instead of raising the action. *Gardner* v. *Fraser*, 1860, 22 D. 1501.

41. Proof—Nature of Evidence.—In a question of nuisance, *held* incompetent to ask the reason assigned by persons who had looked at a house in the neighbourhood, for not taking it in lease. *Hart* v. *Taylor*, 1827, 4 Mur. 311.

42. Proof—Productions.—In a question of nuisance, a witness *not allowed* to produce in evidence branches cut from shrubs in the neighbourhood. *Hart* v. *Taylor*, 1827, 4 Mur. 309.

43. Public Health Act, 1867 (30 and 31 Vict. c. 101), s. 73 — Drainage Scheme Resolved on by Local Authority—Right to Object.—A local authority under the Public Health Act having resolved to carry out a scheme of drainage, certain feuars petitioned the sheriff for interdict on the ground that the proposed scheme would cause a nuisance and injuriously affect their property. *Held* that the application being an attempt to have the resolution of the Local Authority reviewed had been rightly dismissed. *Observed*, that if a nuisance is actually created by the operations of a Local Authority those affected by it have an interest and a right to complain. *Steel, etc.* v. *Police Commrs. of Gourock*, 1872, 10 M. 954; 44 J. 526.

44. Right to Object—Abatement—Nuisance Sanctioned under Local Police Act—Common Law. — A petition for interdict against an alleged nuisance was dismissed by the sheriff as incompetent, on the ground that one of the respondents was in possession of the sanction of the magistrates, granted by them under a local police Act, and that the petitioners had taken no previous steps to obtain from the magistrates the recal of the sanction. *Held* that the sanction given by the magistrates could not warrant the party obtaining it to commit a nuisance, and that such sanction could not preclude an application at common law for the abatement of that nuisance. *Pentland* v. *Henderson*, 1855, 17 D. 542; 27 J. 241.

45. Sewage—Discharge into Mill-Lead.—Circumstances in which it was *held* that a party was not entitled to introduce the contents of a common sewer into a mill-lead. *Eyre* v. *E. of Moray*, 1827, 5 S. 912.

46. Slaughter-House — Abatement — Regulations.—A place for slaughtering cattle in the immediate vicinity of inhabited houses, in a burgh, is a nuisance; and it is not sufficient that it be placed under regulations which may tend, if duly observed, to abate the effect of it. *Kelt* v. *Lindsay*, 8 July 1814, F. C. Cf. *Lauder*, 16 June 1815, F. C. (Restriction in Title Deeds). *Swinton* v. *Pedie*, 1837, 15 S. 775; 12 Fac. 765. *Remitted*, 1839, M'L. & R. 1018.

Held that the magistrates of a burgh could not, under 3 and 4 Will. IV. c. 46, s. 112, prevent the erection of a slaughter-house outside the burgh limits. *Bowie* v. *Douglas*, 1845, 2 Broun 377.

47. Slaughter-House—Superior and Vassal—Building Restriction.—A superior, in granting building feus for a street, inserted provisions with a view to comfort and amenity, and prohibited the feuars "to erect or carry on, within the said grounds, any brewery, tanwork, brickwork, soapwork, distillery, or any kind of manufacture whatever, or chemical process, whereby a nuisance can be created within any part thereof." *Held* that a slaughter-house was prohibited; and inter-

dict granted accordingly. *Porteous* v. *Grieve*, 1839, 1 D. 561 ; 14 Fac. 641.

48. Smoke from Chimney.—A chimney placed in a stable in a meuse lane of Edinburgh emitted smoke within seven feet from the windows of the house of another. The court *ordained* it to be raised so as to obviate the nuisance. *Laing* v. *Muirhead*, 1822, 2 S. 73.

49. Steam-Engine.—A patent steam-engine, in the village of Portobello, for converting bar-lead into pipes, is not a nuisance. *Rae* v. *Marshall*, 3 Mar. 1809, F. C. *Raeburn* v. *Kedslie*, 1816, 1 Mur. 1.

50. Steam-Engine — Feu-Contract—Construction.—A prohibition in a feu-contract against *inter alia* "steam engines, or any other business which may be nauseous or hurtful, or occasion disturbance, to the neighbouring feuars," *held* not to strike against the erection of every kind of engine, and that it required that a party complaining of the erection of a steam-engine should prove that it occasioned disturbance to the neighbouring feuars. *Frame* v. *Cameron*, 1864, 3 M. 290 ; 37 J. 131.

51. Statute'—Construction—Scope. — By a police Act, the police court was authorised to prohibit "the collecting, keeping, grinding, or using in any way" of bones, wherever it should be established that this was prejudicial to the health or comfort of the neighbourhood. *Question*, whether the Act applied to a large chemical manufactory where bones were used in some of the operations, it being contended that the Act applied only to dealers in bones, and not to such a manufactory. *Anderson & Co.* v. *Burnet*, 1849, 12 D. 131 ; 22 J. 5.

52. Title to Sue—Superior and Vassal—Feu-Charter — Reservation of Minerals — Noxious Vapours.—*Held* that a feuar's right to sue his superior and a lessee of the superior for damage done to his property by calcining ironstone on property belonging to his superior, was not excluded by the superior having reserved the minerals of the ground feued, nor by the terms of the lease which gave power to calcine, and was anterior in date to the feu. *M'Callum* v. *Forth Iron Co.*, 1861, 23 D. 729 ; 33 J. 371.

53. Who may Object — Jurisdiction—Nuisances Removal Act (19 and 20 Vict. c. 103), ss. 4, 5.—*Held*, on a construction of the Nuisances Removal Act (19 and 20 Vict. c. 103), ss. 4, 5, that in a parish, partly within and partly beyond the jurisdiction of any of the various authorities mentioned in the Act, each of the authorities is entitled to act within its own jurisdiction until the Board of Supervision determine which shall be the local authority ; and therefore, in the case of a nuisance alleged to exist in a place within the jurisdiction of police commissioners, and also of a town council, but in a parish partly beyond their jurisdiction, a petition at the instance of an officer empowered by the police commissioners as the local authority under the 4th section, *sustained*. *Sim* v. *Cadenhead*, 1863, 1 M. 225. Cf. *Forrest* v. *Mags. of Leith*, 1861, 23 D. 592 ; 33 J. 285.

PARENT AND CHILD

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1. Affiliation—Evidence.—*Held* that the proof of the paternity of a bastard child was complete, without calling for the oath of the mother in supplement. *Anderson* v. *Kirk-Session of Lauder*, 1848, 10 D. 960; 20 J. 232.

2. Affiliation—Evidence.—Circumstances which *held* sufficient to corroborate the evidence of the mother of an illegitimate child as to its paternity. *Sands* v. *Auld*, 1869, 7 S. L. R. 71.

3. Affiliation—Evidence.—Circumstances in which the paternity of an illegitimate child *held* not proved. *Stoddart* v. *Carruthers*, 1865, 1 S. L. R. 75; *Munn* v. *Shaw*, 1866, 3 S. L. R. 31.

4. Affiliation—Evidence.—In an action for the aliment of an illegitimate child, born six years before the action was raised, although there was evidence of opportunity of connection, and of connection having taken place about ten months before the birth of the child, circumstances in which *held* that it was not established that the defender was the father of the pursuer's child. *Ruddiman* v. *Bruce*, 1863, 2 M. 70; 36 J. 41.

5. Affiliation—Evidence.—In an action of filiation of a child born on 6th December, the defender admitted connection with the pursuer in July previous, but denied that there was connection prior to that month. *Held* that the connection in July being admitted, and it being established by the evidence that the parties had had previous opportunities for connection, the pursuer's deposition that connection had taken place at the period of conception was sufficient to prove the case. *Ross* v. *Fraser*, 1863, 1 M. 783; 35 J. 473.

6. Affiliation—Evidence.—A filiation case *held* not proved, notwithstanding an alleged admission of carnal intercourse by the defender. *Paterson* v. *Nelson*, 1864, 36 J. 288.

7. Affiliation—Evidence—False Statement by Defender.—Circumstances in which the court *held* the paternity of an illegitimate child proved by the evidence of the mother, corroborated by only one witness, who had twice seen the pursuer and defender meet on the street. The defender was discredited because he swore he had not met the pursuer. *M'Bayne* v. *Davidson*, 1860, 22 D. 738; 32 J. 296.

8. Affiliation—Evidence—Admissibility.—In an action for aliment of a natural child, the brother and sister of the mother, under certain circumstances, *allowed* to be examined as witnesses in corroboration of another witness. *Martin* v. *Mackissan or Maxwell*, 8 Feb. 1816, F. C.

9. Affiliation—Evidence—Admissibility—Oath in Supplement—Cross-Examination.—*Held* that as the oath in supplement of the pursuer of an action for the aliment of her natural child is given by her as a witness, it is competent for the defender specially to cross-examine her as to all pertinent details, although her own counsel has asked the general question whether the defender is the father of the child, and she has deponed that he is. *M'Naughton* v. *Glass*, 1838, 16 S. 614, 1103; 13 Fac. 487.

10. Affiliation—Evidence—Likeness—Admissibility of Evidence.—Evidence of likeness to a supposed parent *refused* to be allowed in a question of filiation. *Routledge* v. *Carruthers*, 20 Jan. 1810, F. C.

11. Affiliation—Evidence—Admissibility—Cross-Examination of Pursuer.—In an action of filiation and aliment, *held* that the testimony of the mother of an illegitimate child, given by her in the position of a witness, is liable to be tested by cross-examination, and its credibility is to be weighed by the same rules as apply to the testimony of other witnesses, and upon a view of the whole evidence led by both parties. *Opinion* that the pursuer was not entitled to her oath in supplement after being examined as a witness, and that it was objectionable to take judicial declarations from the parties. *Scott* v. *Chalmers*, 1856, 19 D. 119; 29 J. 57.

12. Affiliation—Evidence—Hearsay Evidence—Admissibility—Death of Pursuer—Sist of Mother.—The pursuer of an action for aliment and inlying expenses of a bastard child died, after it had been found that a *semiplena probatio* had been established, but before emitting her oath in supplement; whereupon her mother, alleging that she had disbursed the sums sued for, compeared, and was, without instructing any title, sisted as pursuer. *Held* that this compearance was incompetent; and *observed*, that the oath of the mother, which had been allowed to be taken as to the statements made by her daughter on deathbed with regard to the paternity of the child, was incompetent. *Dobbie* v. *Gaff*, 1843, 5 D. 1385; 15 J. 615.

13. Affiliation—Evidence—Legitimacy.—Where it was proved that a woman had illicit intercourse with A in summer 1823, was

pregnant prior to September of that year, was married to B on the 28th, and could not have had connection with him earlier than the 18th, *held* that A was liable in aliment to the child, reserving the question of its legitimacy. *Jobson* v. *Reid*, 1832, 10 S. 594.

14. Affiliation—Evidence—Oath in Supplement—Discrepancy in Dates.—A woman raised a summons for the aliment of a bastard child, stating it to have been born on the 3d of "February"; and she concluded for aliment from that date. A record was made up, and her oath *allowed* in supplement; and she deponed that the defender was father of her child, which she stated was born on the 3rd of "January." *Held* competent, without amendment of the libel, to give decree for the aliment from February, the defender having been aware of the true date, and not having objected till the end of the cause. *Hutchison* v. *Thomas*, 1828, 6 S. 1130.

15. Affiliation—Evidence—Oath in Supplement—Judicial Examination.—After a woman has deponed in supplement as to the paternity of a bastard child, she cannot be judicially examined. *Jameson* v. *Barclay*, 14 Jan. 1820, F. C.

16. Affiliation—Evidence—Onus on Pursuer—Connection with Other Men.—*Held* that it is not incumbent on the pursuer of an action of filiation to prove that no other man than the defender had intercourse with her at the time corresponding to the birth of her child. *Scrimgeour* v. *Stewart*, 1864, 2 M. 667; 36 J. 334.

17. Affiliation — Evidence — Period of Gestation.—A defender in an action of filiation and aliment, who admitted intercourse with the pursuer 237 days before the birth of the child, *held* to be the father. *Pitcairn* v. *Smith*, 1872, 9 S. L. R. 608.

18. Affiliation — Evidence — Period of Gestation.—The pursuer of an action of filiation alleged intercourse with the defender 228 days before the birth of her child. There was no evidence that the child was prematurely born, and no allegation of previous intercourse. *Held* that although the alleged intercourse had taken place, that was not sufficient to raise against the defender a presumption of paternity. *Ritchie* v. *Cuningham*, 1857, 20 D. 35; 30 J. 19.

19. Affiliation — Evidence — Period of Gestation.— *Question* as to what length of interval between the connection and the birth of a child is sufficient to exclude the presumption of paternity. *Grassie* v. *Couper*, 1829, 8 S. 259.

20. Affiliation—Evidence—Presumption.—Circumstances in which the paternity of a bastard *held* proved; and *observed*, that the presumption of intercourse at the period of conception will not hold where the parties have met for the first time three months before the birth, although intercourse then took place. *Burns* v. *Cumming*, 1846, 8 D. 916.

21. Affiliation—Evidence—Reference to Oath.—An oath by a defender, on a reference in an action of filiation, that he had had connection once only with the pursuer 306 days before the birth, *held* negative. *Boyd* v. *Kerr*, 1843, 5 D. 1213.

22. Affiliation—Evidence—Reference to Oath.—In an action of filiation, where the defender did not admit that a child had been born, and the court found that fact established, but that *semiplena probatio* had not been made out, they allowed a reference of the other facts to the defender's oath. *Cameron* v. *Armstrong*, 1851, 13 D. 1256; 23 J. 593.

23. Affiliation — Evidence — Semiplena probatio.—*Questions* of *semiplena probatio* as to filiation depend on their own circumstances, and cannot be ruled by precedent. *M'Crone* v. *Bell*, 1831, 9 S. 692.

24. Affiliation — Evidence — Semiplena probatio—Meaning of.—The rule that "*semiplena probatio* did not mean merely a suspicion, but that it must amount to such evidence as induces a reasonable belief, although not complete evidence," confirmed by reference to the doctrine of the older cases, and of the civil law. *Kirkpatrick* v. *Donaldson*, 1843, 5 D. 1104; 15 J. 444.

25. Affiliation — Evidence — Semiplena probatio.—Connection with a woman having been admitted about six calendar months "or so" before the birth of her child, and the circumstances being such as to permit intercourse a month earlier, this was presumed to have taken place, and *held* sufficient, with the woman's oath in supplement, to fix the paternity. *Robertson* v. *Petrie*, 1825, 4 S. 333.

26. Affiliation — Evidence — Semiplena probatio.—In an action for aliment of a natural child, the defender had said to a witness, in a conversation regarding the pursuer some time previous to the birth of the child, that "others had to do with her as well as he." *Held* that, although there was no other evidence of connection, further than that the parties had opportunities of being together, the pursuer was entitled to her oath in supplement. *Simpson* v. *Ross*, 1841, 3 D. 984.

27. Affiliation — Evidence — Semiplena probatio.—In an action for aliment of a natural child, the pursuer *held* entitled to her oath in supplement, upon evidence amounting to *semiplena probatio*, although, in the course of the proceedings, certain additional evidence had been referred to, but which it was considered superfluous should be taken. *Smith* v. *Boyle*, 1840, 2 D. 994.

28. Affiliation — Evidence — Semiplena probatio.—A letter was written by a man confessing connection, but denying being the father of a woman's child. He made an admission in his declaration of being in company with the woman alone for more than an hour at one o'clock in the morning of 2nd

November, and that he had stated to her that if the child came to his time (meaning from 2nd November) he would acknowledge himself the father. *Held* equivalent to a *semiplena probatio*. *Wightman* v. *Tomlinson*, 17 Nov. 1807, F. C.

29. Affiliation — Evidence — Semiplena probatio.—In an action of filiation, evidence of familiarity and admissions by the man which was *held* to amount to a *semiplena probatio*. *Patrick* v. *Goodwin*, 1845, 8 D. 138; 18 J. 61.

30. Affiliation — Evidence — Semiplena probatio.—*Semiplena probatio* of paternity of a bastard child *held* not to be inferred from the circumstance of the mother, a young woman of about twenty years of age, living as sole servant with the defender, a single man of middle age, this being a common practice in the country. *Bowie* v. *Robertson*, 1 Dec. 1808, F. C.

31. Affiliation — Evidence — Semiplena probatio.—In an action by a married woman living separate from her husband against another man, for aliment to a child alleged to have been procreated by him, and in which her two sisters were the principal witnesses, *held* that there was no *semiplena probatio*. *Cantley* v. *Robertson*, 1834, 12 S. 725.

32. Affiliation — Evidence — Semiplena probatio.—A man originally admitted that he was the father of one child, and that he had afterwards had connection with the woman seven months and four days before the birth of a second child, which, in the course of the litigation, he varied and gradually amended so as to reduce it to five lunar months and a half. *Held* that there was *semiplena probatio*. *Elliot* v. *Scott*, 1800, Hume 33.

33. Affiliation — Evidence — Semiplena probatio.—An admission by a person that he had had carnal connection with the mother of a bastard child a year and fourteen days prior to its birth, *held* sufficient *semiplena probatio* of paternity so as to admit the woman's oath in supplement. *Hunter*, 24 May 1814, F. C.

34. Affiliation — Evidence — Semiplena probatio.—*Semiplena probatio held* to be established by the declaration of the man admitting carnal connection, but dating it more than ten months prior to delivery. *Wightman* v. *Tomlinson*, 1807. *Leckie* v. *Lindsay*, and *Prott* v. *M'Lean*, 1810, Hume 33.

35. Affiliation — Evidence — Semiplena probatio.—Circumstances which were *held* to establish a *semiplena probatio* in an action for the aliment of a bastard child, although there was no direct evidence of any undue familiarity of behaviour on the part of the man towards the woman; but he had, at her request, made application, during an early period of her pregnancy, for a medicine to give to her for the purpose of procuring abortion. *Lowe* v. *Bayne*, 1840, 2 D. 470.

36. Affiliation — Evidence — Semiplena probatio.—In an action of filiation of a child born on 3rd July, the defender admitted connection with the pursuer in December previous, but denied that there was connection prior to that month. It was proved (although she denied it) that previous to November the pursuer frequently had connection with another man. *Held* that the connection in December being admitted, and there being previous opportunity, the pursuer's oath was sufficient to establish her case. *Lawson* v. *Eddie*, 1861, 23 D. 876; 33 J. 471.

37. Affiliation — Evidence — Semiplena probatio.—Although it had been found that the mother of a natural child had established a *semiplena probatio*, yet *held* that as her oath in supplement was contradictory of the main facts on which the *semiplena probatio* was rested, the defender ought to be assoilzied. *M'Naughton* v. *Glass*, 1838, 16 S. 1103; 13 Fac. 759. *Greig* v. *Morrice*, 1838, 16 S. 1132; 13 Fac. 779.

38. Affiliation — Evidence — Semiplena probatio.—Circumstances under which it was *held* that the payment of a sum of money by a married man to a woman who charged him with being the father of her bastard child, in consideration of receiving from her a declaration that he was not so, constituted a *semiplena probatio*. *M'Kenzie* v. *Smith*, 1826, 5 S. 189.

39. Affiliation — Evidence — Semiplena probatio—Insufficiency of Oath in Supplement.—In an action by a woman of filiation of her bastard child, *held* that while there was a sufficient *semiplena probatio* to entitle her to her oath, yet the oath did not come up to the other *semiplena probatio* so as to constitute the legal *plena probatio*. *Folley* v. *Douglas*, 1848, 10 D. 1424; 20 J. 522.

40. Affiliation — Evidence — Semiplena probatio — Admissibility of Evidence of Pursuer's Sister.—Evidence in an action of filiation which *held* insufficient to warrant the pursuer's oath in supplement; and in such action, the pursuer's sister *held* not admissible as a witness, except for the purpose of corroborating the testimony of other witnesses, in defect of other evidence. *Clunie* v. *Drysdale*, 1837, 15 S. 447; 12 Fac. 398.

41. Affiliation — Evidence — Semiplena probatio — Character of Pursuer. — In an action for aliment of an illegitimate child, *held* that the evidence did not amount to a *semiplena probatio*. *Question*, whether the character of the pursuer is to be taken into consideration in judging whether or not the proof adduced amounts to a *semiplena probatio*. *Mann* v. *Forrest*, 1850, 12 D. 1090; 22 J. 502.

42. Affiliation — Evidence — Semiplena probatio.—Circumstances which *held* sufficient to constitute *semiplena probatio*. *Hunter* v. *Watson*, 15 Jan. 1811, F. C. *Binny* v. *Kennedy*, 1821, 1 S. 134. *Aitken* v. *Neill*, 1822, 1 S. 559. *Hutchison* v. *Thomas*, 1826, 4 S. 815. *Bertram* v. *Steel*, 1829, 7 S. 434; 4 Fac. 536. *Glendinning* v. *A B*, 1835, 13 S. 270. *Byres* v. *Shankland*,

1835, 13 S. 950. *Dykes* v. *Finlay*, 1836, 14 S. 815. *Lennox* v. *Agnew*, 1839, 2 D. 234.

43. Affiliation — Evidence — Semiplena probatio.—Circumstances which *held* not to amount to *semiplena probatio*. *Craig* v. *Crighton*, 14 June 1809, F. C. *Humphrey* v. *Aitken*, 1822, 1 Shaw's App. 111. *Robb* v. *Campbell*, 1824, 3 S. 301. *Paul* v. *Gilmour*, 1824, 3 S. 368. *Durham* v. *Guthrie*, 1827, 5 S. 685. *Mitchell* v. *Paton*, 1833, 11 S. 253. *Martin* v. *Smith*, 1834, 12 S. 604. *Crighton* v. *Fleming*, 1840, 3 D. 313 ; 16 Fac. 262. *Bruce* v. *Petrie*, 1841, 4 D. 49 ; 14 J. 17. *Brown* v. *Wilson*, 1842, 4 D. 392 ; 14 J. 146. *Milne* v. *Cobban*, 1842, 4 D. 1149 ; 14 J. 390. *Boyd* v. *Kerr*, 1842, 4 D. 1424 ; 14 J. 516.

44. Affiliation—Presumption—Pater est quem, etc.—A child of a married woman found to be illegitimate, notwithstanding the presumption *pater est quem nuptiæ demonstrant*. *Mackay* v. *Mackay*, 1855, 17 D. 494 ; 27 J. 206.

45. Affiliation—Presumption—Pater est quem, etc.—The presumption *pater est*, etc., must receive effect, unless there are clear and conclusive facts to redargue it ; and therefore, although a wife who had not for ten years had any children, had given herself up to adulterous crimes, and had a child born pending an action of divorce, *held* that the child must be presumed to be that of the husband. *Routledge* v. *Carruthers*, 1816, 4 Dow 392 ; 2 Bligh 692 ; 29 June 1816, F. C. Affg. 19 May 1812, F. C.

46. Affiliation—Presumption—Pater est quem, etc.—A child was born within six months after a marriage which was subsisting at its birth, and an action was brought by the wife against a person not her husband, alleging that he was the father of the child, and concluding for aliment. The court, *ante omnia*, appointed the husband to be called as a party, and further inquiry to be made as to his opportunities of access to his wife recently before the marriage. *Jobson* v. *Reid*, 1827, 5 S. 715 ; 1830, 8 S. 343.

47. Affiliation—Presumption—Pater est quem, etc.—A woman who had borne a natural child to Brown, afterwards married Watson, and was delivered within five months thereafter of another child, full grown, which both she and Brown admitted to be their child. It was not alleged that there had been any antenuptial connection between her and Watson. The commissaries having sustained a plea, that the presumption *pater est quem nuptiæ demonstrant* was one *juris et de jure*, a bill of advocation *passed*, with a view to investigate the fact. *Lepper* v. *Brown*, 1802, Hume 488.

48. Affiliation—Presumption—Pater est quem, etc.—A man admitted that he had carnal intercourse with a woman, who in due time from that period had a full-grown child, but five months previously she was married to another man. *Held* that the presumption *pater est*, etc. was not insurmountable, and was in the circumstances redargued. *Aitken* v. *Mitchell*, 1806, Hume 489.

49. Affiliation—Presumption—Pater est quem, etc.—In an action of filiation and aliment brought by a married woman against a man not her husband, *held* that the presumption *pater est quem nuptiæ demonstrant* had been redargued, although there was a possibility of access. *Brodie* v. *Dyce*, 1872, 11 M. 142 ; 45 J. 92.

50. Child — "Living Child" — Meaning of.—A child which dies shortly after its birth without uttering a cry is not regarded in law as a living child although it has showed other signs of life. *Robertson* v. *Moderator of General Assembly*, 1833, 11 S. 297.

51. Collation — Inter liberos — Dead's Part.—Collation of separate provisions has no place as to dead's part. *Clark* v. *Burns*, 1835, 13 S. 326 ; 10 Fac. 182.

52. Curator — Appointment — Insanity —Nomination by Father.—A curator cannot be named by a father to his son, who is insane, but of full age. *D. of Atholl's Curators*, 1831, 3 J. 419.

53. Custody of Children — Access by Mother. — A lady living out of Scotland allowed, but only on her coming to live within Scotland, to have her pupil children with her for three days in each fortnight of the school vacation, and thereafter to visit them at school once a fortnight, though her deceased husband had directed that the children should be removed entirely from her control and influence. *Allan* v. *Allan's Trs.*, 1869, 41 J. 617.

54. Custody of Children — Access by Mother.—A mother whose husband was dead, and who had married again, *found* entitled to access to her minor daughter by her first marriage, in the custody of her curator ; but, in the peculiar circumstances of the case, this allowed only in presence of a third party. *Logan* v. *Cathcart*, 1827, 5 S. 341.

55. Custody of Children — Access by Mother. — A husband is not entitled, in respect of his own mere will, to refuse to his wife all access to her children. *Held* to be not a sufficient reason for debarring her all access, that the husband still believed her to have been guilty of adultery, after the court had acquitted her of the charge. *M'Iver* v. *M'Iver*, 1859, 21 D. 1103 ; 31 J. 619.

56. Custody of Children — Access by Mother.—Circumstances in which the court *allowed* a wife, against whom an action of divorce on the ground of adultery had been unsuccessfully maintained, and who was living separate from her husband, to have access to her children. *Lacy*, 1868, 5 S. L. R. 601.

57. Custody of Children — Access by Mother—Misconduct.—A wife, who was a defender in a process of divorce on the ground of adultery, refused access to her son, a child of about seven years of age, who was in his father's custody. *A* v. *B* (*Thom* v. *Thom*), 1847, 10 D. 229 ; 20 J. 73.

58. Custody of Children—Father Abroad.—A father, who was in America, petitioned the court through a mandatory to order the custody of his child, aged six, who was living with his wife's sisters, to be given to him or to his mandatory. The petition was dismissed. But in a subsequent application, craving custody to be given to his sister, the prayer of the petition was *granted*. *Russell*, 1873, 10 S. L. R. 170 and 314.

59. Custody of Children — Insanity of Father.—A husband and wife who had two children, both in pupillarity, executed a deed of separation, founded upon incompatibility of temper alone. The husband having become insane, his brother took charge of the children, who were then of the ages of eight and ten years respectively. *Held* that the mother was entitled to the custody of her children. *A* v. *B*, 1850, 12 D. 1297; 22 J. 572.

60. Custody of Children—Misconduct of Father.—The court *refused* to interfere with the father's custody of a child, seven months old, although the mother averred and offered to prove that he was an improper custodier for the infant. *Nicolson* v. *Nicolson*, 1869, 7 M. 1118; 41 J. 613.

61. Custody of Children—Misconduct of Father—Access by Mother.—A husband who had deserted his wife and children for two years *held* entitled to custody of minor children without conditions as to wife's access, where there was no allegation that the children would suffer morally or physically. *A* v. *B*, 1870, 42 J. 224.

62. Custody of Children—Misconduct of Father—Interim Custody.—In an application to have a child removed from the father's custody on account of his improper conduct, interim interdict against the father's interference with the child *granted* before answers were ordered, and interim custody of the child regulated until the petition and answers should be advised. *Cameron*, 1847, 9 D. 1401; 19 J. 617.

63. Custody of Children—Misconduct of Father.—A father, who was divorced from his wife for adultery, contributed nothing to the support of his two children for twelve years, during most of which period he was abroad. While he was abroad, the children corresponded with him; and when he was in Scotland for short visits, they visited him at his mother's house. When they arrived at the ages of fifteen and fourteen respectively, he presented a petition praying for warrant to obtain custody of and access to them. *Held* that, in respect of the conduct and character of the father, the prayer of the petition ought to be refused. *Harvey* v. *Harvey*, 1860, 22 D. 1198; 32 J. 548.

64. Custody of Children—Misconduct of Father.—A husband divorced for adultery committed under aggravated circumstances *held* not entitled to claim the custody of the child of the marriage, a girl of four. *Ketchen* v. *Ketchen*, 1870, 8 M. 952; 42 J. 549.

65. Custody of Children—Misconduct of Father—Judicial Separation.—A husband who was separated from his wife on account of his cruelty *held* entitled to the custody of a girl of four. *Steuart* v. *Steuart*, 1870, 8 M. 821; 42 J. 480.

66. Custody of Children—Misconduct of Father—Judicial Separation.—A wife who had obtained judicial separation from her husband on the ground of cruelty, presented a petition for the custody of her two pupil children. Petition *refused*. *Observed* that the only ground for interference with a father's right to the custody of his pupil children is that their physical or moral interests are in danger. *Lang* v. *Lang*, 1869, 7 M. 445; 41 J. 159.

67. Custody of Children—Misconduct of Father—Interim Custody.—In an application by a husband against a wife (who had separated from him, pending an action of judicial separation at her instance, on the ground of cruelty) to obtain the custody, from the wife, of their children, a girl aged eight and a boy aged three years, the court *found* him entitled to the custody of the girl, but *refused hoc statu* to order restitution of the boy. *M'Farlane* v. *M'Farlane*, 1847, 9 D. 904; 19 J. 394.

68. Custody of Children—Misconduct of Mother.—On the application of a factor *loco tutoris*, a pupil was ordained to be removed from the custody of his mother, who after the death of her husband had had a natural child, and to be placed under the care of a third party. *Paul*, 1838, 16 S. 822.

69. Custody of Children—Misconduct of Mother.—A tutor-at-law *held* entitled to remove a pupil from the custody of the mother, who, after the death of her husband, had had a natural child; and authorised to fix on a suitable place of residence, but not to take the personal custody of the child. *Walker* v. *Walker*, 1824, 2 S. 788.

70. Custody of Children—Misconduct of Mother.—A woman who had been divorced for adultery applied, after her husband's death, to have her pupil son removed from the charge of a person to whom she had herself, before her divorce, committed him; but the court *refused* the petition, on the ground that her conduct disqualified her for having any control over the custody of the child. *Kennedy* v. *Steele*, 1841, 4 D. 12; 14 J. 4.

71. Custody of Children—Misconduct of Mother—Tutors Dative.—The tutors dative of a boy three years of age having removed him from the custody of his mother in consequence of her having borne a natural child to her own servant, and she having clandestinely got possession of him, *held* that the tutors were entitled to take him under their own care. *Hogg* v. *Stoddart*, 1805, Hume 889.

72. Custody of Children—Misconduct of Mother.—Different principles apply to claims

for aliment by children and applications for custody by mother where there are charges of profligate conduct against the mother. *Couper* v. *Riddell*, 1872, 44 J. 484.

73. Custody of Children — Misconduct of Mother—Application by curator bonis. —On the application of a *curator bonis* the court *granted* authority to have a pupil removed from the custody of its mother, who had in her widowhood become pregnant, to the family of a clergyman selected by the curator and approved by the friends of the pupil. *A B* v. *C D*, 1837, 9 J. 536.

74. Custody of Children—Misconduct of Mother—Petition for Removal—Failure to Obtemper Order of Court.—In a petition for the removal of a child from the custody of his mother, on the ground that she was teaching the child improper habits, the court remitted to the sheriff of the county to inquire into the circumstances, and to report, and remitted the petition to the Lord Ordinary on the Bills during vacation. The Lord Ordinary on the Bills having ordained the child's mother and stepfather to deliver up the child, and they having failed to obtemper this order, warrant granted for taking the child from the mother. The officers of court having been unable to find the child, the court ordered the mother and stepfather to appear at the bar. The mother did not appear; and the stepfather having declined to give information regarding her address, the court committed him to prison. *Muir* v. *Milligan*, 1868, 6 M. 1125; 40 J. 631.

75. Custody of Children—Second Marriage of Mother. —Warrant granted to a mother for obtaining the custody of her daughter, a child eleven years of age, by a former marriage, and who was residing with her paternal aunt. *Johnston* v. *Otto*, 1849, 11 D. 718; 21 J. 240.

76. Custody of Children—Second Marriage of Mother — Tutors Nominate. — Where a widow married again, and tutors nominate craved the court to find them entitled to appoint the place of residence and education of her three daughters, aged between five and eight years, the court, after obtaining a medical report that the eldest daughter's delicate health required her mother's care, *refused* the petition. *Morton* v. *Thorburn*, 1835, 13 S. 640.

77. Custody of Children—Second Marriage of Mother—Tutor-at-Law.—A tutor-at-law *held* entitled to fix the residence of his pupil, and remove her, though only nine years of age, from the custody of her mother, who had married a second husband. *Fisher* v. *Sarmon*, 1827, 6 S. 270.

78. Custody of Children—Second Marriage of Mother.—On the petition of the nearest relations on the father's side, and the factor *loco tutoris* of pupil children whose father was dead, they were removed from the custody of the mother, who had married a second husband. *Denny* v. *Macnish*, 1863, 1 M. 268; 35 J. 183.

79. Custody of Children — Illegitimate Child.—The mother of a natural child of six years old (to the latter of whom a large fortune had been left by the father), *held*, in a question with his trustees, entitled to the custody. *Baxter* v. *Dougal's Trs.*, 5 July 1825, F. C.; 4 S. 139.

80. Custody of Children — Illegitimate Child.—The father of a bastard son of six years of age *held* entitled to get the custody of it from the mother, who was married, and had a family, and to place it with the schoolmaster of the parish. *Fairweather* v. *Lyall*, 1826, 4 S. 614.

81. Custody of Children — Illegitimate Child.—In a competition between the mother and the relations of the deceased father of a bastard child aged twelve years, *held* that the custody belonged to the mother, and that she was entitled to remove it from Scotland to England, where it was born, and where she resided. *Goodby* v. *M'Candys*, 7 July 1815, F. C.

82. Custody of Children — Illegitimate Child.—A petition by the trustees of the father of a natural child, six years old, praying that the mother, who was married to a spirit-dealer in Edinburgh, should be ordered to deliver the child to them in order to be placed in a boarding-school, and there being no allegation of bad character, refused *in hoc statu*. *Hunter* v. *Speid*, 2 Dec. 1820, F. C.

83. Custody of Children — Illegitimate Child. — A party furnishing aliment to a bastard child, but denying the paternity, is not entitled to the custody. *Keay* v. *Watson*, 19 Feb. 1825, F. C.; 3 S. 561.

84. Custody of Children — Illegitimate Child.—Where a natural son had reached his sixteenth year, *held* that the father, if called on to provide for him, was entitled to the custody of him. *Pott* v. *Pott*, 1833, 12 S. 183.

85. Custody of Children — Illegitimate Child.—The mother of a bastard child alleged to be a pupil, who clandestinely, and in face of a judicial warrant, carried it off from a school where it had been placed by the trustees of its deceased father, ordered *ante omnia* to restore it to the school. *Speid* v. *Webster*, 18 Dec. 1821, F. C.; 1 S. 221.

86. Custody of Children — Illegitimate Child.—In an application by the mother for the custody of an illegitimate child eight years of age, for whose aliment she had obtained decree against the father, two years of which were still to run, the court *held* that the mother was entitled to the custody, on giving up all claim for further aliment. *Simpson* v. *Cassels, etc.*, 1865, 3 M. 396; 37 J. 182.

87. Custody of Children — Illegitimate Child.—*Held* that trustees and tutors appointed by the father of two natural children (to whom he had bequeathed his fortune) were

entitled to have one of them (who had attained nearly eleven years of age) removed from the custody of the mother, who had married. *Whitson* v. *Speid*, 28 May 1825, F. C.; 4 S. 42.

88. Custody of Children — Illegitimate Child—Mother's Relatives.—*Observed*, that the mother's relatives have no right to the custody of her illegitimate child in preference to the father. *Wilson* v. *Taylor*, 1865, 3 M. 1060; 37 J. 557.

89. Custody of Children—Illegitimate Child.—The mother of a bastard is entitled to have the custody of it till it is seven or ten years of age. *Weepers* v. *Kirk-Session of Kennoway*, 1844, 6 D. 1166; 16 J. 507.

90. Custody of Children—Illegitimate Child.—Aliment having been awarded to the mother of a natural son till he should attain ten years of age, *held* that the father, although he was a married man, and had a family, was entitled thereafter to the custody of the boy. *Ballantyne* v. *Malcolm*, 1803, Hume 424.

91. Custody of Children—Orphan.—In a competition for the custody of orphan children between their maternal grandmother and their paternal aunt and uncle, the court assigned the care of the children to the former. *Brown* v. *Orr*, 1870, 7 S. L. R. 418.

92. Custody of Children—Orphan.—The maternal grandfather preferred to the custody of a pupil in a question with the maternal grandmother and aunt, who was also the infant's heir-at-law. *Gibson* v. *Dunnet*, 1824, 3 S. 249.

93. Custody of Children—Orphan.—The maternal uncle, being the nearest cognate, is entitled to the custody of an orphan pupil in preference to the tutor-at-law or the father's sister. *Higgins* v. *Boyd*, 1821, 1 S. 50.

94. Custody of Children — Orphan — Right of Nearest Male Agnate. — Four destitute orphans were, at the request of their mother, taken into an institution for orphans, and on her deathbed she nominated two gentlemen as their guardians, who took charge of their maintenance and education. An application by their paternal grandfather, a man in poor circumstances but of good character, for delivery of the children to him as their nearest agnate, *granted* after inquiry. *M'Lay* v. *Thornton, etc.*, 1868, 41 J. 68.

95. Custody of Children — Factor loco tutoris — Grandmother. — The agent of a deceased widower having, immediately before his appointment as factor *loco tutoris* to the children, removed them, with the concurrence of the medical attendant of the family, from the care of their maternal grandmother to that of a third party, selected by him; and the grandmother having applied by petition and complaint to the court, admitting that she was not a fit person for the custody, but praying that they might be removed from the situation in which the factor had placed them, to one suggested by herself, or to be selected by the court—the court, in the first place, ordered intimation to the paternal aunt in Scotland, as the nearest agnate; and thereafter, remitted to a clerk of Session and a medical man, to consider and report, whether the situation in which the factor had placed the children was a fit and proper place for them. *Macleod* v. *Hill*, 1833, 5 J. 271.

96. Custody of Children—General Rule—Tutors Nominate.—*Held* that, after the father's death, the general rule is that the mother is, in preference to tutors nominate, entitled to custody of the children till they attain the age of seven years respectively, the tutors having the superintendence of their education. *Borthwick* v. *Dundas*, 1845, 8 D. 318; 18 J. 141.

97. Custody of Children — Interdict against Removal. — A mother interdicted from removing children from Scotland; and the interdict being disobeyed *held* competent to grant a warrant to bring them back and place them in the custody of a party named for that purpose. *E. of Buchan* v. *Lady Cardross*, 1842, 4 D. 1268; 14 J. 415; see 5 D. 343; 15 J. 39.

98. Custody of Children — Rights of Guardians Appointed by Father—Access. —A husband, by his will, appointed his wife, during her widowhood, and his trustees and executors, to be the guardians of his infant children. The widow entered into a second marriage when the sole surviving child was five years of age. The other guardians interdicted the widow from removing the child beyond the jurisdiction of the court, and applied to the court to obtain the custody of the child. Circumstances in which the court allowed the widow, on finding caution not to remove the child out of the jurisdiction of the court, to retain the custody of the child for twelve months, and found the paternal grandfather entitled to reasonable access to it, and to certain specified visits from it during the year. *M'Callum & Others* v. *M'Donald & Husband*, 1853, 15 D. 535; 25 J. 320.

99. Custody of Children—Stepmother. —The petition of the maternal grandfather and nearest cognate of a pupil, for its removal from the custody of its stepmother, *refused*. *Black* v. *Ferguson*, 1866, 4 M. 807; 38 J. 432.

100. Custody of Children—Tutor-at-Law. —The court *refused* to allow a tutor-at-law to remove his pupil from her mother, and to choose her place of residence. *Campbell* v. *Campbell*, 1833, 11 S. 544.

101. Custody of Children—Tutor-at-Law. —A complaint by a tutor-at-law *sustained* against a maternal uncle for removing and detaining pupils from the place of residence assigned by the tutor. *Fullerton* v. *Wilson*, 1829, 7 S. 353.

102. Custody of Children—Tutor-at-Law—Removal beyond Jurisdiction of Court.—A tutor-at-law, who in a clandestine and unwarrantable manner removed a pupil out of

the jurisdiction of the court, was ordered to replace her within the jurisdiction, and deliver her to a particular person, and *found* not entitled, under the circumstances, to fix her place of residence. *Reoch* v. *Rob*, 14 Nov. 1817, F. C.

103. Custody of Children—Tutor Dative—Removal beyond Jurisdiction of Court.—It appeared incidentally, from an application by a tutor dative as to the pupil's estate, that the pupil was about to be removed beyond the jurisdiction of the court. The court directed the tutor's attention to be called to the responsibility he incurred; but being satisfied by the explanations given as to the reasons for that step, no further proceedings were taken. *Speirs*, 1854, 17 D. 289; 27 J. 122.

104. Custody of Children—Tutor-at-Law—Removal to English School.—The court, on the petition of a tutor-at-law, *allowed* a pupil to be removed to an English school, on condition that he should be in Scotland and at liberty to choose curators when he arrived at puberty. *Stuart* v. *Moore*, 1861, 23 D. 779; 33 J. 394.

105. Custody of Children—Tutor-at-Law.—During the dependence of a question as to the effect to be given in Scotland to an order by the Court of Chancery relative to the custody of a pupil, a native of and possessed of heritable estate in Scotland, *held* that his tutor-at-law was responsible for his remaining within the jurisdiction of the court. *Stuart* v. *Moore*, 1860, 22 D. 1504; 32 J. 696.

106. Custody of Children — Tutor-at-Law—Directions of Court.—The court, on the application of a tutor-at-law, made an order giving directions as to the residence and custody of a pupil who, besides his estates in Scotland, had estates in England, and a guardian appointed by the Court of Chancery. *Stuart* v. *Moore*, 1861, 4 Macq. 1; 23 D. 902; 33 J. 474.

107. Custody of Children—Regulation—Power of Sheriff. — *Question*, whether a sheriff has any power to control or regulate the custody or guardianship of children. *Lang* v. *Lang*, 1849, 11 D. 1217; 21 J. 485.

108. Custody of Children—Sequestration—Interim Interdict.—In a petition to sequestrate children and to interdict their father from removing them from the custody of their mother, the court on presentation of the petition *granted* interim interdict. *Thomson*, 1829, 1 J. 201.

109. Custody of Children — Voluntary Separation.—Circumstances in which *held* that a delicate child, four years of age, whose parents had separated under a deed of voluntary separation, should be allowed to remain under his mother's care. *Stewart* v. *Stewart*, 1870, 8 S. L. R. 279.

110. Father—Liability for Sons' Debts.—For several years accounts for clothes, etc., furnished by a tailor to two young men, one of them major, living with their father in Glasgow, were rendered to and paid by him. The father removed to Dundee; the sons quarrelled with and ceased to live with him. About four years after the last payment by the father, when the sons were twenty-seven and seventeen years of age and were not living with him, the same tailor furnished goods to a considerable amount to the sons, who were living in Edinburgh. In an action by the tailor against the father for payment, on the ground of implied mandate, *held* that, though no notice had been given to the tailor, the lapse of time and change of circumstances were sufficient to interrupt the previous implied mandate; and defender assoilzied. *Ferguson & Lille* v. *Stephen*, 1864, 2 M. 804; 36 J. 390.

111. Father—Liability for Son's Debts.—A father having frequently paid accounts contracted by his son to clothiers, both before and after getting a commission in the army, and thereby induced them to rely on his credit, *held* liable for an account incurred by the son after attaining majority and holding his commission. *Knox & Wilson* v. *Hay*, 1813, Hume 351.

112. Father—Rights as Administrator.—A father as his child's administrator is entitled to demand his child's share of trust money; but it may be unjustifiable to do so without requiring caution if the father is at the time in embarrassed circumstances. *Dumbreck* v. *Stevenson*, 1861, 23 D. (H. L.) 1; 4 Macq. 86; 33 J. 269. [See Nos. 194, 195.]

113. Legitim—Amount.—*Held* that where a bairn resorts to his legal rights in the face of a universal settlement by the father, he is entitled to his own proper share of the fund of legitim, as that share would naturally have existed if no attempt had been made to dispose of the *universitas* of the succession to his prejudice. *Wilson's Trs.* v. *Wilson*, 1843, 15 J. 549.

114. Legitim — Amount. — A daughter *found* not entitled to challenge a will executed by her father, on the allegation that he had tested on the *legitim*, he having disposed of no more than the dead's part. *Milne* v. *Innes*, 1822, 2 S. 66.

115. Legitim—Amount. — Upon a wife renouncing her *jus relictæ* the division of the personal estate is bipartite, one-half being *legitim* and the other half dead's part. *Nisbet* v. *Nisbet*, 1726, Robert. 594.

116. Legitim—Amount.—A deed executed by a widow after her husband's death, accepting of special provisions in her husband's settlement in lieu of *jus relictæ*, and ratifying the settlement and renouncing her *jus relictæ*, has the same effect in causing a bipartite division of his succession between the dead's part and *legitim*, as if it had been executed during the husband's lifetime. *Andrews* v. *Sawer*, 1836, 14 S. 589.

117. Legitim — Amount. — Where the great bulk of a testator's succession was conveyed to trust disponees, while some portions

of the estate were not included in the conveyance, *held* that, in estimating the amount of the *legitim*, the whole personal property of the testator, whether conveyed to the trustees or not, was to be computed and taken into account. *M. of Breadalbane's Trs.* v. *Duchess of Buckingham*, 1842, 4 D. 1259.

118. Legitim—Amount—Insurance on Life of Surviving Wife.—A husband predeceased his wife, on whose life he had effected two policies of insurance. *Held*, in a question with children claiming *legitim*, that these policies formed part of his moveable estate at the date of his death, and in calculating the amount of *legitim* were to be valued at their actuarial value at the date of the husband's death. *Pringle's Trs.* v. *Hamilton, etc.*, 1872, 10 M. 621; 44 J. 345.

119. Legitim — Amount. — A testator directed his trustees to divide the residue of his estate among his children on their majority and on his wife's death. All the children save one died in minority. *Held* that the *legitim* was to be calculated as at the father's death, and that though the claimant was entitled to interest therefrom she had no claim to share on the profits of the father's business as carried on by the trustees. *M'Murray* v. *M'Murray's Trs.*, 1852, 14 D. 1048; 24 J. 639; 1 Stuart 1118.

120. Legitim — Amount—Deductions.—A party, in his son's contract of marriage, became bound for a provision to the children of the marriage. He thereafter executed a general settlement, wherein he provided for the payment of this provision out of the rents of an estate entailed by him on his son, and left provisions to a daughter, declared to be in full of all legal claims. On his death, the daughter refused to accept these, and betook herself to her *legitim*. *Held* that, in estimating the executry of the deceased, the provision contained in the son's contract was not to be deducted; that the daughter was entitled to found on the deed, to show that this sum was not a burden on the executry; and that an advance of *legitim* being made during the father's life, interest on it, as well as the principal, was to be deducted. *Johnston* v. *Cochran*, 1829, 7 S. 226; 4 Fac. 267.

121. Legitim — Amount — Deductions—Provisions to Widow.—An increased provision to a widow by a deed of settlement, which was moderate and reasonable, beyond what was provided by her marriage-contract, *held* to be deducted from the whole moveables before ascertaining the *legitim*. *Laurie* v. *Edmond's Trs.*, 1816, Hume 291.

122. Legitim—Amount — Deductions.—A father died leaving a deed of settlement in favour of his son, as general disponee, burdened with provisions in favour of his daughter in satisfaction of *legitim*. She repudiated her provision and betook herself to her *legitim*. *Held*, in estimating the amount of her *legitim*, that the son was entitled to have the amount corresponding to his *legitim* (from which he was not precluded by the deed) taken out of the general fund prior to fixing the amount due to her as *legitim*. *Fisher* v. *Dixon*, 1841, 3 D. 1181; 16 Fac. 1289.

123. Legitim — Amount — Deductions — Voluntary Provison. — *Held* that a child cannot claim both voluntary provisions settled on her and *legitim*; and that sums advanced as voluntary provisions, including an annuity, must be deducted from the *legitim*. *Hog* v. *Lashley*, 1804, 4 Pat. 581.

124. Legitim—Amount — Deductions—Losses Incurred after Realisation.—In a question between a son claiming *legitim* and his deceased father's executor, who had allowed the agent employed to ingather the executry estate to retain in his own hands funds belonging thereto, part of which had been lost through the insolvency of the agent, *held* that, whether there was negligence on the part of the executor or not, this was a loss incurred after realisation, which could not diminish the amount of the *legitim*. *E. of Dalhousie* v. *Crokat*, 1868, 6 M. 659; 40 J. 341.

125. Legitim—Amount — Deductions.—Where a sum had been paid by trustees to a testator's widow in name of aliment, etc., as from the date of his death to the next legal term, and the widow claimed her legal provisions, *opinion*, that the sum was not to be charged on the testator's moveable succession until after the amount of the *legitim* had been ascertained. *M. of Breadalbane's Trs.* v. *Duchess of Buckingham*, 1842, 4 D. 1259.

126. Legitim — Amount — Deductions.—*Held* that the expenses of trustees in obtaining confirmation as to the estate fell to be deducted before the amount of *legitim* was struck. *M. of Breadalbane's Trs.* v. *Duchess of Buckingham*, 1842, 4 D. 1259.

127. Legitim — Amount— Deductions—Annuity to Widow.—An annuity provided to a widow in her contract of marriage, having been, in a general settlement by a father of his whole estate in favour of his son, declared a burden on the conveyance, *held* still to be a debt to be deducted from the whole estate before striking the *legitim*, and not a burden on the dead's part merely. *Minto* v. *Kirkpatrick*, 1833, 11 S. 632.

128. Legitim — Amount — Deductions.—A father, by his holograph settlement, gave the interest of a sum to a daughter, and the principal to her children, adding, "It is understood that I include her mother's share in the above sum." The daughter repudiated the settlement, and claimed her *legitim* and her share of her predeceasing mother's right to a third of the goods in communion. *Held* that, in setting aside the sum provided to be laid out for the family of the daughter, there fell to be deducted therefrom whatever sum she should be entitled to as her mother's share of the goods in communion, such being the import of the settlement. *Sinclair's Exrs.* v. *Rorison & Others*, 1852, 15 D. 212; 25 J. 142.

129. Legitim — Amount — Deductions—Annuity.—A father settled on his son an annuity, and later disponed to him an estate. *Held* that the son in claiming *legitim* was not bound to deduct the annuity. *Marshall* v. *Glen*, 1829, 8 S. 110; 5 Fac. 100.

130. Legitim — Amount — Deductions—Arrears of Feu-Duty.—In estimating *legitim*, arrears of feu-duty due by the parent must be deducted. *Johnston* v. *Cochran*, 1829, 7 S. 226; 4 Fac. 267.

131. Legitim — Amount — Discharge of Debts Due Deceased by his Son.—*Held* that a party could not, by a *mortis causa* settlement, discharge debts due to him by his son, to the prejudice of *legitim*. *Mackenzie* v. *Gunn's Trs.*, 1833, 5 J. 292.

132. Legitim—Collation.—A son, who had been taken into partnership by his father, was *held* not obliged to collate the value of the share of the stock thereby acquired, in order to entitle him to his *legitim* after his father's death. *Minto* v. *Kirkpatrick*, 1833, 11 S. 632.

133. Legitim — Collation — Advances.—Where a father makes loans to a child the child is not bound to collate them in claiming *legitim*. So *held* in a case where the father had made loans and the child had been discharged of this and other debts under a composition-contract. *Webster* v. *Rettie*, 1859, 21 D. 915; 31 J. 504.

134. Legitim — Collation — Advances.—Advances were made by a father to a son (without taking from him any obligation to repay) for purchase of a commission in the army. *Held* (1) that the advances were to be regarded as advances to account of *legitim*; and (2) that they must be imputed in a claim by the son for *legitim*, although the other children entitled to *legitim* had, since their father's death, discharged their claims. *Nisbet's Trs.* v. *Nisbet*, 1868, 6 M. 567; 40 J. 293.

135. Legitim — Collation — Advances.—*Held* that a sum which had been advanced by a father to set up his son in trade, and which exceeded the whole personal property of his father out of which he could claim *legitim*, barred his claim for *legitim*. *Hay* v. *Kay*, 1844, 16 J. 550.

136. Legitim — Collation — Advances—No Obligation of Debt Taken.—Advances made by a father to his child, for which no obligation of debt was taken, cannot be imputed to account of *legitim*, except in a question with other children entitled to *legitim*. *Trevelyan* v. *Trevelyan*, 1873, 11 M. 516; 45 J. 330.

137. Legitim—Collation—Advances.—A daughter raised an action against her brother who intromitted with her deceased father's personal estate for her *legitim*. The brother refused payment and claimed to retain her share for large advances made to her husband during the father's lifetime. *Held* that her father, having entered into a transaction with her husband, had discharged all these claims for advances, and that she was entitled to her *legitim*. *Rae* v. *Newal*, 1806, 5 Pat. 127.

138. Legitim—Collation—Advances.—By a marriage-contract a father disponed in the event of his dying intestate his whole estate to children of his first and second marriages. *Question* whether the children were bound to collate what they had received from their father during his life. *Bannerman* v. *Bannerman*, 1805, 4 Pat. 662; Hume 130.

139. Legitim — Discharge — Rights of Other Children.—*Question*, whether a discharge, in a *mortis causa* settlement, of advances by a father to his son, can affect the *legitim* in a question with the other children. *Grant* v. *Gunn's Trs.*, 1833, 11 S. 484.

140. Legitim—Discharge.—Circumstances in which *held* that a son had not discharged his *legitim* during his father's lifetime; but the assignees of the son *held* to have discharged or released the claim after his death. *Hog* v. *Thwaites*, 1802, 4 Pat. 364.

141. Legitim — Discharge — Effect of.—*Held* that a renunciation of *legitim* by a child or children operates in favour of the other children who have not renounced. *Hog* v. *Hog*, 1792, 3 Pat. 247.

142. Legitim—Discharge—Reduction.—*Held* that a wife who signed a discharge of *legitim*, on pain of imprisonment, was entitled to have the discharge set aside. *Wilson* v. *Wilson*, 1831, 9 S. 680; 6 Fac. 438.

143. Legitim—Exclusion of.—*Held* that a deed was testamentary and therefore ineffectual to disappoint a claim for *legitim*. *Johnston* v. *Johnston*, 1814, Hume 290.

144. Legitim—Exclusion of.—A father, with the intention of excluding any claim for *legitim* by the children of his first marriage, assigned his whole estate (a farm and stock) to his son by his second marriage. The assignation having been delivered, acted on and intimated, *held* that the assignation had been duly completed and excluded *legitim*, although the son was burdened with provisions in favour of his father and three sisters. *Skinner* v. *Beveridge*, 1872, 10 S. L. R. 12.

145. Legitim—Exclusion of.—*Held* that the claim of *legitim* was not cut off by a gratuitous deed, although the whole stock and conquest were provided to the children of the marriage, with a destination over in the event (which happened) of their dying before majority or marriage, and that the executors of the children were entitled to claim *legitim*. *Burden* v. *Smith*, 1738, 1 Pat. 214.

146. Legitim—Exclusion of—Acceptance of Provisions.—A father granted two dispositions *mortis causa* of part of his heritable property in favour respectively of his two daughters (who were his only children), for their liferent use allenarly, and to their children in fee, declaring that these disposi-

tions "should be accepted by them in full satisfaction of all *legitim*" and other claims; and if they resorted to their claims of *legitim*, etc., "the rights both of liferent and fee" should become void and null. He died intestate as to the remainder of his property, which consisted both of heritable and moveable estates. *Held* (1) that the above clause was not meant to operate as a disherison of the daughters in case of his dying intestate as to his other property, and that they were entitled to succeed each to a half of the whole intestate subjects; and (2) that they could not repudiate the dispositions by which rights of fee were created in the children. *Wilson* v. *Gibson*, 1840, 2 D. 1236; 15 Fac. 1330.

147. Legitim—Exclusion of—Acceptance of Legacy.—A testator bequeathed to his only child (a daughter) a legacy of £2000, and the residue to his brothers and sisters, but not declaring that the legacy should be in full of *legitim*. *Held* that the daughter was entitled to the *legitim*, and also to the legacy payable out of the dead's part. *Howdens* v. *Crighton*, 1821, 1 S. 18.

148. Legitim—Exclusion of—Acceptance of Provisions.—Provisions (not exclusive of *legitim*) made to children are not debts on the whole executry. The children must impute the *legitim* in payment of the provisions and take the remainder from the dead's part if necessary. *Nisbet* v. *Nisbet*, 1726, Robert. 594. See *Breadalbane* v. *M. of Chandos*, 1836, 2 S. & M'L. 377.

149. Legitim—Exclusion of—Acceptance of Legacy.—Where a father executed a gratuitous trust deed for payment of debts, and of a restricted liferent annuity to himself, and bequeathing a legacy to his daughter, and disposing of the residue of his property at his death, *held* that her claim of *legitim* was not barred by the deed, but that the legacy must be imputed towards payment of the *legitim*. *Nicolson's Assignee* v. *Macalister's Trs.*, 1841, 3 D. 675; 16 Fac. 728.

150. Legitim—Exclusion of—Acceptance of Legacy—Marriage-Contract Provisions—Amount.—By antenuptial marriage-contract, provisions were made to the wife and younger children in full of their *jus relictæ* and *legitim*. The father predeceased. He left a small legacy to his heir. The widow, by her marriage-contract, had accepted her special provision in full of her legal claims. *Held* (1) that the heir was entitled to *legitim*; (2) that the exclusion of the younger children operated in favour of the heir in the same way as the death of these younger children in their father's lifetime would have done. *Baron Panmure* v. *Crokat*, 1856, 18 D. 703; 28 J. 297.

151. Legitim—Exclusion of—Acceptance of Legacy.—A son, acting as a trustee under his father's deed of settlement, and taking payment of a small legacy provided to him, *held* to have homologated the deed, and his claim for *legitim* barred. *Carmichael* v. *Carmichael's Trs.*, 1823, 2 S. 198.

152. Legitim—Exclusion of—Bond.—A party having lent money on a bond taken payable to trustees for behoof of his two grandsons, reserving his own liferent, the debtors, by his direction, delivered the bond to one of the trustees, his son-in-law, whom he desired to keep it till he should receive further notice. *Held* that it was a delivered and irrevocable deed, and therefore effectual to exclude a claim of *legitim* at the instance of a daughter. *Collie* v. *Pirie's Trs.*, 1851, 13 D. 506; 23 J. 213, 380.

153. Legitim—Exclusion of—Conveyance of Heritable Property to Son.—A conveyance by a father of a certain heritable property to a son, *held* not to be in satisfaction of the son's *legitim*. *Marshall* v. *Marshall's Trs.*, 1829, 8 S. 110; 5 Fac. 100.

154. Legitim—Exclusion of—General Disponee.—A son who is the general disponee of his father is not entitled to *legitim*. *Stewart* v. *M'Naughton*, 1824, 3 S. 351.

155. Legitim—Exclusion of—Inter vivos Deed.—*Observed*, that in order that a claim for *legitim* may be excluded by an *inter vivos* settlement, the father must have deprived himself of all power of dealing with the funds falling under the settlement. *Held* that a conversation as to the disposal of property between a father on his deathbed and certain of his children did not exclude a claim for *legitim* by another child. *Little* v. *Little*, 1856, 18 D. 701; 28 J. 295.

156. Legitim—Exclusion of—Inter vivos Deeds.—A voluntary and gratuitous disposition by a father to his son, in partnership with him, of all his effects, reserving an annuity to himself, and providing a small annuity to his daughter, which, from all the circumstances, appeared to have been devised to defeat the *legitim* of the daughter, *held*, although it was declared to be irrevocable and was recorded, to be no bar to her *legitim*. *Millie* v. *Millie*, 1807, 5 Pat. 160. Affg. 7 June 1803, F. C.; M. 8215.

157. Legitim—Exclusion of—Inter vivos Deeds.—The *legitim* may be disappointed by the gratuitous deeds of the father *inter vivos*, although the object should be to disappoint it. *Hog* v. *Hog*, 1804, 4 Pat. 581; 12 Fac. 394; M. "Legitim" App. No. 3.

158. Legitim—Exclusion of—Inter vivos Deed—Possession.—A father delivered to one of his sons a writing which imported a donation of all his effects, but no proper possession took place during the father's lifetime, and he acted on the idea that they belonged to him, by making a will in relation to them. *Held* not sufficient to exclude a sister from claiming *legitim* out of them. *Craigie* v. *Craigie*, 1811, Hume 288.

159. Legitim—Exclusion of—Marriage-Contract Provision—Construction.—Under a contract of marriage, provisions were

made to the wife and children *nascituris*, declaring "that the provisions before written, conceived in favour of the said Mrs. Ann Mudie and her foresaids, are in full contentation of all that she or they can claim . . . by and through the death of both or either of the said apparent spouses." *Held* that the words "her foresaids" applied to her next-of-kin, and could not include children to the effect of excluding their claim of *legitim*. *Stephen* v. *Straiton*, 1803, Hume 286.

160. Legitim—Exclusion of—Marriage-Contract Provision.—A father became bound, in the antenuptial contract of a daughter, to secure, in name of trustees, for behoof of her and her husband, £500, "in full satisfaction to his daughter and her husband" of her "patrimony, and all that they can or might ask or crave of" her father "or his representatives, through his death, or the death of his spouse, in name of *legitim*, portion-natural, bairn's part of gear, executry, or any other manner of way whatever, excepting goodwill only; of which sum the" daughter and her husband "hereby accept as in full of *legitim*, executry, and all that they can claim of her said father, or his heirs and representatives through his death." The father thereafter died intestate, and was survived by his widow and three other children. *Held* that the daughter's claim to any share of her father's succession had been renounced. *Johnston* v. *Miller*, 1847, 9 D. 1389; 19 J. 611.

161. Legitim—Exclusion of—Marriage-Contract Provision.—The marriage-contract of a daughter (pursuer of an action against her father for a share of the goods in communion at her mother's death) contained a provision by her father, the defender, of the sum of £5000, to be paid to the marriage-contract trustees at the first term after her father's death, which sum was declared to be the pursuer's share of her father's "means and estate intended to be left her at his death, which she hereby agrees to accept in full satisfaction of *legitim*, etc., and everything else she could claim by and through the death" of her father. The marriage-contract was dated after the mother's death. *Held* that the pursuer's claim in this action was a debt due by the father at the date of the marriage-contract, and was not discharged expressly, or by implication, by the clause quoted. *Kennedy* v. *Bell*, 1868, 6 M. (H. L.); 40 J. 476; L. R. 1 Sc. App. 307.

162. Legitim—Exclusion of—Marriage-Contract Provision.—Provisions to children in a contract of marriage unless so expressed do not exclude their right of *legitim*. *Nisbet* v. *Nisbet*, 1726, Robert. 594.

163. Legitim—Exclusion of—Marriage-Contract Provision — Amount. — Circumstances in which the *legitim held* not to be excluded by a child's acceptance from her father, under an English marriage-contract, of a provision, declared to be her "portion or fortune"; and this provision not taken into view in fixing the amount of the *legitim*. *M. of Breadalbane's Trs.* v. *Marchioness of Chandos*, 1836, 2 S. & M'L. 377. Affg. 14 S. 309; 11 Fac. 265.

164. Legitim—Exclusion of—Marriage-Contract Provision—English.—*Held*, in an action for payment of *legitim*, that the defender's averments in regard to the terms of the marriage-contract and its effect by the law of England were not relevant averments of such a deed as by the law of Scotland would exclude a claim for *legitim*. *Trevelyan* v. *Trevelyan*, 1873, 11 M. 516; 45 J. 330.

165. Legitim—Exclusion of—Marriage-Contract Provision—Entail.—A presumptive heir of entail bound himself, by antenuptial contract, as soon as he should come into possession, to convey the estate to the eldest child, and secure his wife and younger children the provisions allowed by the entail. Special provisions were over and above made for the younger children, and it was declared that the provisions "in favour of the children of the marriage" should be in full satisfaction of *legitim* and executry. The husband having died intestate, predeceasing the heir of entail in possession, and the wife being also dead, *held* that the contract excluded all the children of the marriage from both *legitim* and executry. *Maitland* v. *Maitland*, 1843, 6 D. 244; 16 J. 162.

166. Legitim—Exclusion of—Marriage-Contract Provision—"Children"—"Heir."—Provisions under a marriage-contract were to be accepted by the "children of the marriage in full satisfaction" of their rights of *legitim*. *Held* that the word "children" applied to the heir. *Keith's Trs.* v. *Keith*, 1857, 19 D. 1040; 29 J. 497.

167. Legitim—Exclusion of—Marriage-Contract Provision—Collation.—Terms of a marriage-contract in English form between parents, which *held* not to import a discharge of *legitim* by the children of the marriage. Trustees under a universal settlement cannot compel a party entitled to *legitim* to collate marriage-contract provisions, when collation is not demanded *inter liberos*. *Keith's Trs.* v. *Keith*, 1857, 19 D. 1040; 29 J. 497.

168. Legitim—Exclusion of—Marriage-Contract Provision.—By antenuptial contract, the goods in communion were provided to the spouses and the longest liver of them in liferent, and to the children in fee. The wife having survived, *held* that although there was no express exclusion of the *legitim*, the children were barred by the terms of the marriage-contract from claiming *legitim* as at their father's death. *Fisher's Trs.* v. *Fisher*, 1844, 7 D. 129; 17 J. 59.

169. Legitim—Exclusion of—Marriage-Contract Provision.—Terms of an antenuptial contract, under which the court *found* that a child of the marriage had right to a proportional share of £1000, therein provided, and to his *legitim*. *Fraser* v. *Fraser's Trs.*, 1835, 15 S. 174; 11 Fac. 145.

170. Legitim — Exclusion of — Mortis causa Deed.—*Legitim* cannot be defeated by a *mortis causa* deed. *Hog or Lashley* v. *Hog*, 1792, 3 Pat. 247.

171. Legitim—Exclusion of—Deathbed Deeds.—*Question* whether, where a father on deathbed delivers cash and indorses a bill to one of his children, this can affect the *jus relictæ* or *legitim*; and *opinion* expressed that it could not, but might be effectual *quoad* the dead's part. *Milroy* v. *Milroy*, 1803, Hume 285.

172. Legitim—Exclusion of—Undelivered Testamentary Deed.—*Held* that a testamentary deed not delivered by a father in favour of his children of a second marriage, did not preclude the children of the first marriage from *legitim*. *M'Donald* v. *M'Donald*, 1808, Hume 288.

173. Legitim — Substitutes. — A father cannot call substitutes after the child in the *legitim*. *Morton* v. *Young*, 11 Feb. 1813, F. C.

174. Legitimacy — Invalid Marriage — Knowledge of Affinity.—Children of a pretended marriage between a man and the daughter of his deceased wife, who was aware of the affinity at the time of the marriage, *declared* illegitimate. *Muir* v. *Watsons*, 1871, 8 S. L. R. 596.

175. Legitimacy—Issue of Marriage in England with Deceased Wife's Sister.—A Scotsman domiciled in England had issue by a marriage celebrated in England with his deceased wife's sister. *Held* that the marriage being null *in loco contractus*, it must be held null in Scotland, and the issue illegitimate. *Fenton* v. *Livingstone*, 1861, 23 D. 366; 33 J. 184.

176. Legitimacy—Legitimation per subsequens matrimonium.—In a declarator of bastardy against a party born in England of a Scots mother, evidence was led which would have established a clandestine marriage between his parents according to the law of Scotland, but no register of the marriage was discovered, and there was no proof of its having actually been celebrated. *Held* that the evidence was insufficient to warrant the inference of a marriage in England between the parties, and decree of declarator of bastardy pronounced. *Cullen* v. *Gossage*, 1850, 12 D. 633; 22 J. 209.

177. Legitimacy—Legitimation per subsequens matrimonium—Adulterous Connection. — A woman having contracted an irregular marriage in Scotland, eloped from her husband, who thereafter obtained a decree of divorce against her, in which the name of the adulterer was inserted. The woman thereafter cohabited with the adulterer, and went with him to Lower Canada, where they were married *in facie ecclesiæ*, after having acquired a domicile there. In an action raised by the issue of this connection, concluding for declarator that they were legitimate, *held* that, in the circumstances of the case, the previous marriage of the woman must have been known to the man with whom she committed adultery. *Beattie* v. *Beattie*, 1866, 5 M. 181; 39 J. 83.

178. Legitimacy—Legitimation per subsequens matrimonium.—A child was born of parents who were unmarried, and the mother thereafter married a third party, to whom she bore several children, and after her husband's death she married the father of her first child. *Held* that the intervening marriage did not bar the subsequent marriage from legitimating the first child. *Kerr* v. *Martin*, 1840, 2 D. 752; 15 Fac. 776.

179. Legitimacy—Legitimation per subsequens matrimonium.—*Held* that a child procreated and born in England, of parents domiciled there, although the father was a Scots Peer (as well as British), and possessed of estates in Scotland, was not legitimated by their subsequent marriage. *Strathmore Peerage* (*Bowes Petitioner*), 1821, 6 Pat. 645; 4 W. & S. 89.

180. Legitimacy—Presumption.—*Observed* that there is no presumption of legitimacy where a party merely avers circumstances said to infer the marriage of his parents. *Swinton* v. *Swinton*, 1862, 24 D. 833; 34 J. 424.

181. Legitimacy — Presumption. — A Scotsman, proprietor of an heritable estate in Scotland, had a daughter while residing in France, by a Frenchwoman, and afterwards came to Scotland with another Frenchwoman, whom he described in his deeds of settlement as his wife, while the other was alive. On his death, his estate was sold in an action of sale by his apparent heir on behalf of creditors. *Held*, in a question as to whether the daughter was legitimate, that under all the circumstances this was not to be presumed. *Middlemore* v. *M'Farlane*, 5 Mar. 1811, F. C.

182. Legitimacy — Presumption — Pater est quem, etc.—*Question*, whether an interval of nine calendar months and twenty-nine days between the death of a husband and the birth of a child be of itself conclusive against the legitimacy; but waved in respect of the special circumstances establishing the legitimacy. *Sandy* v. *Sandy*, 1823, 2 S. 453.

183. Legitimacy — Presumption — Onus of Displacing—Adulterous Connection.—*Opinions*, that a son having proved that his father had enjoyed the status of legitimacy during his whole life, the onus lay upon the party averring his illegitimacy to establish it by proving that his parents were never married, and that the onus of proof was not changed by proving merely that their connection was at one time adulterous. *Campbell* v. *Campbell*, 1867, 5 M. (H. L.) 115; 39 J. 576; 1 A. C. 182.

184. Legitimacy — Presumption — Habit and Repute a Bastard.—*Question* whether, when a party is proved to have been habit and repute a bastard, the onus is on a party insisting in a reduction of the service of the

alleged bastard to prove him a bastard, or is thrown on the party supporting the service. *Lindsay* v. *Kerr*, 1824, 2 Shaw's App. 147.

185. Legitimacy — Prior Marriage of Woman — Cohabitation of Parents. — A woman, whose husband went abroad in 1801, began about the year 1803 to cohabit with another man, at which time her husband was known to be alive, but he had never been heard of after the year 1804, and it was conjectured that he had been lost at sea. The intercourse continued till the man's death, in January 1810, during which time they were held and reputed to be married persons by many neighbours. In a question as to the legitimacy of the children born of this connection, *held* that as there was no evidence of the husband's death, and no presumption that it had occurred within the period during which the connection subsisted, and as the cohabitation had been illicit in its commencement, the legitimacy of the children was not established. *Lapsley* v. *Grierson*, 1845, 8 D. 34; 18 J. 17.

186. Legitimacy — Proof. — *Held* that parties had failed in proving that they were legitimate. *Lapsley* v. *Grierson*, 1848, 20 J. 360.

187. Legitimacy — Proof — Period of Gestation.—*Held* that the son of a woman who was married about three and a half years after his birth had failed to establish that he was the son of the person to whom she was so married. *Question*, whether a child born 301 days after access by the alleged father could be held to be his child? *Innes* v. *Innes*, 1837, 2 S. & M'L. 417. Affg. 13 S. 1050; 10 Fac. 827.

188. Legitimacy — Proof — Subsequent Marriage.—A person born before the marriage of his mother *held* proved to be the son of the man whom she married after the birth, although the mother, after her husband's death, and at an advanced age, emitted a declaration of his illegitimacy. *Walker* v. *Walker*, 1857, 19 D. 290; 29 J. 140.

189. Legitimacy—Proof of Illegitimacy. —A woman had an illegitimate child, and three years afterwards married. The child was brought up by her and her husband, went by his name, and was generally reputed to be his daughter. After the death of the husband and wife, and of the daughter, an action of declarator of illegitimacy was raised. It was proved that at the time of the girl's birth she was reputed to be the daughter of another man, and that her mother subsequent to her husband's death had acknowledged that her husband was not the father. From these and other facts *held* that the daughter was illegitimate. *Smith* v. *Dick, etc.*, 1869, 8 M. 31; 42 J. 5.

190. Legitimacy — Filius carnalis — Meaning of.—*Held* that the description of a person in an ancient deed as *filius carnalis* did not prove that he was illegitimate. The word "carnalis" being ambiguous, evidence was allowed as to the facts. *D. of Roxburgh* v. *Ker*, 1822, 1 Shaw's App. 157; 6 Pat. 820.

191. Minor—Action against—Declarator of Expiry of Legal.—A decree of declarator of expiry of the legal in absence opened up, where the debtor was at the time abroad, and during part of the term after decree of adjudication a minor. *Aitken* v. *Aitken*, 1809, 1 Bell 706.

192. Minor—Action against—Curator not Called.—A decree of declarator of expiry of the legal in absence against a minor, without calling his curator, opened up. *Brackenridge*, 1809, 1 Bell 705.

193. Minor—Action against—Adjudication—Tutors and Curators not Charged.—When proceedings are instituted against a minor as heir, it is a good objection to a decree of adjudication that his tutors and curators were not charged on the special charge. *Robertson* v. *Crs. of Robertson*, 1805, 1 Bell 743.

194. Minor — Bequests to — Payments Made on Discharge of Administrator-in-Law. — Trustees ordained to pay certain interests bequeathed to children in minority, on the discharge of their father as administrator-in-law; but the latter not allowed to apply these interests (which were bequeathed to the children equally) towards the education, etc., of one preferably to the others. *Willison* v. *M'Quarie*, 1830, 9 S. 160. [See No. 112.]

195. Minor—Bequests to—Payment of Income to Father as Administrator-in-Law.—Trustees held a fund for behoof of children. The father (who was domiciled in England) applied to the court to have the trustees ordained to pay the income to him "as administrator-in-law and for himself." The application *granted* as he was the proper person to have charge of the children; but *observed*, that authority could not have been given if the petition had been at his instance merely as administrator-in-law, because in that capacity he was a creditor and his course was to sue the trustees. *Edmiston* v. *Miller's Trs.*, 1871, 9 M. 987; 43 J. 545.

196. Minor — Curator — Accounting. — Where curators in an inferior rank of life had acted with *bona fides*, and for the advantage of the minor, the court would not enter, after a settlement at majority, into a new accounting, merely because they had not made up inventories nor found caution. *Williamson* v. *Williamson*, 30 June 1815, F. C.

197. Minor—Curator—Accounting.—In an action by a curator against his ward after his majority the former was allowed to prove by parole evidence that the proceeds of certain retired bills, which he produced, had been expended for behoof of the latter. *Stark* v. *Tennant*, 1843, 5 D. 542; 15 J. 284.

198. Minor—Curator—Father—Citation. —A father, as administrator-in-law to his son, may be cited like tutors and curators. *Buchanan*

v. *Gray*, 20 Jan. 1801, F. C.; M. "Adjudication" App. No. 12.

199. Minor—Curator—Father—Title to Sue.—An action for delivery of a minor's title deeds, at the instance of his father as his guardian, without the minor being made a pursuer, *held* competent. *M'Kirdy* v. *M'Lachlan*, 1840, 2 D. 949; 15 Fac. 1055.

200. Minor—Curator—Father—Administration of Estate by Father.—*Observed*, that a father's poverty alone is not a sufficient ground for depriving him of the administration of his minor children's property. *Wardrop* v. *Gosling*, 1869, 7 M. 532; 41 J. 280.

201. Minor—Curator—Father—Sale of Heritage belonging to Son—Liability to Account—Rents.—A father who got possession of an estate as guardian of his son, a minor, under titles by which they were apparently validly entailed, having made up titles to them in his own favour in fee-simple, and sold them, *held* that he was liable to account for the rents during the son's minority as if they had not been sold. *Bontine* v. *Grahame*, 1839, 2 D. 27; 15 Fac. 20.

202. Minor—Curator—Father—Liability of for Rents—Bona fide Perception.—A father succeeded to two entailed estates, but from the conditions of the entail he could not hold both, and one was accordingly ceded to his infant son, for whom he acted for some years as administrator-in-law. He afterwards made up titles to that estate as proprietor, and drew the rents during the son's minority. On the latter attaining majority, the father disponed the estate to him, on which he was infeft, and thereafter obtained declarator of irritancy against his father. *Held*, in an action by the son for payment of the rents, that the father was bound to account for them during the whole period of the son's minority, that no plea of *bona fide* perception was competent to him, and that in a question with him it was not necessary to set aside the titles made up by him to the estate. *Bontine* v. *Grahame*, 1838, 1 D. 286; 14 Fac. 297.

203. Minor—Curator—Father an Undischarged Bankrupt—Factor loco tutoris.—A factor *loco tutoris* and *curator bonis* appointed to children who had right to the fee of a liferented property, although their father was alive, but he was an undischarged bankrupt, and had no settled domicile. *Johnstone* v. *Wilson*, 1822, 1 S. 558.

204. Minor — Curator — Payment by Trustees — Appropriation by Curator — Liability of Trustees.—Trustees paid part of a minor's money to a *curator bonis*, who had never extracted his appointment nor found caution, and who soon after left the country, in a state of insolvency. *Held* that the trustees were liable to pay the sum over again to the minor. *Donaldson* v. *Donaldson's Trs.*, 1833, 11 S. 740.

205. Minor — Curator — Powers. — The tutors of a pupil let his lands to his mother, and on expiration of his pupillarity and of the lease, without giving warning, his curators, with his consent, exposed the lands on lease, and they thereupon raised an action of removing against the mother, which the minor disclaimed. *Held*, although they pleaded that he was acting under the influence of his mother to his prejudice, they were not entitled to insist in the action. *Allan* v. *Walker*, 1812, Hume 586.

206. Minor—Curator—Powers—Alteration of Succession.—*Held* that curators could not alter the succession to the minor's estate by taking bonds secluding executors in lieu of bonds to heirs and executors, without the consent of the minor or constituent, and that such consent could be proved by parole. *Wauchope, etc.* v. *Wauchope*, 1737, 1 Pat. 200.

207. Minor—Curator—Powers—Voting—Mandate of Curator.—In the election of a minister to a parish, *held* that the vote given for a minor, then seventeen years of age, per mandate of her curator alone, without her signature or consent, was inept. *Stirling, etc.* v. *Campbell, etc.*, 1816, 6 Pat. 238.

208. Minor—Curatory—Citation of Next-of-Kin.—When the nearest of kin on the mother's side of a minor were furth of Scotland, their citation, in an edict of curatory, dispensed with, upon an application to that effect. *Thomson*, 1833, 5 J. 180.

209. Minor — Curatorial Inventories — Citation of Next-of-Kin.—An application by a curator making up curatorial inventories, to dispense with the citation of a minor's next-of-kin on the mother's side, in respect there were no such next-of-kin in Scotland, must be sent to the wall. *Murdoch*, 1835, 7 J. 369.

210. Minor — Curatorial Inventories — Statute, 1672, c. 2—Citation of Next-of-Kin—Bastard.—The curator of a bastard presented an application to the court stating that he was unable to comply with the statutory requisite of citing the next-of-kin on the mother's side to concur with him in making up the usual inventories, in respect that a bastard was held in law to have no next-of-kin, and praying to dispense with citation. The court, without ordering the petition to the walls and minute-book, *de plano granted* the prayer. *Fiddes*, 1839, 11 J. 333.

211. Minor—Curatorial and Tutorial Inventories — Citation of Next-of-Kin—Bastard. — The guardians appointed to a bastard by the father, presented an application to the court, stating that they were unable to comply with the requisites of the statute, 1672, c. 2, in regard to citing the next-of-kin to concur in making up inventories, in respect a bastard was held in law to have no next-of-kin. The court ordered intimation to be made to the next-of-kin on the mother's side, on the ground that they had an interest to be called to see that the proceedings were *rite et solemniter actæ*. *Stuart, etc.*, 1837, 9 J. 391.

212. Minor — Curatorial Inventories — Statute, 1672, c. 2—Citation of Next-of-Kin.—Dispensation *granted* by the court from citing the nearest of kin on the mother's side to concur in making up tutorial and curatorial inventories, in respect the next-of-kin on the mother's side were not natives of Scotland, and resided in India. *Bannerman*, 1838, 10 J. 241.

213. Minor — Curatorial Inventories — Failure to Lodge.—*Held* that the privilege of inflicting on curators the penalties of 1672, c. 2, is personal to the minor, and does not pass to his creditors. *Harkness* v. *Graham*, 1836, 14 S. 1015.

214. Minor—Evidence of Minority.—*Held* that two affidavits by brothers of a party (alleging that he was minor) of an entry by their mother in a prayer-book, and a certificate by the clergyman of the parish in the West Indies that the records of births and baptisms were lost, and affidavits by two persons that he had been baptized at a particular date, were evidence sufficient to establish minority. *Sutherland* v. *Morson*, 19 Jan. 1825, F. C.; 3 S. 449.

215. Minor — Liability. — Minors *found* liable to a third party for expenses and remuneration, in relation to a matter in which he was employed by their factor *loco tutoris*. *Orr* v. *Ross*, 1822, 1 S. 412.

216. Minor — Liability — Board and Residence.—A young man who was *majorennitati proximus* having gone to an inn, and lived there for three weeks as shooting quarters, *held* liable to the landlord for the account incurred by him for food and lodging. *Wilkie* v. *Dunlop & Co.*, 1834, 12 S. 506; 9 Fac. 294.

217. Minor — Liability — Bill—Acknowledgment of after Majority.—Acknowledgment of liability for a bill, after majority, *held* to obviate pleas of minority and no value. *Forrest* v. *Campbell*, 1853, 16 D. 16; 26 J. 22.

218. Minor — Liability — Bill.—A minor, who was married and lived separate from his father, but was an apprentice, granted a bill to his stepmother, on which, being charged by her and his father, he brought a suspension, on the ground that the bill was truly granted to his father, belonged to him *jure mariti*, and was null, and that at all events he had counter claims. *Held* that, in the circumstances of the case, a reduction was not necessary, and that as the father did not prove the contents of the note to have been *in rem versum*, the minor was not liable for the note. *Anderson* v. *Cation or Anderson*, 1828, 7 S. 78; 1832, 11 S. 10.

219. Minor—Liability—Bill—Lesion—Reduction.—A minor living in family with his father, who was incapable of attending to business, granted a bill in satisfaction of a debt due by his father. *Held* that although the minor was managing his father's estate, and acting generally in his affairs, the bill was liable to be reduced on the head of minority and lesion. *M'Michael* v. *Barbour*, 1840, 3 D. 279.

220. Minor—Liability—Bill—Lesion.—A charge on a bill which had been accepted by a minor, not for his own behoof, but as manager for his father, *suspended* on the ground of minority and lesion. *Robertson* v. *Mackintosh Brothers*, 1867, 5 S. L. R. 118.

221. Minor—Liability—Bill.—Diligence on a bill accepted by a minor who had curators, without their concurrence, and directed against the minor alone, without reference to the curators, *suspended* as irregular. *Wilkie* v. *Dunlop & Co.*, 1834, 12 S. 506; 9 Fac. 294.

222. Minor — Liability — Bill—Acceptance after Majority of Bill in Favour of Curator.—Bennet, after his majority, accepted along with his partner a bill in favour of Reid, who had been his curator, for advances made to them by Reid. *Held* that this did not entitle Bennet and his partner to reduce the bill, but *question* whether, in the circumstances, payment could be exacted. *Bennet* v. *Reid's Trs.*, 1828, 6 S. 854.

223. Minor—Liability—Bill—Fraud.—A bill reduced on the head of minority and fraud, and another sustained in a question with an indorser. *Campbell* v. *Turner*, 1822, 1 S. 266; 20 F. C. 508.

224. Minor—Liability—Bill—Suspension—Reduction.—A charge on a bill accepted by a minor cannot be suspended on the ground of minority and lesion. Reduction is the only remedy. *Waddle* v. *Gibson*, 18 Jan. 1812, F. C.

225. Minor — Liability — Desertion of Service.—*Held* that minority at the date of the contract was no objection to a conviction under the stat. 4 Geo. IV. c. 34, where a workman aged seventeen years, and earning wages, had engaged with his master for a term of two years, and subsequently deserted his employment. *Argo* v. *Smarts*, 1853, 1 Irv. 250; 25 J. 450; 2 Stuart 458.

226. Minor—Liability—Erroneous Application of Money.—*Held* that a minor employed as a sheriff-clerk-substitute was liable to the sheriff-clerk for erroneous application of money, although done under the directions of the sheriff-substitute. *Heddel* v. *Duncan*, 5 June 1810, F. C.

227. Minor — Liability — Tradesmen's Accounts.—*Observed*, that a minor was not liable to tradesmen who had furnished him with articles on credit without his father's order or consent. *Gray* v. *Purves*, 1816, Hume 411.

228. Minor — Liability — Furnishings Ordered by Minor.—A minor living in family with her father, *held* not personally liable for furnishings ordered by her. *Hamilton* v. *Forrester*, 1825, 3 S. 572.

229. Minor—Liability—Clothes Ordered by Minor.—An Irish young gentleman aged seventeen, having been sent by his guardian to Edinburgh for his education, contracted in a few months a debt of £50 to a tailor for clothes, although he was otherwise supplied. *Held* that both he and his guardian were liable for

the debt. *Fontaine* v. *Foster*, 1808, Hume 409.

230. Minor — Liability — Partnership.— Bill of suspension passed of a charge on an acceptance by a minor, under a partnership firm. *Dick* v. *Cuming*, 1824, 3 S. 231.

231. Minor — Liability — Partnership. — A minor engaged by his father in a copartnery trade, *held*, on the failure of the concern, liable in payment of the firm debts. *Wilson* v. *Laidlaw*, 1816, 6 Pat. 222.

232. Minor—Liability—Passive Title.— Circumstances in which a party *majorennitati proximus* was found to have incurred a passive title. *M'Eachern* v. *M'Eachern*, 1833, 11 S. 441.

233. Minor—Powers—Power to Test.— A minor even with consent of his curators cannot alter the succession to his estates. *M. of Clydesdale* v. *E. of Dundonald*, 1726, Robert. 564.

234. Minor—Powers — Bond — Lesion—Ratification—Personal Bar.—A minor, not engaged in any trade or profession, granted an heritable bond for a loan of £4000, with consent of his curators. A ranking and sale of his estate having followed, *held* that the general creditors of the minor were entitled *vi exceptionis*, in the ranking and sale, to challenge the bond on the ground of minority and lesion, except in so far as the lender should prove the sum to have been *in rem versum* of the minor. A ratification after majority being executed, but only after the process of ranking and sale was in dependence, *held* no bar to the challenge. *Harkness* v. *Graham*, 1833, 11 S. 760.

235. Minor — Powers — Marriage-Contract.—*Held* that an antenuptial contract of marriage entered into by a minor was, lesion not being proved, not *ipso jure* a nullity, in respect that at its date the minor was under curators, and that the deed was not signed by a quorum. *Bruce* v. *Hamilton*, 1854, 17 D. 265; 27 J. 107.

236. Minor—Powers—Marriage-Contract Provisions.—A minor lady, who had conveyed to her husband, by their antenuptial contract, no more than he had right to at common law, *held* not entitled to have it set aside, although he was insolvent, and unable to implement provisions undertaken by him. *Anderson* v. *Abercrombie's Trs.*, 1824, 2 S. 662.

237. Minor — Powers — Leases — Reduction—Lesion.—A married woman under age *held* entitled to be restored against leases granted with consent of her husband, to her lesion. *Gibson* v. *Scoon*, 6 June 1809, F. C.

238. Minor—Powers—Lease in Favour of Administrator-in-Law.—*Question* as to the validity of a lease by a minor, with consent of her administrator-in-law, in favour of the administrator. *Gillespie* v. *Clark*, 1821, 1 S. 160.

239. Minor—Powers — Lease—Duration. —A lease by a minor for nineteen years, with consent of his curators, *held* effectual, not merely during his minority, but for the whole period. *Alexander* v. *Thomson*, 1813, Hume 411.

240. Minor—Powers—Application to Feu Entailed Estate — Affidavit Signed by Minor Alone.—In an application for leave to feu a part of an entailed estate, under the Entail Amendment Act, by the heir in possession, who was a minor, and his curators, the affidavit was subscribed by the minor himself. The court, without indicating any opinion as to whether this affidavit was sufficient, recommended that *ob majorem cautelam* it should be subscribed by one or more of the curators. *M. of Hastings*, 1849, 12 D. 918.

241. Minor—Powers—Sale of Heritage. —The court refused an application by children, and their father as administrator for his children, to sell a property (to whom it was provided by his contract of marriage), in respect no sufficient necessity had been shown. *Finlayson* v. *Finlaysons*, 22 Dec. 1810, F. C.

242. Minor—Powers—Sale of Heritage—Annuity—Cognition and Sale—Aliment.— Circumstances in which *opinions* expressed against authorising a sale at the instance of a minor, apparent heir, and his curators, where the estate was worth from £7000 to £8000, and there was an excess of expenditure over the income of £97, 8s. per annum, occasioned chiefly by an annuity of £300 a year, due to the widow. *Drysdale, etc.* v. *Gordon, etc.* (1831), 3 J. 558.

243. Minor—Powers—Sale of Heritage. —*Question* as to the validity of a sale of heritage, in which minors had an interest. *Scott* v. *Reid*, 1822, 1 S. 332.

244. Minor — Powers—Indenture. — A minor entered into an indenture, with consent of his elder brother, whom he held out as his curator. His curator not having interfered, or stated that he was the curator, though in knowledge of the indenture, *held* that the minor was bound. *Harvie* v. *M'Intyre*, 1829, 7 S. 561; 4 Fac. 809.

245. Minor — Powers — Apprenticeship. —*Opinion*, that a contract of apprenticeship entered into by a minor without consent of his father is not void but merely voidable. *Stevenson* v. *Adair*, 1872, 10 M. 919; 44 J. 529.

246. Minor—Powers — Partnership—No Consent of Curators.—Objection to validity of partnership that one of the partners was a minor, the consent of whose curators had not been obtained. *Blackwood* v. *Thorburn*, 1868, 7 M. 318; 41 J. 187.

247. Minor—Powers — Title to Sue—Refusal of Father to Concur — Curator ad litem.—Where a father will not concur with a minor child, pursuer of an action, the court will appoint a curator *ad litem*. *M'Connochie* v. *Bennie*, 1847, 9 D. 791; 19 J. 322.

248. Minor — Powers — Title to Sue—Multiplepoinding.—*Question*, whether it is a

good objection to a summons of multiplepoinding brought in name of a minor, that it is not also in name of all the curators. *Robertson* v. *Niven*, 1829, 7 S. 421; 4 Fac. 916.

249. Minor—Powers—Voting.—A minor cannot vote in the election of a deacon of an incorporation of a royal burgh. *Ogilvie* v. *Mags. of Edinburgh*, 6 Feb. 1810, F. C.

250. Minor—Powers—Transactions between Parent and Child.—*Observations* on the validity of transactions between parent and child. *Smith Cunninghame* v. *Anstruther's Trs.*, 1872, 10 M. (H. L.) 39; 44 J. 407; L. R. 2 Sc. App. 223.

251. Minor—Powers—Trustee on Sequestrated Estate.—A minor cannot be a trustee on a sequestrated estate. *Threshie*, 30 May 1815, F. C.

252. Minor—Powers.—*Held* that a minor was not entitled to plead the brocard "*minor non tenetur placitare super hæreditate paterna*" to an action brought for the purpose of setting aside the settlement, in virtue of which the minor's ancestor and the minor himself possessed the heritage, where the ancestor had obtained himself infeft on a seisin, whose warrant flowed from a party who had no *ex facie* or intelligible title to grant it. *Tomison* v. *Tomison*, 1840, 2 D. 239; 12 J. 382.

253. Minor — Powers — Disposition — Reduction — Consent of Husband. — A disposition by a lady was reduced on the ground of minority although granted with consent of her husband who was major. *Held* also that a warrandice by the husband of the wife's deed was also reducible but that a conveyance in the same deed of his right of courtesy was effectual. *Hamilton* v. *Boswell*, 1720, Robert. 346.

254. Minor—Powers—Decree in Absence — Reduction.—Although the pursuer of a reduction of a decree in absence has been found, in respect of minority, not excluded from reducing it, he is not entitled forthwith to be reponed, but only to be heard on the merits of the decree. *Macdonald* v. *Brown*, 1838, 14 Fac. 206.

255. Minor — Powers — Executor. — A minor or pupil may be confirmed executor. *Johnstone* v. *Lowden*, 1838, 16 S. 541.

256. Minor—Powers—Homologation of Deed.—*Held* that an averment of homologation as barring challenge of a deed was irrelevant as the party said to have homologated the deed was then a minor. *M'Gibbon* v. *M'Gibbon*, 1852, 24 J. 306; 1 Stuart 569.

257. Minor — Powers — Reduction of Father's Will — Personal Bar. — *Held* that possession by a minor under his father's trust deed and settlement, challengeable on deathbed, does not bar a challenge by his heir-at-law. *Irving* v. *Tait*, 3 June 1808, F. C.; M. "Deathbed" App. No. 6.

258. Minor—Powers—Patron—Presentation. — Minors may, with consent of their curators, exercise the rights of a patron in presentation. *Brown* v. *Johnstone*, 1830, 8 S. 899; 5 Fac. 729.

259. Minor—Powers—General Service—Reduction.—A son expede a general service as heir-male and of provision, in terms of a marriage-contract, to his father, brought a reduction of certain deeds executed by him as in fraud of the contract, and died while it was in dependence, leaving an infant son, whose tutors served him heir in general to his father. After coming of age, he compounded his father's right to reduce the deeds challenged, and within the *quadriennium utile* brought a reduction of the service which had been expede, on the ground of minority and lesion. *Held* that as his right of challenge and power to compound were independent of the service, he was entitled to have the general service declared void, and had not by it incurred liability to pay his father's debts. *Blair & Others* v. *Moncrieff*, 1766, 2 Pat. 126. Affg. M. 12871.

260. Minor — Powers — Suspension — Oath. — In a suspension at the instance of two parties, one of whom was a minor and abroad, the court having passed the note on juratory caution only, of consent of the respondent remitted to take the oath of the one suspender, and of one of the curators of the minor. *Andrew & Others* v. *Colquhoun*, 1852, 15 D. 164; 25 J. 118; 2 Stuart 82.

261. Minor—Powers—Submission with Trustees on Attaining Majority—Bequests Payable on Attaining Twenty-Five.—A truster directed his trustees to divide his property among his children on their attaining the age of twenty-five. *Held* that the restraint imposed in regard to the estate could not deprive the children of the rights of legal majority on their attaining the age of twenty-one, and that a submission entered into by them with the trustees on their attaining that age, and acted upon by them, could not be repudiated by them on attaining the age of twenty-five. *Adam* v. *Adam*, 1861, 23 D. 859; 33 J. 432.

262. Minor—Powers—Lesion—Restitution—Mora.—A minor granted a mandate, when abroad, to uplift any sum arising to him out of a certain process. The mandatary did so, and granted a discharge of the process. The minor, after majority, discharged the mandatary. *Held* not entitled to reduce that discharge, and the discharge of the process, after a lapse of fifteen years, on the allegation that no curator *ad litem* had been appointed to him during the process, or that the mandatary had exceeded his powers in discharging it. *Roberton* v. *Roberton*, 1831, 9 S. 865.

263. Minor—Powers—Lesion—Bond—Reduction.—A minor sister, with consent of her father, granted a bond to her brother for £300, in consideration of trouble and expense incurred by him relative to an action in which she got decree for £900. *Held* that the bond was reducible on the head

of minority and lesion. *Rose* v. *Rose*, 1821, 1 S. 154.

264. Minor — Powers — Lesion — Reduction — Quadriennium utile. — In order to make the *quadriennium utile* available, a reduction on the ground of minority and lesion must be brought within the four years. It is not enough that the plea shall have been stated within the four years in defence to an action on a document granted during minority. *Stewart* v. *Snodgrass*, 1860, 23 D. 187; 33 J. 91.

265. Minor — Powers — Lesion — Discharge of Tocher.—A discharge by a minor without curators of part of the tocher stipulated in his contract of marriage, *reduced* at the instance of the granter, on the head of minority and lesion, and as being *contra fidem tabularum nuptialium*. *Morrison* v. *Viscount Arbuthnott*, 1728, 1 Pat. 7. Affg. M. 9487.

266. Minor — Powers — Lesion — Quadriennium utile—Fraud.—*Held* that the lapse of the *quadriennium utile* could not be pleaded in bar of a reduction of a bond, in which it was averred that the pursuer was a minor when the bond was granted; that he was not indebted to the defender; that he was induced to sign the bond solely as cautioner for his father, who was his administrator-in-law, and who concurred with him in granting it; and that the defender, in the knowledge of these facts, took the bond for his own benefit. *Manuel* v. *Manuel & Mandataries*, 1853, 15 D. 284; 25 J. 182; 2 Stuart 149.

267. Minor—Powers—Lesion—Restitution.—A general averment of misrepresentation and concealment on the part of a brother, *held* irrelevant to infer reduction of a probative document granted to third parties, homologating a transaction entered into in minority. *Kyle* v. *Allan*, 1832, 11 S. 87.

268. Minor—Powers—Lesion—Reduction of Deed.—*Held* that deeds granted by a minor to a mother for the aliment of a child who had died in minority, and whom the minor represented, were reducible on the ground of minority and lesion only in so far as they ascertained a liquidated debt. *Davidson* v. *Watson*, 1740, 1 Pat. 288. Revg. M. 11077; 5 Br. S. 200.

269. Minor—Powers—Lesion—Restitution. — A firm of sharebrokers bought and sold railway shares on the employment of a minor, the result of which was a balance of £290 against the minor, for which they brought an action of payment. The court *sustained* a defence of minority and lesion, in respect that there were circumstances to lead the pursuers to the knowledge of the minority, and that they did not allege that he fraudulently represented himself as of full age. *Dennistoun & Jardine* v. *Mudie*, 1850, 12 D. 613; 22 J. 195.

270. Minor—Powers—Lesion—Restitution.—A minor, in trade, gave a receipt for £3000, which was not a trade transaction. He alleged that he had not received £3000, but only certain items and orders, some of which had been paid, and others not. The court ordered an inquiry as to the amount received. *Crawford* v. *Bennet*, 1827, 2 W. & S. 608.

271. Minor—Possession of Parent's Estate — Confirmation. — A minor daughter, who survived her mother, *held* to have acquired a vested right to her mother's share of the moveables without confirmation, in respect that the possession of them by her father was in law the possession of the minor. *Observed*, that in this question no distinction could be entertained between the case of minority and that of pupillage. *Jamieson* v. *Spottiswood's Trs.*, 6 Dec. 1808, F. C.

272. Pupil—Action against—Adjudication.—Adjudication against a pupil *set aside*, in respect the action for the constitution of debt, although directed, was not executed against his tutors. *M'Turk* v. *Marshall*, 7 Feb. 1815, F. C.

273. Pupil—Action against—Citation.—An action was raised concluding against a pupil as representing his father, and against his father's trustees *nominatim*. It was executed against the pupil and his tutors and curators, if he any had; but in the *partibus* there was no mention of tutors and curators. A joint defence was given in in name of the pupil and of the trustees *eo nomine*. *Held* that the pupil was not made a party to the action, and the interlocutors pronounced in it *quoad* him reduced. *E. of Craven* v. *Lord Elibank's Trs.*, 1854, 16 D. 811; 26 J. 403.

274. Pupil — Action against — Edictal Citation of Tutors and Curators.—A decree against a pupil who has no tutors, and for whom no appearance is made, on a summons regularly executed against him personally, with edictal citation against tutors and curators, but without the appointment of a tutor *ad litem*, is not null, but merely subject to be opened up as a decree in absence. *Sinclair* v. *Stark*, 1828, 6 S. 336; 3 Fac. 371.

275. Pupil — Action against — Edictal Citation of Tutors.—Where a pupil has no tutors, it is necessary that a tutor *ad litem* should be appointed in order to render a decree against him effectual, and edictal citation of tutors and curators is not sufficient. *Bannatyne*, 14 Dec. 1814, F. C.

276. Pupil — Action against — Competency — Tutors not Called. — An action is incompetently brought against a pupil whose tutors and curators, if he any has, are not called; and the objection cannot be remedied by the appointment of a tutor *ad litem*, even when appearance is made for the pupil. *Thomson's Trs.* v. *Livingston*, 1863, 2 M. 114; 36 J. 52.

277. Pupil — Action against — Decree Undefended.—A decree against a pupil undefended is null, and the pupil is entitled to

be restored against it *in integrum*. *Dick* v. *M'Ilwham*, 1829, 7 S. 364.

278. Pupil—Action against—Reduction of Decree—Mora.—An objection to a decree under a judicial sale, that the rights of a pupil were thereby affected, and no tutor *ad litem* had been appointed, *sustained* after the lapse of more than twenty years from its date. *Agnew* v. *E. of Stair*, 1822, 1 Shaw's App. 333.

279. Pupil—Action against—No Tutor ad litem.—A decree against a pupil without tutors or a tutor *ad litem* is to be regarded as a decree in absence; and all parties to be restored to the state in which they stood at its date, and their rights judged of accordingly. *Dick* v. *M'Ilwham*, 1828, 6 S. 798.

280. Pupil — Decree of Adjudication against—Effect of.—A decree of adjudication obtained against a pupil who has no tutor or curator is not null, but may be opened up as a decree in absence. *Grieve* v. *Burns*, 1871, 9 M. 582; 43 J. 354.

281. Pupil—Powers.—A sum found to be vested in and payable to an infant girl, ordered to be paid over by trustees to her father as her administrator-at-law. *Cattanach* v. *Thom's Exrs.*, 1858, 20 D. 1206.

282. Pupil — Powers — Bonds, etc.—Lesion.—In an action to reduce certain bonds and a bill of exchange, on the grounds of minority and lesion, verdict for the pursuer in part, and for the defender in part, on the grounds of *in rem versum* and homologation. *Dempster* v. *Potts*, 1837, 15 S. 364; 12 Fac. 20.

283. Pupil — Powers — Deed Conferring Powers on Father—Validity.—*Held* that a deed executed by a pupil and a minor *pubes*, with consent of their father as administrator-in-law, and by which the father acquired a faculty or power affecting the heritage, was null. *M'Gibbon* v. *M'Gibbon*, 1852, 14 D. 605; 24 J. 306; 1 Stuart 569.

284. Pupil—Powers—Lesion—Reduction of Decree.—*Held*, in an action of reduction reductive of decrees against a pupil of a disposition of an heritable estate in favour of his father, that it was a simulate right without consideration, that the pupil was not lesed, and that decree of reduction thereof had been properly pronounced. *Sinclair* v. *Brown*, 1841, 3 D. 871.

285. Pupil — Powers — Partnership — Liability of Father.—A father who engaged his pupil son as a partner of a company, *held* liable for the debts of the company as if he himself were the partner, on the principle that he could not make the pupil a partner to the effect of such liability. *M'Aulay* v. *Renny*, 1803, 2 Bell 624. *Calder* v. *Downie*, 11 Dec. 1811, F. C.

286. Pupil — Powers — Title to Sue — Personal Injury.—An action of damages for personal injury, at the instance of a pupil *nominatim*, with concurrence of his father as his administrator-at-law, and also at the instance of the father *nominatim*, as such administrator, concluding for payment of damages and expenses to the pupil *nominatim*, *sustained*. *Keith* v. *Archer*, 1836, 15 S. 116; 12 Fac. 124.

287. Pupil — Powers — Title to Sue—Action Raised by Tutors in Name of Pupil.—Decree obtained in an action raised by tutors in name of their pupil, *held* not reducible on that ground by a third party. *M'Kenzie* v. *Sir J. G. Sinclair*, 1834, 12 S. 822.

288. Pupil—Powers—Prorogating Jurisdiction.—A pupil without tutors, or a tutor *ad litem*, cannot prorogate jurisdiction. *Rankine* v. *Rankine*, 31 May 1821, F. C.; 1 S. 43.

289. Pupil—Tutor — Accounting.—*Opinion*, that expenses incurred by Scots tutors, appointed by a Scotsman to his daughter, a Scots heiress, in resisting proceedings in the Court of Chancery for the purpose of making the pupil (who was temporarily in England) a ward of Chancery, and having English guardians appointed, formed a proper charge in their tutory accounts, though they were unsuccessful both in the Court of Chancery and House of Lords, and no judgment as to costs had been pronounced in either court. *Beattie* v. *Johnstone*, 1849, 12 D. 357; 22 J. 113.

290. Pupil — Tutor — Accounting. — Accounts and vouchers of a tutor, who acted as factor, were lodged with an accountant to report in a process of count and reckoning against him by a co-tutor, and a subsequent accounting was brought by the pupil on his passing the years of puberty. *Held* that the factor was entitled to take credit for the accountant's fee paid to recover his vouchers to be produced in the process. *Stewart* v. *Stevenson*, 1828, 6 S. 591.

291. Pupil—Tutor — Accounting—Reimbursement of Monies Expended—Tutorial Inventories not Made up.—A tutor or curator, although acting as a trustee under a trust deed, who has not made up inventories in terms of the Act, 1672, c. 2, is not entitled to reimbursement of money applied to the maintenance or outfit of a pupil or minor, if it encroach upon his capital. *Thomson* v. *Waddell*, 16 June 1812, F. C.

292. Pupil—Tutor—Advocation of Brief of Tutory.—A brief of tutory advocated from magistrates of a burgh, and remitted in terms of 1 and 2 Geo. IV. c. 38, and 1 and 2 Vict. c. 86, notwithstanding a proof had been taken under a previous brief, but which was abandoned under a reservation to bring a new brief. *Godwin* v. *Sawers*, 1841, 3 D. 996; 16 Fac. 1032.

293. Pupil—Tutor—Auctor in rem suam.—The objection that a tutor cannot be *auctor in rem suam* is personal to the pupil, and cannot be stated by any third party. *Downie* v. *Campbell*, 31 Jan. 1815, F. C.

294. Pupil—Tutor—Appointment—Married Woman.—*Question*, whether a married woman can be a tutor or curator. *Stoddart* v. *Rutherford*, 30 June 1812, F. C.

295. Pupil—Tutor ad litem—Appointment—Competency.—It is incompetent to appoint a tutor *ad litem* for a pupil called as defender, for whom no appearance has been entered. *Calderhead's Trs.* v. *Fyfe*, 1832, 10 S. 582; 7 Fac. 439.

296. Pupil—Tutor ad litem—Appointment.—The court *refused* to appoint a factor *loco tutoris* to children of a bankrupt under sequestration, but appointed a tutor *ad litem*. *Saunders*, 1821, 1 S. 115.

297. Pupil — Tutors-Dative — Appointment. — Two clergymen appointed tutors-dative to a pupil heir-at-law, and another clergyman appointed tutor-dative to other pupils, being the younger children, under the Act 19 and 20 Vict. c. 96, s. 19, transferring the duties of the Court of Exchequer in such cases to the Court of Session. *Wilson*, 1857, 19 D. 286; 29 J. 140.

298. Pupil — Tutor-Dative — Appointment.—It is competent to appoint a pupil's nearest agnate as tutor-dative, on a petition to the court. *Urquhart*, 1860, 22 D. 932; 32 J. 394.

299. Pupil — Tutor-Dative — Appointment.—The person entitled to the office of tutor-at-law declined to serve, but expressed readiness to act as tutor-dative. The court conferred that office on him, though year and day had not elapsed after the death of the pupil's father. *Simpson*, 1861, 23 D. 1292; 33 J. 649.

300. Pupil — Tutor-Dative — Appointment.—On an application presented within a year after the death of the pupil's father, and on production of a deed of renunciation of the office of tutor-at-law executed by the party entitled to the office, the court *appointed* tutors-dative. *Martin*, 1859, 22 D. 45; 32 J. 23.

301. Pupil—Tutor Nominate—Appointment — Acceptance — Liability — Failure to Make up Inventories. — Circumstances in which parties, named trustees and tutors and curators under a deed of settlement, were *held* by their acts and deeds to have accepted; and having failed to make up inventories, were bound (notwithstanding a clause of protection) to account under the liabilities of the Act, 1672, c. 2. *Mollison* v. *Murray*, 1833, 12 S. 237; 9 Fac. 155.

302. Pupil—Tutors Nominate—Appointment.—A father appointed his testamentary trustees to be tutors and curators to his children, declaring that if the nomination should fall, a prior nomination of tutors and curators should take effect. The second nomination having fallen as regarded the appointment of curators, not having been executed *in liege poustie*, *held* that the nomination of tutors subsisted, the nomination of tutors and curators being separate. *Greig* v. *Greig*, 1872, 11 M. 20; 45 J. 12.

303. Pupil — Tutor — Appointment — Disqualification.—A party *found* incapable to act as tutor-at-law, who was domiciled in England, and was partner of a company indebted to the pupils. *Hadden* v. *Barr*, 27 Feb. 1822, F. C.; 1 S. 357.

304. Pupil — Tutor — Appointment — Disqualification.—A party claiming to be served tutor-at-law to pupils, found by the verdict of a jury not provident and careful of his own affairs, and his claim *dismissed*. *Godwin* v. *Sawers*, 1842, 4 D. 1451.

305. Pupil — Tutor-at-Law — Appointment—Disqualification.—Service of an uncle as tutor-at-law to his nephews and nieces *refused*, as he had not proved that he was provident in his own affairs. *Sawers* v. *Sawers*, 1842, 4 D. 1451.

306. Pupil—Tutor-Dative—Appointment—Disqualification.—The office of tutor-dative should not be conferred on a party who is not amenable to the jurisdiction of the Scots courts. *E. of Craven and Mandatary* v. *Lord Elibank's Trs.*, 1853, 15 D. 781; 25 J. 464; 2 Stuart 469.

307. Pupil — Tutor — Decree against — Appearance of some Tutors—Effect.—A decree against pupils and their tutors, pronounced after appearance of the pupils and one tutor, is not to be held as a decree in absence as to another tutor who has not appeared. *Wallace* v. *Anderson*, 1826, 5 S. 179.

308. Pupil — Tutor — Duties. — Circumstances in which a tutor was bound to accumulate the rents into a capital, bearing interest at 5 per cent. every three years. *Hamilton* v. *Marshall*, 25 Feb. 1813, F. C.

309. Pupil—Tutor—Duties—Realisation of Estate.—A party died leaving heritable and moveable estate. Part of the latter consisted of shares in the Western Bank. The tutor-at-law of the children, who was himself interested as a shareholder in the bank, did not realise the bank shares. After the lapse of nearly two years, the bank having become insolvent, the Accountant of Court pronounced an order, under the Pupils Protection Act, 12 and 13 Vict. c. 51, on the tutor to consign the value of the shares as at the date of the death of the deceased. The court, in the circumstances, *recalled* the order *hoc statu*. *Accountant of Court* v. *Baird*, 1858, 20 D. 1176; 30 J. 703.

310. Pupil—Tutor—Liability—Intromissions with Estate.—Intromissions by a tutor before making up inventories, but which were afterwards made up, does not subject him personally for debts affecting the estate. *Wallace* v. *Anderson*, 1826, 5 S. 179.

311. Pupil — Tutor — Liability — Investment.—*Held* that a tutor, who had no direct intromissions with the pupil's funds, was nevertheless liable for the contents of an heritable bond, which was *ex facie* an inadequate security. *Murrays* v. *Murray*, 1833, 11 S. 663.

312. Pupil—Tutor—Liability—Failure to Give up Inventories. — Tutors appointed under a deed which declared each liable only for his actual intromissions, having failed to

give up inventories, in terms of 1672, c. 2, *held* liable for omissions, as well as intromissions, and *singuli in solidum*. *Murray* v. *Murray*, 1832, 10 S. 276.

313. Pupil—Tutor—Liability.—*Question*, whether any person but a father, when bequeathing an estate to minors, and naming tutors and curators, can exempt them from all liability, except each for his own actual intromissions. *Moffat* v. *Robertson*, 1834, 12 S. 369; 9 Fac. 216.

314. Pupil—Tutor—Liability of Representatives.—The representative of a tutor who has died prior to litiscontestation is not liable to the penalties of the Act. *Mollison* v. *Murray*, 1833, 12 S. 237; 9 Fac. 152.

315. Pupil—Tutor—Liability—Removing Pupil from Lease—Neglect to Make up Inventories.—A tutor (who was also factor for the landlord) *held* liable in damages for removing a pupil from a lease, and decrees of removing reduced. *Held* that tutors who had neglected to make up inventories were liable *singuli in solidum*. *Henderson* v. *Duff & Henderson*, 1793, 3 Pat. 283.

316. Pupil—Tutor—Liability to Implement Obligations of Pupil's Predecessor.—An agreement to feu property was entered into with a proprietor, who died before it was completed, and was succeeded by a pupil, to whom a tutor-dative was appointed. *Held* that the tutor was bound to implement the agreement. *E. of Aberdeen* v. *Laird*, 1823, 2 S. 527.

317. Pupil—Tutor—Powers—Alienation of Estate.—A tutor cannot enter into a contract of alienation of the pupil's estate, where it is not one of necessary administration, but of discretionary power, exercised by the tutor in the view of ultimately promoting the benefit of the pupil. *Colt* v. *Colt*, 3 July 1801, F. C.

318. Pupil—Tutor — Powers—Appointment of Law Agent.—A law agent and cashier, appointed by his constituent a tutor and curator, along with others, to his minor children, may be employed in the former capacity by the tutors. *Lady Montgomerie* v. *Wauchope*, 4 June 1822, F. C.; 1 S. 453.

319. Pupil—Tutor—Powers—Purchase of Annuity—Advances.—The tutors of a boy of four years of age were authorised to transact for the purchase of an annuity for his maintenance and education during pupillarity, and for an immediate advance to pay debts and expenses already incurred. *E. of Buchan*, 1837, 16 S. 238; 13 Fac. 234. 1839, 1 D. 637.

320. Pupil—Tutor—Powers—Petition to Make Advances—Competency.—Summary petition by a tutor-at-law, for warrant to apply annually part of the capital belonging to his pupils for their maintenance and education, *refused* as incompetent. *Woodrow*, 1830, 8 S. 604; 5 Fac. 467.

321. Pupil—Tutor—Powers—Bond.—In corroboration of a moveable bond taken to his pupil, whom failing, to her father's heirs, the tutor took an heritable bond to the pupil, whom failing, to the father's next-of-kin *nominatim*. *Held* that as the destination in the second bond was equivalent to that in the first bond, the tutor had not exceeded his powers. *Stevenson* v. *Fife*, 1718, Robert. 216.

322. Pupil — Tutor — Powers—Bond—Entailed Estate.—*Held* that the tutors of an heir in pupillarity could not exercise the power in the 21st section of the Entail Amendment Act, allowing an heir, who is liable to pay any sum under a bond of provision by a former heir to younger children, to grant a bond and disposition in security for the amount over the entailed property. *Muirhead's Tutors*, 1849, 11 D. 1249.

323. Pupil — Tutor — Powers — Discharging Bond.—An English guardian cannot discharge a Scots heritable bond of minors domiciled in England. *Young & Co.* v. *Thomson*, 1831, 9 S. 920; 6 Fac. 618.

324. Pupil—Tutor—Powers—Discharge of Bond after Expiration of Office.—*Held* that a discharge of an heritable bond, granted by persons in the capacity of tutors after their office had expired, was null; and that they were bound to relieve the parties to whom the discharge had been granted of all the consequences thereof. *Lockhart* v. *M'Kenzie's Trs.*, 1829, 3 W. & S. 481. Affg. 5 S. 136.

325. Pupil—Tutor — Powers—Collation.—A tenant died possessed of a lease and stocking of the farm, and leaving a widow and several young children. *Held* that although it had been considered beneficial for all concerned that the subjects should be collated, and that the widow should manage the farm, the tutor-at-law of the heir was entitled to remove her and repudiate the collation. *M'Feggan* v. *Murray*, 1805, Hume 887.

326. Pupil—Tutor—Powers — Uplifting Consigned Money—Procedure.—Course of procedure under 12 and 13 Vict. c. 51 (Pupils Protection Act), in reference to a tutor-at-law who had uplifted money consigned by order of court. *Dewar*, 1853, 16 D. 163; 26 J. 79.

327. Pupil—Tutor—Powers—Co-Tutors—Voting.—An objection to a vote at an election of a common agent in a ranking and sale, that it was given by one of two acting tutors as being the "sole acting, accepting, and surviving tutor and curator," *sustained*. *Thorburn* v. *Ranken*, 1832, 10 S. 380; 7 Fac. 285.

328. Pupil—Tutor—Powers—Borrowing Money.—Circumstances in which the court granted authority to a tutor-at-law to effect a loan over his pupil's estate. *Wilson*, 1835, 13 S. 1046.

329. Pupil—Tutor—Powers—Borrowing Money.—Where the moveable property of a deceased testator was insufficient to pay his debts, the court, on the application of the tutors nominate of his children, who were all in pupillarity, *granted* authority to borrow money on the security of the heritable property

to pay them, but *refused* to declare prospectively that such loan should be "in all respects as valid and effectual as if granted by the said pupil (the eldest son) after having attained majority." *Copland*, 1854, 17 D. 115; 27 J. 31.

330. Pupil—Tutor—Powers—Borrowing Money.—A power granted to a tutor-dative to borrow money and grant security over the estate of the pupil, to repair the property and make certain necessary payments. *Crawford*, 1839, 1 D. 1183; 14 Fac. 1203.

331. Pupil—Tutor—Powers—Borrowing Money.—*Held*, in a question with a party who had lent money to a tutor, which it was alleged was usefully expended for behoof of the pupil, that unless there was evidence of its having been so expended, credit could not be allowed for it. *Blair* v. *Mitchell*, 20 May 1802, F. C.

332. Pupil—Tutor—Powers—Borrowing Money.—In a petition by a tutor-nominate for authority to borrow to relieve his ward's estate from the diligence of his father's creditors, *held* that there was no such incompetency in the application as to warrant its being refused *de plano*, but that the proper course was to remit for inquiry in the usual way. *Callander*, 1869, 6 S. L. R. 527.

333. Pupil—Tutor—Powers—Granting Leases.—The court will not, on a summary petition, authorise the tutor of a pupil to let a lease of the pupil's subjects beyond the endurance of his office. *Beatson*, 24 Feb. 1810, F. C. *Ross* v. *Ross*, 9 Mar. 1820, F. C.

334. Pupil—Tutor—Powers—Granting Lease.—The court *authorised* a tutor-dative to let the family mansion-house of a pupil for a term of years. *Speirs*, 1854, 17 D. 289; 27 J. 122.

335. Pupil—Tutor—Powers—Granting Lease.—The court will authorise tutors-nominate to grant leases for nineteen years when satisfied that they are for the pupil's benefit in the ordinary administration of his estate. *Morison*, 1861, 23 D. 1313; 33 J. 664.

336. Pupil—Tutor—Powers—Granting Lease.—Powers *granted* to tutors-nominate of a child three years old to grant a lease of a farm for nineteen years, where it was clearly for the advantage of the estate to do so. *Morison's Tutors*, 1857, 19 D. 493; 29 J. 234.

337. Pupil—Tutor—Powers—Granting Lease.—The Pupils Protection Act sanctions the granting of leases by tutors-at-law for a period beyond the subsistence of their office. *Kincaid*, 1856, 18 D. 1208; 28 J. 611.

338. Pupil—Tutor—Powers—Granting Leases.—The court *authorised* tutors to let a farm belonging to their pupil ward for nineteen years, as, by so doing, a rent of £570 would be obtained, whereas, if let merely for the uncertain period of the tutors' office, the rent would only be £540. *Halkett*, 1847, 10 D. 146.

339. Pupil—Tutor—Powers—Granting Leases.—The court *granted* power to the tutor testamentary of a pupil heir of entail, to let farms on leases for the period of nineteen years, by public roup or private bargain, as might be most expedient and advantageous to the estate. *Forbes, etc.*, 1838, 1 D. 355; 14 Fac. 387.

340. Pupil—Tutor—Powers—Granting Lease.—Authority *granted* to tutors-nominate to let entailed lands on an agricultural lease for nineteen years to the previous tenant, without advertising for offerers, but after a judicial valuation of the farm. *Brown's Tutors*, 1867, 5 M. 1046; 39 J. 593.

341. Pupil—Tutor—Powers—Granting Leases.—The court *authorised* the tutors of a pupil heir in possession of an entailed estate (1) to grant leases of the agricultural portions of the estate for nineteen years, although the father of the pupil had, in some instances, deviated from the usual rule, and let farms on leases of ten or twelve years; (2) to let the minerals on the estate for thirty-one years; and (3) to let waterfalls for twenty-one years. *Spiers' Tutors*, 1848, 10 D. 1474.

342. Pupil—Tutor—Powers—Granting Lease.—*Held* (1) that it is competent, under the Pupils Protection Act, to grant special leasing powers to tutors-at-law; (2) that they should be granted only where a case of necessity is made out. *Fraser*, 1857, 19 D. 801; 29 J. 367.

343. Pupil—Tutor—Powers—Granting Lease—Colliery.—Circumstances in which powers granted to a father, as administrator-in-law of his pupil child, to concur in granting a lease for nineteen years of coal-fields, one *pro indiviso* half of which was the property of the pupil. *Douglas* (Petitioner), 1867, 6 M. 178; 40 J. 102.

344. Pupil—Tutor—Powers—Granting Lease—Colliery.—Special powers *refused* to a tutor-at-law to grant a lease of a colliery for fourteen years, and to grant a feu-right for workmen's houses. *Waddell*, 1851, 13 D. 739; 23 J. 289.

345. Pupil—Tutor—Powers—Granting Leases—Renunciation.—A tutor *authorised* to renounce a lease, and relet the farm by public roup for twenty-one years, in terms of an entail of the lands. *Brown*, 1846, 9 D. 250; 19 J. 87.

346. Pupil—Tutor—Powers—Renunciation of Lease.—The court *authorised* the tutors-nominate of a pupil to renounce agricultural leases to which the pupil had right under his father's settlement. *Turner*, 1862, 24 D. 694; 34 J. 347.

347. Pupil—Tutor—Powers—Renunciation of Lease.—Although a landlord offered to pay £200 to the tutors of a pupil who had succeeded to a lease for a renunciation of it, and they offered to prove that it was beneficial for the pupil, and that, if refused, the lease

would be forfeited, yet the court *refused* to interfere. *Forman's Tutors*, 1805, Hume 888.

348. Pupil—Tutor—Powers—Renunciation of Lease.—Tutors *authorised* to renounce in favour of the landlord a lease excluding assignees and subtenants, to which the pupil had succeeded, on the landlord agreeing to pay during its currency an annuity to the pupil equal to the highest surplus rent that could be got by a subset. *Blyth* v. *Craig*, 1808, Hume 889.

349. Pupil—Tutor—Powers—Renunciation of Lease.—The Court of Session *authorised* the renunciation of a disadvantageous lease belonging to pupils. *Cockburn's Tutors* v. *Cockburn*, 1825, 3 S. 642.

350. Pupil — Tutor — Powers — Reduction of Lease—Title to Sue.—Circumstances under which it was *held* that the tutor of a pupil was entitled to pursue a reduction of a lease, although inventories had not been made up. *Fraser* v. *Fraser*, 1827, 5 S. 301.

351. Pupil — Tutor — Powers — Sale of Heritage — No Feudal Title. — *Held* that tutors (who had no feudal title) were not entitled without the court's authority to dispone the pupil's lands, and that the objection was not confined to the pupil. *Davidson* v. *M'Kenzie*, 1826, 4 S. 632 ; 1 Fac. 613.

352. Pupil — Tutors — Powers — Sale of Heritage.—A sale of heritable property made by the tutors of a pupil under the authority of the court, set aside as inept. *Vere* v. *Dale*, 29 Feb. 1804, F. C.

353. Pupil — Tutor — Powers — Sale of Heritage.—A petition by a father, as administrator-in-law for his pupil child, for authority to sell heritage, *refused*, but allowed to be altered so as to pray for appointment of a *curator bonis*, and authority to sell. *Sawers*, 1850, 12 D. 905 ; 22 J. 392.

354. Pupil — Tutor — Powers — Sale of Heritage.—A father disponed his estate to the heirs of his marriage, whom failing, substitutes, and named tutors and curators, with power to sell, "in case they should think it for the interest of my children to do so." *Held*, on an application by them for authority to sell and grant a disposition, that evidence must be adduced to show that a sale would be beneficial to the children. *Parrot* v. *Fraser*, 1810, Hume 889.

355. Pupil — Tutor — Powers — Sale of Heritage. — Authority given to a tutor-nominate to sell heritable property belonging to a pupil, for the purpose of paying off heritable debts, with which the property was burdened. *Mackenzie*, 1855, 17 D. 314.

356. Pupil — Tutor — Powers — Sale of Heritage.—Circumstances in which the court *held* that authority might be granted to a tutor-nominate to sell heritage belonging to pupils ; but warrant delayed until a *curator bonis* should be appointed to receive the proceeds on their behalf. *Mackenzie*, 1866, 5 M. 158 ; 39 J. 83.

357. Pupil — Tutor — Powers — Sale of Heritage by Father.—Authority *refused* to the father of a pupil, as tutor-at-law and administrator of his son, to sell or burden a property to which the pupil had succeeded, and of which the father enjoyed a liferent, for the purpose of paying off certain real burdens, and other debts affecting it. *White*, 1855, 17 D. 599 ; 27 J. 625.

358. Pupil — Tutor — Powers — Completion of Title.—The court, distinguishing from the case of a judicial factor, *refused* to authorise tutors-nominate to make up the titles by service, etc., of the pupil, leaving them to act as they should be advised. *Grahame*, 1852, 14 D. 357 ; 24 J. 167 ; 1 Stuart 292.

359. Pupil — Tutor — Removal — Bankruptcy. — A tutor-at-law, who had become bankrupt, removed from the office. *M'Laurin*, 1831, 3 J. 550.

360. Pupil—Tutor—Removal.—It is not relevant to remove a tutor as suspect under the stat. 1672, c. 2, that he is domiciled and resides in England. *Rob* v. *Rob*, 22 Dec. 1184, F. C.

361. Pupil — Tutor — Removal — Failure to Give up Inventories.—*Held* that where a party agreed to act as tutor-at-law for a pupil, but did not meddle with the writs and means of the estate of the pupil, it was not relevant to have him removed *qua* suspect, under the stat. 1672, c. 2, that he had delayed to make up inventories. *Rob* v. *Rob*, 22 Dec. 1814, F. C.

362. Pupil — Tutor — Removal — Failure to Give up Inventories.—Tutor removed as suspect, under the stat. 1672, c. 2, for having neglected to make up judicial inventories. *Gibson & Thomson* v. *Sharp & Robb*, 21 Dec. 1811, F. C.

363. Pupil—Tutor—Removal of—Failure to Give up Inventories—Disclamation of Nearest of Kin—Title to Sue.—Tutors who had intromitted with their pupil's effects before making up inventories, removed as suspect. The disclamation of the nearest of kin in an action for removing tutors is no bar to the title of the pupils to insist in it. *Austin* v. *Wallace*, 1826, 5 S. 177.

364. Pupil—Tutor—Removal.—A tutor-at-law who had been guilty of contempt of court and malversation, and was removed from his office, *dismissed* from the bar *simpliciter*, and not imprisoned, in respect the result of the proceedings taken against him had been to deprive him of everything he possessed, and leave him destitute. *Accountant of Court* v. *Dewar*, 1854, 16 D. 489 ; 26 J. 226.

365. Pupil — Tutor — Removal — Procedure.—In a petition and complaint for the removal of a tutor-at-law as suspect for alleged malversations in office, *observed* that, in cases of extreme urgency, the court might interpose on a summary petition ; but as this case did not require extraordinary despatch, the court ordered an ordinary action to be repeated, and in the meantime sisted the complaint.

Butchart v. *Butchart*, 1851, 13 D. 1258; 23 J. 595.

366. Pupil—Tutor—Remuneration.—An uncle who acted as tutor-at-law to his niece and employed a factor and agent (who were paid from the estate), *held* not entitled to recompense for his trouble or to expenses in the management. *Scott* v. *The Fife Bank*, 1833, 5 J. 204.

367. Pupil—Tutory—Termination of.—A gift of tutory to three parties does not fall by the death of one of them *Stewart* v. *Baikie*, 1828, 7 S. 330; 4 Fac. 390.

368. Pupil—Tutory—Termination of.—The death of one of several tutors-dative terminates the tutory. *Stewart* v. *Scott*, 1834, 7 W. & S. 211. Revg. 10 S. 394; 7 Fac. 316.

369. Pupil—Tutor—Title to Sue—Confirmation.—A pupil who pursues, by his administrator-in-law, as executor or next-of-kin, must produce a confirmation before extract. *Reid* v. *Turner*, 1830, 8 S. 960.

370. Pupil—Tutorial Accounts—Expense of Litigation.—Testamentary tutors, under the advice of the Dean of Faculty, entered into litigation in England, and were unsuccessful. *Held* that they were entitled to charge the expense in their tutorial accounts. *Johnstone* v. *Beattie*, 1856, 18 D. 343; 28 J. 161.

371. Pupil—Tutorial Accounts—Summary Petition—Competency.—It is incompetent to present a summary petition to have the accounts and intromissions of a tutor approved of. *Marjoribanks*, 1846, 9 D. 168.

372. Pupil—Tutorial Accounts—Petition to Audit.—Petition to audit tutorial accounts *superseded*, the children being about to choose curators. *Ritchie*, 1830, 8 S. 469.

373. Pupil—Tutorial Inventories.—In making up tutorial inventories to children whose father had been illegitimate, the court *authorised* them to be made at the sight of the nearest of kin on the mother's side only. *Auchincloss*, 1831, 9 S. 380.

374. Pupil—Tutorial Inventories—Petition to Dispense with Citation of Next-of-Kin Resident in England—Necessity for.—In an action of giving up of tutorial inventories the tutors called as defenders the nearest relatives of the pupil resident in Scotland, and presented a petition to the court to dispense with the citation of the next-of-kin who were resident in England. The court expressed some doubt as to the necessity of the application, but after inquiry *ordered* intimation in common form. *Buchan, etc.*, 1873, 11 M. 662; 45 J. 417.

375. Pupil—Tutorial Inventories—Citation of Next-of-Kin.—Where there were no relations on the mother's side in Scotland, and a petition was presented by tutors craving the court to find that they complied with the stat. 1672, c. 2, if they made up inventories with the consent of two of the next-of-kin residing in England, or, failing the concurrence of these parties, if a summons was raised against them citing them to concur, and therefore craving warrant to cite them, the court *found* it necessary to cite the next-of-kin residing in England. *Lady Blantyre*, 1832, 10 S. 702.

376. Pupil—Tutorial Inventories—Citation of Next-of-Kin.—One of the pupil's next-of-kin on the mother's side being the wife of a tutor, *held* not necessary to cite her to concur in making up inventories, though no other cognates were in Scotland. *Lady Blantyre*, 1832, 10 S. 702.

377. Pupil—Tutorial Inventories—Citation of Next-of-Kin.—Dispensation *granted*, in an action for making up tutorial inventories, from citing the next-of-kin on the mother's side, who lived beyond the jurisdiction of the court. *Hobbs*, 1831, 9 S. 841. *Shields*, 1832, 10 S. 282. See also *Cruickshank*, 11 Feb. 1819, F. C.

378. Pupil—Tutorial Inventories—Citation of Next-of-Kin.—Personal intimation *ordered* to pupil's next-of-kin furth of the kingdom, whose addresses were known, in an application to dispense with their concurrence or citation in making up inventories. *Thomson*, 1855, 18 D. 193; 28 J. 77.

379. Pupil—Tutorial Inventories—Citation of Next-of-Kin.—The court will not dispense with intimation of a petition to dispense with citation of pupils' next-of-kin in a process for making up tutorial inventories in the case of bastards. *Wilson & Alexander*, 1859, 21 D. 736.

380. Pupil—Tutorial Inventories—Next-of-Kin—Citation—Process.—In making up tutorial and curatorial inventories, where the pupils have no major next-of-kin resident in Scotland, the regular way of obtaining a dispensation with their citation is by a written petition to the court. *De Maria* v. *De Maria*, 1831, 3 J. 536.

381. Stepmother—Right to Interest of Child's Estate for Maintenance of Child.—Trustees were directed to pay the income of an estate to the guardian of a child for his maintenance and education. The child lived with his stepmother and also had a factor *loco tutoris*. *Observed*, that the interest fell to be paid to the stepmother for the child's maintenance and not to the factor. *Ferguson* v. *Robertson*, 1869, 41 J. 212; 6 S. L. R. 238.

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Validity of Partnership, 244–249.

1. Constitution — Agreement to Accept Fixed Sum from Profits.—Agreeing to accept a fixed annual sum out of the profits of a concern, is sufficient to constitute the party so agreeing a partner of the concern. *M'Kinlay* v. *Gillon*, 1831, 5 W. & S. 468. Affg. 9 S. 90.

2. Constitution—Contract Signed but not Acted on and not Published. — An allegation that a brother, who traded under the firm of J. S. & Co., induced a younger brother to sign a contract of partnership which was not acted on by the latter, and had been afterwards cancelled and was unknown, *held* not relevant to liberate the latter from liability for a bill granted by his brother under the firm during the existence of the contract. *Watson* v. *Smith*, 1806, Hume 756.

3. Constitution — Evidence. — It is incompetent to ask whether a witness believed that two persons were acting in partnership; but he may be asked as to facts, to show that they acted as partners. *Chatto & Co.* v. *Piper & Co.*, 1827, 4 Mur. 354.

4. Constitution — Evidence — Statement of Partner.—In an action to have a defender found a partner of a company, the statements of another partner are admissible as part of the *res gestæ*; but the effect of them is a different question. *Smith* v. *Puller*, 1820, 2 Mur. 342.

5. Constitution — Evidence. — Circumstances under which it was *held* that there was no evidence of the respondent being a partner of a company indebted to the appellants. *Learmonth & Co.*, 1823, 1 Shaw's App. 481.

6. Constitution—Lease.—*Question* as to constitution of a partnership under a joint lease. *Dickson* v. *Dickson*, 1821, 1 S. 113.

7. Constitution — Lease — Heirs of Partners. — Leases of coal-works and salt-works by two adjacent proprietors to themselves and each other, to the effect of creating a partnership for 124 years, *held* binding on heirs. *Warner* v. *Cuninghame*, 1815, 3 Dow 76.

8. Constitution—Partner or Servant.—Circumstances in which *held* that a person who had agreed to act as editor of a Post Office Directory at a fixed salary was in reality a partner in the adventure, and only entitled to his salary if there should be profits. *Gunn* v. *Ballantyne & Co.*, 1870, 7 S. L. R. 289.

9. Constitution—Rebus ipsis et factis.—Where goods were purchased on individual account, and thereafter an interest was purchased therein by another, as part of a cargo shipped for foreign trade, on which the first purchaser effected insurances; he having died, circumstances in which *held*, although there was no written contract, there was an existing copartnery, and that the deceased, in purchasing the goods, ordering the insurances, etc., acted as *præpositus negotiis* of the company, and bound the other partners. *Cunningham* v. *Kinnear, etc.*, 1765, 2 Pat. 114.

10. Constitution—Rebus ipsis et factis. —Liability as partners of a company *held* to

be constituted *rebus ipsis et factis*, although the parties had signed no contract. *Dundee Rly. Co.* v. *Miller*, 1832, 10 S. 269; 7 Fac. 212.

11. Constitution—Rebus ipsis et factis.—Circumstances in which a jury *found* that a pursuer failed to prove his having been a partner with the defender. *Mack* v. *Cleland*, 1832, 10 S. 851.

12. Constitution—Rebus ipsis et factis.—A son was engaged in extensive cash and bill transactions, in which his father was concerned. After the father died, the son became bankrupt, and his estate was sequestrated. Circumstances *held* not to infer any claim of debt against the father's estate by the trustee in the sequestration, in respect of these transactions. *Mansfield* v. *Rennie's Trs.*, 1835, 14 S. 128.

13. Constitution—Rebus ipsis et factis — Partnership without Name — Bill of Exchange.—*Held* that a summons was competently libelled which stated that the defender and his deceased brother carried on business together, but without assuming any company firm, and that the defender, as surviving partner in such business, and as representing his brother, the other partner therein, was indebted to the pursuers in the contents of certain bills which his brother had accepted in relation to the business. *National Bank of Scotland* v. *Hope*, 1837, 16 S. 177; 13 Fac. 181.

14. Constitution—Rebus ipsis et factis.—*Held* that an association of proprietors of mills and works upon the banks of a stream, for the purpose of maintaining reservoirs, etc., and defraying the expenses thereof, had been constituted, and that a certain proprietor had become a member of this association, and as such was liable in the proportion of the annual expense allocated upon his property, although no formal contract had been entered into; and *observed*, that the power of assessing the members proportionally for the expense incurred is necessarily implied in the nature and purposes of such an association. *Orr & Co.* v. *Pollock*, 1840, 2 D. 1092.

15. Constitution—Rebus ipsis et factis.—The A railway company was by statute amalgamated with the B railway company, under the proviso that, on notice given by the A shareholders, the B company should be bound to purchase and redeem their stock at a certain specified price. The A shareholders gave the required notice, and thereafter raised actions against the B company, for payment of the redemption-money. Thereupon certain parties, who stated that they were creditors of the B company, for work done in the formation of both railways, and had obtained decree for their debts, but that the B company, though willing, were for the present unable to meet the same, applied for interdict against the B company paying the redemption-money, and against the A shareholders from proceeding against the B company for recovery of the same, until the suspenders should be paid, on the ground that the A shareholders, as in a question with the applicants, were truly partners, and not creditors of the B company. The court, without giving any opinion on the points raised, *refused* the interdict as incompetent. *Stephenson & Co.* v. *Caledonian Rly.*, 1851, 23 J. 426.

16. Constitution — Share of Profits.—Circumstances under which *held* that a party who held a nominal share in the stock of a company, with a share of profits corresponding thereto, but who was truly a manager with a salary, to which such share of profits was to be added as an inducement to exert his skill and industry, was not liable, in a question with the other partner, to a share of loss. *Geddes* v. *Wallace*, 1820, 2 Bligh 270; 6 Pat. 643.

17. Constitution—Trustees Carrying on Business whether Partners or not.—A truster directed that his business of G. P. & Co. should be carried on by his son for behoof of himself and the truster's family, an annual balance-sheet to be made up at the sight and to the satisfaction of his trustees, the profits to be divided—one-half to his son, and the other half to his widow—and the trustees to have a discretionary power to dissolve the firm and wind up the business. After the truster's death the business was carried on by the son in name of the firm, who divided the profits with the widow as directed. The firm and the son having been sequestrated, a question arose between the creditors of the son as an individual and those of the company, whether the trustees of the father were partners of the firm. *Held* that they were not *Morrison (Paterson's Tr.)* v. *Learmont & Co.*, 1870, 8 M. 500; 42 J. 232.

18. Constitution—Victualling Association.—A victualling association for supplying themselves and the public, and purchasing on credit, *held* to be a copartnery, and the members to incur the ordinary obligations of partners. *Sawers* v. *Tradestown Victualling Society*, 24 Feb. 1815, F. C. See also *Wright* v. *Arthur*, 1832, 11 S. 212.

19. Contract of Copartnery—Second Contract Prorogating First and Inserting Limiting Condition.—Two parties entered into a contract of partnership for working coal, under which a permission in general terms was granted to work coals in the lands of one of them, by means of pits sunk in the lands of the other; and thereafter they entered into another contract, prorogating the whole terms of the first contract, but declaring that the coal in the lands of the first party should be worked only to the east of a certain point. *Held* that the company had no right to work beyond that point. *Cunninghame* v. *Warner*, 1824, 2 Shaw's App. 225.

20. Contract of Copartnery—Original and Renewed Contract of Banking Company.—An individual partner, who had subscribed both the original and the renewed and modified contract of a banking company, could

not object (when called on for an extra contribution to account of losses sustained under both contracts) that the concerns under each contract were separate, and therefore that his liability under each contract should be established in separate actions. *Drummond* v. *Holliday*, 1831, 9 S. 284.

21. Contract of Copartnery — Original and Renewed Contract—Second Contract not Signed by Party.—A party signed an agreement as joint shareholder of a steamboat, and thereafter a contract of copartnership was subscribed by the majority of shareholders, containing provisions unwarranted by the original agreement, but which he did not sign. *Held* that an action against him, resting exclusively on the contract, could not be maintained. *Sclanders* v. *Kennedy*, 1833, 11 S. 279.

22. Contract of Copartnery—Original and Renewed Contract.—A company carried on business under a contract which expired on 30th June 1836, and a second was commenced immediately thereafter; and on 19th July the company made an agreement to transfer their business and effects, as from 1st July, to another copartnery, in consideration *inter alia* of a bonus to be divided among the partners, "according to their respective interests in the same, as fixed by their present contract of copartnership"; and one of the partners had a larger, and another a proportionally smaller share of the stock under the first contract than they respectively had under the second. *Held* that the agreement must be construed to have reference to the second, and not to the first contract. *Buchanan* v. *Lennox*, 1838, 16 S. 824.

23. Dissolution — Bankruptcy — Dissolution on Bankruptcy of a Partner—Bankruptcy of Another Partnership with a Common Partner.—A condition was made in a contract of copartnery, that in case of bankruptcy of any of the partners, or arrestment in the hands of the manager of the funds of any of the partners not loosed for sixty days, which should be equivalent to notour bankruptcy, the partner should cease to be a partner, and his creditors should have no right to his share, but the same should belong to the other partners, who were to grant bills for the amount of his share according to the last balance. *Held* that although one of the partners was a partner of another company, which became insolvent, and he concurred with the partners of that company in granting a trust deed of their estates for behoof of their creditors, but which was not acted on, he did not thereby forfeit his share in terms of the contract. *Munro* v. *Cowan & Co.*, 8 June 1813, F. C.

24. Dissolution — Bankruptcy—Balance-Sheet.—A clause in a contract of copartnery, obliging the representatives of deceased or the creditors of bankrupt partners to draw their share of stock and profit as the same should stand at the last preceding settlement of the company's affairs, does not apply when there is no stock and profit to divide, and bankruptcy has taken place. *Blair* v. *Douglas, Heron, & Co.*, 1777, 6 Pat. 796.

25. Dissolution—Death or Bankruptcy of Partner.—Circumstances in which death or bankruptcy of partners *held* not to dissolve a company. *Sclater* v. *Clyne*, 1831, 5 W. & S. 625. Affg. 9 S. 248.

26. Dissolution—Death of Partner.—Two partners (without any definite term for their copartnery) took, for the purposes of the partnership, a lease of a quarry to themselves individually (without mention of any partnership), and to a third party, who was truly a cautioner, though taken directly bound to the landlord, and their assignees and subtenants, they always continuing liable for the rents. *Held*, on the death of one partner, that the partnership thereby came to an end, notwithstanding several years of the lease were still to run. *Aitken's Trs.* v. *Shanks*, 1830, 8 S. 753; 5 Fac. 594.

27. Dissolution — Death of Partner — Notice. — Death operates a dissolution of partnership of itself; and, being a public fact, all men are bound to know it. *Christie* v. *Royal Bank of Scotland*, 1839, 1 D. 745; 14 Fac. 825; 2 Robin. 118. *Aytoun* v. *Dundee Bank*, 1844, 6 D. 1409; 16 J. 593.

28. Dissolution—Death of Partner—Contract of Copartnery—Provision for Continuance of Partnership after Death of Partner.—A contract of copartnership between two persons for nineteen years provided that, "in the event of the death of either of the parties during the currency of this contract, the copartnership shall not come to an end, but the surviving partner shall continue to carry on the business along with the representatives of the deceasing partner." *Held* that the partnership was not dissolved by the death of one during the nineteen years, but subsisted as a contract of partnership between the surviving partner and the representatives of the deceased; and *observed*, that the representatives were neither bound nor entitled to make any election. *Hill* v. *Wylie*, 1865, 3 M. 541; 37 J. 271.

29. Dissolution — Death of Partner — Emerging Debt—Assignation of Assets.—After the dissolution of a company by the death of one partner, the surviving partner conveyed the company estate as insolvent to a trustee for creditors. After certain dividends, the outstanding debts due to the company were assigned by the trustee, and the creditors ratified the assignation, and discharged the company and the surviving partner. Afterwards an outstanding debt was recovered. *Held* as between the representatives of the predeceasing partner and the assignee of the trustee (1) that an emerging debt fell to be paid to the surviving partner or his representatives, and that the representatives of the predeceasing partner had merely right to an accounting with the other partner or his representatives; and (2) that here the debt was carried by the onerous assignation, and

that the assignees were preferable. *Duncan's Tr.* v. *Colquhoun & Duncan*, 1863, 35 J. 478.

30. Dissolution — Death of Partner — Guarantee—Intimation.—If a company grant a letter of guarantee, the surviving partner is not liberated by a dissolution in consequence of the death of the other partner, notified in the *Gazette*, but not specially intimated to the holder. *Kemp* v. *Allan*, 17 June 1824, F. C.; 3 S. 153.

31. Dissolution — Death of Partner — Rights of Representatives.—A business was carried on under a deed of copartnery by a body of testamentary trustees, whose interest extended to three-fourths of the capital and profits, and by a surviving partner, whose interest amounted to one-fourth. *Held* that the trustees collectively constituted one partner, and that they could not act in name of the company without the concurrence of the other partner. *Beveridge* v. *Beveridge's Trs.*, 1872, 10 M. (H. L.); 44 J. 171; L. R. 2 Sc. App. 183.

32. Dissolution — Death of Partner — Security against Continuing Obligations.—The representative of a deceased partner of a company is not entitled to demand from the remaining partners, who are in good credit, security to relieve him of the obligation for future rents under certain leases held for behoof of the company, in which the individual partners, with their respective heirs and successors, were taken bound to the landlord. *Murray* v. *Hogarth & Co.*, 1835, 13 S. 453; 10 Fac. 263.

33. Dissolution — Death of Partner — Share — Accounting — Funds Omitted — Mora.—An executor of a deceased partner, fifteen years after the company accounts had been adjusted and settled, *held* entitled to insist that a certain heritable bond which had not been included in the accounting had belonged to the copartnery, and to claim a share therein. *Lister* v. *Sutor*, 1815, 6 Pat. 78.

34. Dissolution — Death of Partner — Share—Accounting—Docqueted Accounts.—Docqueted accounts of an old mercantile firm, although open to correction at the instance of a representative of one of the partners, in so far as they could be shown to be erroneous, must be taken as conclusive in the absence of anything casting doubt on their accuracy, and the onus of establishing their accuracy did not rest on the party founding on them. *Findlay, Bannatyne, & Co.'s Assignee* v. *Donaldson*, 1865, 2 M. (H. L.) 86.

35. Dissolution — Death of Partner — Share—Balance—Date.—A contract of copartnery stipulated that a deceasing partner's share should be taken as fixed by the balance immediately preceding the death. No balance having been struck on the appropriate date immediately preceding the death, but there being one extant for the previous year, *held* that a balance must be made up as at the date when it should have been struck. *Forster* v. *Orr's Trs.*, 1802, 4 Pat. 295.

36. Dissolution — Death of Partner — Share—Balance.—It was stipulated by the original contract of a partnership, that the books should be balanced annually on the 15th of May, and that the representatives of a deceasing partner should be settled with by a medium struck between the annual balance prior to his death and the period of it. The company, by a subsequent resolution, declared that the balance should be struck annually on the 30th of April, and the balances were made accordingly. *Held*, that the balances so struck could not be altered, but must be considered as correct, and conclusive against all concerned. *Russel* v. *Glen*, 1827, 5 S. 221; 2 Fac. 141.

37. Dissolution — Death of Partner — Share — Balance-Sheets and Books.—A writer, with an established business, admitted one of his clerks into partnership without any contract. It appeared from the balance-sheets, and the sums put to the credit of the partners in the books, that for the first nine years the new partner's share was one-sixth, and that, after an interval of three years (during which no balance of the profits had taken place), one-third of the profits for these three years was put to his credit; but no balance took place thereafter, both partners drawing at discretion on the concern. *Held*, on the death of the elder partner (no change having taken place in the respective situations of the parties since the last balance), that the shares of the two partners in the future profits must be determined agreeably to the entry in the books, which were conclusive evidence against both partners. *Blair* v. *Russell*, 1828, 6 S. 836; 1829, 8 S. 72; 5 Fac. 76.

38. Dissolution — Death of Partner — Share—Balance-Sheet.—A contract of copartnery having provided that the Company's books should be annually balanced, and a minute entered in the sederunt-book, and signed, fixing the value of each partner's share in the concern, after making allowance for bad or doubtful debts; and that on the death of any partner, his representatives should be bound to withdraw, on receiving the deceased's share, as ascertained by the minute authenticating the last balance. *Held* that the last balance-sheet, made up before the death of a partner, not being followed by any minute or sederunt in the books, was not *per se* conclusive evidence of the value of the share of that partner. *Dixon & Others* v. *Dixon*, 1834, 6 J. 426.

39. Dissolution — Death of Partner — Share—Balance-Sheet—Error calculi.—By contract of copartnery, two partners agreed that annual balances should be struck, and the interest in the capital of a deceasing or bankrupt partner should be held to be that shown at the last previous balance. The partnership was dissolved by the death of one of the partners. In an action of count and reckoning by the representatives of the first deceasing partner against the representatives of the other, who had paid out the share of the capital of the copartnery belonging to the

first deceaser, *held* that the result shown in the last balance-sheet could only be challenged on the ground of *error calculi*, or of such errors as were apparent on the face of the balance-sheets, and the means of correcting which were to be found in the writings themselves. *M'Laren, etc.* v. *Liddell's Trs.*, 1862, 24 D. 577 ; 34 J. 291.

40. Dissolution — Death of Partner — Share—Value—Arbitration—Public Sale.—Where the executors of a deceased partner of a firm, with the knowledge of the next-of-kin, entered into a reference with the surviving partners to fix the value of the deceased's share in the business, *held* that one of the next-of-kin was barred *personali exceptione* and by *mora* from insisting in a reduction of the award on the ground that the executors had no power to refer. *Observations* on the right of the executors of a deceased partner to insist on a public sale of the business. *M'Kersies* v. *Mitchell, etc.*, 1872, 10 M. 861 ; 44 J. 487.

41. Dissolution — Death of Partner — Liability—Terms of Agreement.—An agreement was entered into between the representatives of a deceased partner of a firm and the surviving partner, relating to specified matters in dispute. *Held*, on a construction of the terms of agreement, that a clause therein, freeing and relieving the representatives of the deceased partner of all debts incurred relative to a certain joint adventure, and of the claims of A as a joint adventurer in and entitled to any part of the said shares, did not include a sum paid by A to the representatives of the deceased partner to extinguish a debt on the joint adventure, which money had not been so applied by them. *Hill* v. *Hill*, 1856, 29 J. 69.

42. Dissolution — Death of Partner — Liability for Order Given after Death before Death Known.—Two orders for goods were given in name of a firm—one in March, the other on 21st May 1761. One of the partners died abroad in April, and the fact of his death was published in London on 23rd May, but was not known to the surviving partner at the date of the second order, which was accepted, and both orders were fulfilled after the death of the partner. The surviving partner having become bankrupt, *held* (1) that the representatives of the deceased partner were liable for the order given and accepted during his life ; but not for that given and accepted after his death. *Cheap* v. *Aiton & Co.*, 1772, 2 Pat. 283. Affg. M. 14573.

43. Dissolution — Duration — No Time Fixed—Reasonable Notice.—Where a partnership is constituted between two individuals for an indefinite time, either of them may withdraw, and so dissolve the company, when he pleases, upon giving reasonable notice of his intention to the other. *Marshall* v. *Marshall*, 26 Jan. 1815, F. C.

44. Dissolution—Property—Debt to Firm —Payment.—Payment to a partner of a firm debt after dissolution of the firm operates as payment to the firm, but *held* that where the debtor had appointed one of the partners as his sole agent, payment to him did not operate as payment to the firm. *Anderson* v. *Rutherfurd*, 1835, 13 S. 488 ; 10 Fac. 282.

45. Dissolution—Property—Lease—Sale.—A lease in the name of a partnership must be exposed to sale on dissolution. *Marshall* v. *Marshall*, 23 Feb. 1816, F. C. *Aitken's Trs.* v. *Shanks*, 1830, 8 S. 753 ; 5 Fac. 594. *M'Whannel* v. *Dobbie*, 1830, 8 S. 914.

46. Dissolution—Property—Overdraft by Partner—Interest.—If a partner has overdrawn his account in the concern, and the parties in winding it up subsequent to its dissolution are in consequence obliged to borrow money, whereby interest is accumulated against the concern, the partner is to be considered not as a mere ordinary debtor, but as an intromitter with the company funds, and as such liable to be charged with accumulated interest after the dissolution, in the same way as had been the practice of the concern prior to the dissolution. *Blair* v. *Russell*, 1829, 8 S. 72 ; 5 Fac. 76.

47. Dissolution—Property—Provision for Payment of Debts before Payment of Profits —Debt Due by Partner.—It was provided in a contract of copartnery, that, on the dissolution of the concern, no division of the stock or profits should take place until the debts due by the company, or to the company by any of the individual partners, should be first paid or secured. *Held* that a partner, on the dissolution of the concern, was not entitled to payment of his share until he paid a debt due to the concern by another company of which he was sole surviving partner ; and circumstances in which it was held that the *proviso* in the contract was not affected by certain agreements subsequently gone into by the partners. *Whytlaw* v. *Coats*, 1800, 4 Pat. 148.

48. Dissolution—Property—Valuation or Sale.—In dividing company property among the copartners, any partner is entitled to have it brought to public sale, and is not bound to fix a value at which he will either part with his own, or take the other partners' shares, although several years may have elapsed since the company was dissolved, its affairs never having been wound up. *Stewart* v. *Simpson*, 1835, 14 S. 72 ; 11 Fac. 49. *Mackersies* v. *Mitchell*, 1872, 10 M. 861 ; 44 J. 487.

49. Dissolution—Retirement of Partner —Acting of Partner after Dissolution—Bill of Exchange.—One of the partners of a dissolved company had no power, after the dissolution, to grant a bill in name of the firm, for a debt alleged to be due by the company, but which had never been constituted during its subsistence ; and an application for sequestration of the company and partners could not competently be founded on such bill. *Snodgrass* v. *Hair*, 1848, 8 D. 390 ; 18 J. 176.

50. Dissolution—Retirement of Partner —Interdict against Using Firm Name—

Judicial Factor.—One of three partners resolved to terminate the copartnery and gave notice thereof to the others. He also petitioned the sheriff to interdict them from disposing of the firm property, using the firm name, etc., and for the appointment of a judicial factor. The sheriff remitted to an accountant and refused interdict. *Held* that his decision was right, and *observed* that, although the petition for appointment of a factor was incompetent, the appellant was barred by his consent from now raising that objection. *Rome* v. *Rome*, 1872, 9 S. L. R. 492.

51. Dissolution—Retirement of Partner—Liability—Continuing to Draw Profits.—A copartnery was dissolved by the retirement of one of the partners, whose share of stock, etc., was transferred to the partner continuing to carry on the business, and it was provided that the retiring partner should still continue to draw a share of the profits of the concern. *Held*, in a question with creditors, that the retiring partner was still a partner, and liable as such. *Bolton, etc.* v. *Mansfield, etc.*, 1787, 3 Pat. 70.

52. Dissolution—Retirement of Partner—Liability—Subsequent Defalcations.—Parties retiring from a company on the terms prescribed by the contract, are not liable to relieve the remaining partners from the consequences of defalcation of funds subsequently arising. *Wright* v. *Gardner's Trs.*, 1831, 9 S. 721.

53. Dissolution—Retirement of Partner—Liability—Acceptance by Firm of Disponee of Retiring Partner's Interest.—Several persons were members of a copartnership, under the contract of which representatives were allowed to dispose of the share of a deceased partner, but with an option to the company to take the share. A, a partner, died at a time when bond debts had been contracted by the company, but there was a large surplus of funds, after deducting all obligations. A's trustees transferred his share to B, one of the partners, who was received by the company as in his right, and the company eventually became insolvent, the bond debts being still unpaid. *Held* that the other partners had no claim for proportionate relief against A's trustees. *Lindesay* v. *Inglis's Trs.*, 1832, 11 S. 181.

54. Dissolution—Retirement of Partner—Liability—Notice—Prescription.—Although a partner had retired from a company, and duly published his retirement, and conveyed his share of the stock to the other partners, and they had for more than six years paid interest on a bill accepted prior to his retirement, *held* that he was still liable for it; and a plea of prescription *repelled*. *Milliken* v. *Love & Crawford*, 1803, Hume 754.

55. Dissolution—Retirement of Partner—Liability—Notice.—Although a partner advertised in a Glasgow newspaper, on the 29th December, his retirement from the company, yet *held* liable for a bill indorsed to bankers in Stirling, on discount by the other partner under the company firm, on the 31st, and though no proceedings were taken against him for nine years. *Campbell, Thomson, & Co.* v. *M'Lintock*, 1803, Hume 755.

56. Dissolution—Retirement of Partn—Liability—Notice—Latent Partner.—A party in Scotland agreed with another in America to ship goods to him for sale, and divide profit and loss; and after doing business, without a firm, for some time, they dissolved the agreement, but no public notice was given; and one of them continued in trade, and became bankrupt. *Held* that the other partner was liable for the debts, that no distinction existed as to this between latent and public partners. *Kay* v. *Pollock*, 27 Jan. 1809, F. C.

57. Dissolution—Retirement of Partner—Liability—Notice.—A private dissolution of copartnery *held* sufficient to free a partner withdrawing from a debt contracted by the other partner under a new and different firm name under which another partner had been assumed. *Dunbar* v. *Remmington, Wilson, & Co.*, 10 Mar. 1810, F. C.

58. Dissolution—Retirement of Partner—Liability—Notice.—Two advertisements in the *Edinburgh Gazette held* to be sufficient notice of the retirement of a partner, and the assumption of a new one, although the firm remained the same. *M'Millan* v. *Walker*, 1814, Hume 755.

59. Dissolution—Retirement of Partner—Liability—Notice.—A person who was partner of a banking company which held funds belonging to a customer, retired from it, and intimated his retirement publicly and also privately to the customer. The business was carried on for some time by the remaining partners, and the company became bankrupt. *Held* that the retiring partner was not liberated from liability for the funds of the customer, by the latter allowing them to remain in the hands of the company. *Ramsay's Exrs.* v. *Grahame*, 18 Jan. 1814, F. C.

60. Dissolution—Retirement of Partner—Liability—Notice in Provincial Newspaper.—Notification in a provincial newspaper is not sufficient intimation of a partner withdrawing from a company as to persons who had been in the habit of dealing with the company before the notification, but is sufficient where the dealing had commenced posterior to it. *Sawers* v. *Tradestown Victualling Society*, 24 Feb. 1815, F. C.

61. Dissolution—Retirement of Partner—Liability—Notice—Dissolution during Currency of Continuing Contract.—A contract concluded with the acting partner of a company prior to notice in the *Gazette* of the retirement of another partner, *held* binding on the latter, although it was not entirely implemented till a subsequent period. *Matheson* v. *Fraser*, 1820, Hume 758.

62. Dissolution—Retirement of Partner—Liability—Notice.—A bank granted a

cash-credit, to be operated on by a company consisting of three partners, on security of a bond, to which the company, and the individual partners as such and as individuals, were parties. The bank continued to make advances to the company after the retirement of one of the partners, duly notified in the *Gazette*, and specially to the bank. *Held* that the retired partner was not liable under the bond for a balance arising on advances so made. *Padon* v. *Bank of Scotland*, 1826, 5 S. 175 ; 2 Fac. 115.

63. Dissolution—Retirement of Partner—Liability—Notice.—Circumstances under which a party who had once been partner of a company *held* not liable for debts contracted by a subsequent company carried on under the same firm, though no special notice of retirement or dissolution had been given to the creditor. *Aitken* v. *Charles & Co.*, 1830, 8 S. 446 ; 5 Fac. 263.

64. Dissolution—Retirement of Partner—Liability—Notice.—A partner who had retired, but did not advertise out, was called upon to pay debt afterwards contracted by the company. *Held* that he was not entitled to relief against others who had previously or at the same time retired, and had advertised out ; but entitled, as against those who did not retire and advertise out till after him, to relief for such debts only as then subsisted, and would have been claimable against them. *Wright* v. *Gardner's Trs.*, 1831, 9 S. 721.

65. Dissolution—Retirement of Partner—Reduction of Agreement to Retire.—*Held* that a person who had with full knowledge signed an agreement with his father and brother, by which, in consideration of payment of his debts, amounting to £8000, he renounced his interest in a very prosperous partnership with the latter, with the conditions (1) that the father should have a discretionary power to repone him as a partner ; (2) that in the event of the father not reponing he should receive £35,000 (less the £8000) from his brother ; and (3) that in the event of the father reponing, the brother should have a power of displacement on payment of £40,000 in place of £35,000, was not entitled to reduce the agreement on the ground that the consideration was grossly inadequate and that the deed was part of a scheme to have him expelled from the partnership, and that he had been induced to sign it by the undue influence of his father and brother at a time when he was embarrassed. *Tennent* v. *Tennent's Trs.*, 1870, 8 M. (H. L.) 10 ; 42 J. 353 ; L. R. 2 Sc. App. 6.

66. Dissolution—Retirement of Partner—Remanent Partner Empowered to Recover Debts—Action by Remanent Partner—Liability of Retiring Partner for Expenses.—At the dissolution of a company consisting of two partners, A and B, the stock, in consideration of a certain sum paid to A, was made over to B, with power to use the company firm in recovering debts. B raised an action describing himself as "remanent partner," and concluding for payment of a debt alleged to be due to him as representing the company. He failed in the action, and was found liable in expenses. *Held* that A, the other partner, was liable for these expenses ; and that he might be sued directly, without further constitution of the claim as against the company. *Kinnear* v. *Thomson*, 1830, 8 S. 512 ; 5 Fac. 408.

67. Dissolution—Retirement of Partner—Obligation to Pay Annuity to Retired Partner—Sale of Business—Transmission of Obligation—"Successors."—A partner in a manufacturing firm agreed to retire, on an undertaking by the remaining partners to pay him an annuity "during such period as he shall survive, and they or their successors in the works and business shall carry on the same." They afterwards sold the whole works, machinery, utensils, and stock, to another firm. Circumstances in which *held* that the firm so acquiring the works were the successors of the previous firm in the sense of the agreement, and that the obligants were still bound to pay the annuity. *Alexander* v. *Clark, etc.*, 1862, 24 D. 323 ; 34 J. 161.

68. Dissolution—Retirement of Partner—Setting up in Same Business—Damages.—A retired from the firm of A, B, & Co. in consequence of an agreement in which it was provided, "as compensation for doing so, he shall receive the sum of £2500." This was irrespective of his share of capital and past profits. When the date at which the compensation was to have been paid arrived, B refused payment, alleging that A had set up a new firm carrying on the same business, and had solicited and withdrawn customers of the old firm ; which last was, he said, a breach of agreement inferring forfeiture of the compensation. *Held* that there was no forfeiture. *Question*, whether the defender's allegations would be sufficient to support an action of damages. *M'Kirdy* v. *Paterson*, 1854, 16 D. 1013 ; 26 J. 616.

69. Dissolution—Winding Up.—Every copartnery must subsist after its dissolution, to the effect of winding up its affairs, even though there is no provision in the contract to this effect. *Gordon* v. *Douglas, Heron, & Co.*, 1795, 3 Pat. 428.

70. Dissolution—Winding Up—Contract of Copartnery.—The partners of a company are bound by the terms of their contract, although the company have announced that they are to cease doing business, but are to remain undissolved, for the purpose of winding up their affairs. *Paul* v. *Taylor*, 1826, 4 S. 572.

71. Dissolution—Winding Up—Accounting.—The partner of a company which had been dissolved, and the affairs of which had been wound up, *held* barred by acquiescence from insisting in an action of accounting against the partners who had formed the committee of management for winding up the affairs. *Flowerdew* v. *Laing*, 1843, 5 D. 440 ; 15 J. 220.

72. Dissolution—Winding Up—Interest on Advances.—In settling accounts between an old mercantile firm and a new firm which wound up the business, the new firm was entitled to interest at 5 per cent. on its advances, with annual accumulations. *Findlay, Bannatyne, & Co.'s Assignees* v. *Donaldson*, 1860, 22 D. 937 ; 1864, 2 M. (H. L.) 86.

73. Holding Out — Bill of Exchange—Signature Used by Two Firms.—A partnership in trade from Greenock to Nassau was carried on in Greenock under the firm of H. Mathie & Co., and in London under the firm of A. Fleming & Co., and Mathie and Fleming were partners in the Nassau concern ; Mathie also carried on a separate trade in Greenock under the firm of H. Mathie & Co., of which Fleming was not a partner, and the accounts of the Nassau concern were distinguished in the books by the letters N. C. *Held*, on the bankruptcy of Mathie, in a question with a banker who had discounted in Greenock bills accepted by H. Mathie & Co., that in respect other bills bearing the same name had been discounted for the use of the Nassau concern, Fleming was liable in payment. *M'Nair* v. *Fleming*, 1812, 5 Pat. 639.

74. Holding Out.—If a company hold out an individual as a partner, the company is responsible to the public as if he were in fact a partner. *Moyes* v. *Cook*, 1829, 7 S. 793.

75. Holding Out—Circumstances.—Circumstances in which *held* that a verdict finding that a defender had held himself out, or allowed himself to be held out, as a partner of a firm from which he had retired, was not contrary to evidence. *Gardner* v. *Anderson*, 1862, 24 D. 315 ; 34 J. 159.

76. Holding Out—Payment bona fide.—Payment of a debt due to a firm, made to a person who has been held out as a partner, and in the *bona fide* belief that he is one, is a good payment. *Hosie* v. *Waddell*, 1866, 3 S. L. R. 16.

77. Joint Adventure — Accounting — Market Price or Cost Price.—A merchant and manufacturer entered into a contract, by which they agreed to ship, for sale, goods to South America, in which each was to have an interest to the extent of one-half profit and loss, and the merchant was to have an interest of one-fourth profit and loss of the goods manufactured and sent by the other, invoiced at the fair market price, and in the event of loss, they were to be stated at cost price. The manufacturer furnished goods made by himself at the market price, on which there was a loss ; but if they had been stated at cost prices, there would have been a profit. *Held*, in an action of accounting between them, that the merchant could not insist on the goods being stated at cost price so as to give him credit for a profit. *Samuel & Co.* v. *Brown*, 1842, 4 D. 1518 ; 14 J. 583.

78. Joint Adventure — Commission — Liability to Account to Copartners.—A mercantile firm, being shipbrokers and agents for the construction of ships, having entered into a joint adventure with other mercantile firms for the building of ships for sale, or to be employed in trade, on the footing that for their services in making the contracts they were to receive from the proprietors a commission of 1 per cent. on the cost, and having received such commission, *held* not entitled, without the knowledge of their copartners, to take from the builders and appropriate to themselves an additional commission, increasing the cost of the ships to the concern, but were bound to account to their copartners for sums so obtained. *Opinions* expressed, that, apart from special stipulation, a partner rendering such services would be presumed to act gratuitously on behalf of himself and the other joint adventurers. *Pender, etc.* v. *Henderson & Co.*, 1864, 2 M. 1428 ; 36 J. 663.

79. Joint Adventure—Compensation.—Compensation cannot be pleaded on a private debt of a joint adventurer against a debt due to the joint adventure. *Thom* v. *North British Bank*, 1850, 13 D. 134 ; 23 J. 40.

80. Joint Adventure — Constitution. — Circumstances in which a party, residing in Jamaica, *held* liable for goods bought by his correspondent in this country to be sent to Jamaica, between whom, it appeared from the correspondence, there was a joint adventure. *Wilkie* v. *Johnstone, Bannatyne, & Co.*, 1808, 5 Pat. 191.

81. Joint Adventure — Constitution. — Circumstances *held* sufficient to establish the existence of a joint adventure. *Logan* v. *Brown*, 1824, 3 S. 15. *Fergusson* v. *Graham's Trs.*, 1836, 14 S. 871.

82. Joint Adventure — Constitution — Publishing Agreement.—The author of a book agreed with a bookseller that the latter should be allowed to publish an edition on condition that he should pay the expense, that the author should bear no loss, but receive one-half of any profits after allowing the bookseller a commission of 10 per cent. on the sales. *Held* in an action, on the bankruptcy of the bookseller, by a papermaker against the author for the price of paper furnished to the bookseller, and employed by him in the publication of the book, that the agreement did not constitute a partnership or joint adventure between the author and the bookseller, and that, even had there been a joint adventure, no liability would have attached to the author for the price of the paper bought by the bookseller in his own name, although used by him in printing the book. *Venables & Co.* v. *Wood*, 1838, M'F. 44 ; 1839, 1 D. 659 ; 14 Fac. 773.

83. Joint Adventure—Constitution.—A builder who was a partner in a joint adventure of erecting houses, agreed by the contract to erect them for a stipulated price ; and thereafter in his own name entered into a separate contract with a bricklayer for the execution of the brick work. *Held*, on the insolvency of the builder, that the bricklayer had no claim

against the other partner in the joint adventure. *White* v. *M'Intyre*, 1841, 3 D. 334; 16 Fac. 309.

84. Joint Adventure — Constitution — Mutual Consignments. — A correspondence between a party in Scotland and another in the Mauritius as to making mutual consignments, did not create a liability as joint adventurers in these transactions. *Baxter & Son* v. *Aitchison & Co.*, 1841, 3 D. 391.

85. Joint Adventure—Illegal Adventure—Accounting.—An American vessel was sent from Britain by British subjects on a joint adventure to the coast of Africa for the purchase of slaves, and thence to proceed to America. A quantity of gunpowder and arms was sent also from Britain by another ship, which, when on the coast of Africa, was transferred to the American vessel. The ship was condemned under the stats. 29 Geo. II. c. 19, and 33 Geo. III. c. 2, and Order in Council, 11 May 1803, forbidding the export of arms. *Held* that the whole transaction was illegal, and that consequently no action of accounting in regard thereto could be maintained between the parties concerned. *Gibson* v. *Stewart*, 1840, 1 Robin. 260. Affg. 6 S. 733.

86. Joint Adventure—Illegal Adventure—Managing Partner—Remuneration.—It having been found that the partner in an illegal adventure was not liable to a copartner for his share of the loss which had arisen on the adventure, a claim for remuneration on account of services performed for behoof of the adventure also disallowed. *Gibson* v. *Stewart*, 1835, 14 S. 166; 1 Robin. 260.

87. Joint Adventure — Latent Joint Adventurer—Liability.—The tenant of a grazing farm entered into an agreement with another person by which the latter became a joint adventurer in the farm. The agreement was kept latent, and the original tenant remained in the management of the farm. In the course of his management he obtained an advance upon his individual credit from a third party for the express purpose of paying his rent, and the money was so applied. *Held* that the latent co-adventurer was jointly and severally liable in repayment of this advance. *Cameron* v. *Young*, 1871, 9 M. 786; 43 J. 437.

88. Joint Adventure—Lease—Possession and Management. — Where parties had entered into a joint tack, the one in possession ordained to give up to the other a joint possession and management along with him. *Dickson* v. *Dickson*, 1823, 2 S. 462.

89. Joint Adventure—Liability—Funds Applied to Joint Adventure.—G, S, and A entered into a joint transaction, on condition that each should have one-third interest for profit or loss, and that S and A should "provide the" funds by "drawing upon G, discounting, and remitting to him the proceeds." S and A each separately drew upon G, who accepted; and they separately discounted the bills, and remitted the proceeds to G. The holder of S's bill having claimed payment of its contents from A, G and S both having failed, *held* that as the proceeds of that bill had been applied in the prosecution of the joint adventure, in accordance with the original agreement, A was liable in payment of it. *British Linen Co.* v. *Alexander*, 1853, 15 D. 277; 25 J. 180; 2 Stuart 146.

90. Joint Adventure—Onus probandi—Bill of Exchange. — In a suspension of a charge upon a bill, circumstances in which *held* that the bill was, on the charger's statement, an accommodation-bill in regard to a joint adventure, the charger's right to recover depending on an accounting; and process sisted to enable the charger to bring it, the onus of proving the joint adventure resting on him. *Blackwood* v. *Hay*, 1858, 20 D. 631; 30 J. 312.

91. Joint Adventure — Powers — Recovery and Discharge of Debts. — The solvent partner of a joint adventure is entitled to recover and discharge debts due to the joint adventure. *Thom* v. *North British Bank*, 1850, 13 D. 134; 23 J. 40.

92. Joint Adventure—Powers—Bill of Exchange.—*Question* as to the power of one of two joint adventurers to bind the other in a bill debt. *Cameron* v. *Young*, 1871, 9 M. 786; 43 J. 437.

93. Joint Adventure — Purchase of Heritage—Advance by Joint Adventurer—Creditor of Joint Adventure—Preference. —Two parties engaged in a joint adventure for the purchase of heritable property, the title of which was taken to them jointly as *pro indiviso* proprietors, while the profits and burdens were shared equally between them. *Held* that one of the joint adventurers having made a super-advance, and thus being a creditor of the joint adventure, was preferable on the price of part of the property which was sold to personal creditors of the other, although they had used inhibition. *Keith* v. *Penn*, 1840, 2 D. 633; 15 Fac. 662.

94. Joint Adventure—Remuneration for Personal Trouble—Indemnity.—A partner in a joint adventure (the terms of which were arranged by a written contract) had no right to recompense for personal trouble connected with the adventure, for which no stipulation was made (but which it was alleged was *casus improvisus*), nor to indemnity for the adventure having been put an end to as ruinous. *Beath* v. *Campbell & Co.*, 1826, 2 W. & S. 25. Affg. 3 S. 353.

95. Liability — Agent — Remuneration. —An agent employed by a number of individuals on their common business *held* entitled to recover his remuneration from one of them. *Walker* v. *Brown*, 23 Nov. 1803, F. C.; M. "Solidum App. No. 1.

96. Liability—Debt of Firm or Partner? —Circumstances which *held* to show that a certain debt was not the debt of the company, but of a partner, although the acknowledgment

was signed in name of the company firm. *M'Leod* v. *Tosh*, 1836, 14 S. 1058; 11 Fac. 884.

97. Liability—Debt of Firm or Partner? —Circumstances in which *held* that a company who executed work on the order of one of the partners of another firm, and delivered goods at the premises of that firm, had executed the order on the credit of the individual partner, and had no claim for the price against the firm. *Crum & Co.* v. *M'Lean*, 1858, 20 D. 751; 30 J. 403.

98. Liability—Debt of Firm or Partner? —Issues in an action against a partnership for the price of goods delivered, where the defence was, that the purchase was made by one of the partners on his own credit. *Tupper & Carr* v. *Rowell*, 1858, 20 D. 758; 30 J. 408.

99. Liability—Debt of Firm or Partner? —A trader assumed two of his shopmen as partners, and entered into a contract of copartnery with them, whereby it was provided that he should put £600 into the concern, and that for any larger amount he should be a creditor of the company. On a valuation of his assets and liabilities, the balance in his favour was estimated at £600, and this balance was accepted by the partners as fulfilment of the condition in the contract. They traded with his stock, and eventually became bankrupt. Neither of the two assumed partners had put anything into the concern, and the contract contained no provision for taking over the trader's liabilities. In the sequestration, *held* that a debt of the trader connected with the business, and included among his liabilities at the date of entering into the copartnery, had been dealt with by the bankrupts as a debt of the firm, and that the creditor was entitled to rank upon the company estate. *M'Keand* v. *Laird*, 1861, 23 D. 846.

100. Liability—Debt of Firm or Partner? —Account for Printing Processes.—In an action against a partner of a company of two law agents (the other being a discharged bankrupt) for payment of a prescribed account of printing law papers in processes, *held* that although the defender in his oath stated that the processes were under the agency of the other partner alone, yet as they were entered in the books of the company, and the defender, after the lapse of three years, had asked for time to pay, he was liable for the amount. *Neill* v. *Hopkirk*, 1850, 12 D. 618; 22 J. 203.

101. Liability—Debt of Firm or Partner? —Bill of Exchange.—The drawer of a bill on a company for a private debt due to himself by one of the partners, and accepted by that partner under the company firm in violation of their contract, *held* not entitled to recover from the company. *Miller* v. *Douglas*, 22 Jan. 1811, F. C.

102. Liability—Debt of Firm or Partner? —Bill of Exchange.—A partner of a firm A drew a bill, payable to himself, on and accepted by him in name of the firm, and endorsed it to his brother B who discounted it with a bank, and applied the money in payment of a private debt due by A. *Held* in a question between B and the other partner of the firm, that he was not entitled, on paying the bank, to relief from that partner. *Matheson* v. *Fraser*, 1820, Hume 758.

103. Liability—Debt of Firm or Partner? — Bill of Exchange — Bona fide Onerous Indorsee. — Bill of suspension of a charge against a partner of a company on a bill accepted in name of the company, but truly by another partner in satisfaction of a private debt, passed to ascertain whether the holder was a *bona fide* onerous indorsee; and thereafter held that he was. *Clarke* v. *Shepherd*, 1821, 1 S. 179; 1823, 2 S. 255.

104. Liability—Debt of Firm or Partner? —Bill of Exchange.—Circumstances under which it was *held* that a bill granted by a partner under the partnership firm for a private debt was not binding on it, although it was alleged an advantage was derived by the company. *Johnston, Sharp, & Co.* v. *Phillips*, 1822, 1 Shaw's App. 244.

105. Liability—Debt of Firm or Partner? —Bill of Exchange.—Circumstances in which *held* that a debt by bill subscribed by a company firm was the private debt of a partner, and not the debt of the company. *Blair* v. *Bryson*, 1835, 13 S. 901; 10 Fac. 665.

106. Liability—Debt of Firm or Partner? —Bill of Exchange.—G, partner of a firm, and manager of all its cash transactions, applied to R for an advance of money, alleging that it was to be applied towards a purchase by the firm in the line of its business. R advanced the money, and got a bill signed by the firm. The firm shortly after became bankrupt. R claimed to rank on the estate in respect of the bill. The trustee in the sequestration rejected the claim on the ground that the advance was solely for behoof of G. *Held*, on a proof, that the claim was good. *Edmond* v. *Robertson*, 1867, 5 S. L. R. 30.

107. Liability—Debt of Firm or Partner? —Descriptive Firm Name—Promissory-Note.—A promissory-note signed by one of the partners of a trading company with the descriptive name of the firm and with his own, is binding on his copartners. *Blair Iron Co.* v. *Alison*, 1855, 18 D. (H. L.) 49; 27 J. 614.

108. Liability—Evidence of Debt—Firm Books.—A partner is presumed to know the contents of his firm's books, and therefrom firm *held* liable for debt entered therein. *Kenney* v. *Walker*, 1836, 14 S. 803.

109. Liability—Evidence of Debt—Firm Books.—Although it appeared *ex facie* of the books of a firm that money had been advanced to it by a third party, yet *held* proved that it in fact belonged to the partners and had been advanced by him as their agent, and they were not liable to his creditors. *Low* v. *Lizars*, 1838, 16 S. 1093.

110. Liability—Holograph of Partner.—A letter written and signed by one of the

partners of a company in the firm's name is holograph of the firm. *Nisbet* v. *Neil's Tr.*, 1869, 7 M. 1097; 41 J. 637.

111. Liability—Liability as Individual—Retiring Partner—Agency.—A firm in India was entrusted, by power of attorney, with the management of their constituent's funds. The firm underwent a change by the retirement of some of the partners. This change was intimated to the constituent; but the new firm, without any renewal of the power of attorney, continued to act as before. On their bankruptcy, with his funds in their hands, one of the partners who had retired, *held* in the special circumstances liable. *Graham* v. *Henderson*, 1802, 4 Pat. 421.

112. Liability—Liability as Individual—Retiring Partner—Bill of Exchange.—Although a partner had retired from a company, and duly published his retirement, and conveyed his share of the stock to the other partners, and they had for more than six years paid interest on a bill accepted prior to his retirement, *held* that he was still liable; and a plea of prescription repelled. *Milliken* v. *Love & Crawford*, 1803, Hume 754.

113. Liability—Liability as Individual—Individual Signature to Company Bond.—The subscription of a partner by his individual signature to a bond granted by the company for a cash-credit to be kept in name of the company, binds him, not only as a partner, but as an individual. *Mellis* v. *Royal Bank of Scotland*, 22 June 1815, F. C.

114. Liability—Agent—Powers—Transaction.—Terms of a transaction gone into by a partner and agent of a banking company which held not sufficient to bind the company or other partners. *Royal Bank of Scotland* v. *Greenock Bank*, 1797, 3 Pat. 595.

115. Liability—Manager—Powers—Bill of Exchange.—A partner *held* liable for a bill subscribed by another partner, who acted as manager per procuration of the company, for goods falling under the description of those in which they traded, although it was alleged he had no authority to grant bills. *Turnbull* v. *M'Kie*, 1822, 1 S. 353.

116. Liability—Manager—Powers—Promissory-Note.—Circumstances in which a company *held* not bound by a promissory-note granted by the manager and a majority of the partners. *Proudfoot* v. *Lindsay*, 18 Jan. 1825, F. C.; 3 S. 443.

117. Liability—Manager—Powers—Order to Storekeeper by Managing Partner.—The granting by a managing partner to workmen of orders upon a storekeeper for furnishings to account of wages *held* to be outwith his powers, and the firm therefore not liable for price of goods so furnished. *Finlayson* v. *Braidbar Quarry Co.*, 1864, 2 M. 1297; 36 J. 647.

118. Liability—Manager—Powers.—A contract of copartnery provided that the partnership should be carried on after the death of one of the two partners by the survivor and the testamentary trustees of the deceased. A manager of the business—a manufactory—was appointed by the contract. One of the partners having died, his trustees delegated to the manager, who was one of their number, power to sign the name of the firm in carrying on the business. In an action by the surviving partner, *held* that the trustee to whom this power had been attempted to be given had no right to sign the name of the firm. *Beveridge* v. *Beveridge's Trs.*, 1872, 10 M. (H. L.) 1; 44 J. 171; L. R. 2 Sc. App. 183.

119. Liability—Manager—Powers.—A manager of the business of a partnership was appointed by the contract of copartnery. *Held* (1) that the manager had no right to leave signed cheques, blank as to the sum, in the hands of a confidential clerk; nor (2) to lend money to banks, without the consent of all the partners; nor (3) to raise the salaries of clerks or increase the fixed capital of the company by introducing steam-power looms in place of hand-looms without the consent of all the partners. *Beveridge* v. *Beveridge's Trs.*, 1872, 10 M. (H. L.) 1; 44 J. 171; L. R. 2 Sc. App. 183.

120. Liability—Pupil Partner.—A father who placed his son, a boy within the years of pupillarity, as partner in a trading company, *held* liable as a partner. *Calder* v. *Downie*, 14 April 1815, F. C. Affg. 11 Dec. 1811, F. C.

121. Liability—Minor Partner.—A minor engaged by his father in a copartnery trade, *held*, on the failure of the concern, liable in the payment of the company debts. *Wilson* v. *Laidlaw*, 1813, 1816, 6 Pat. 222.

122. Liability—Minor Partner.—A written contract of service having been entered into by a minor with a party trading under the firm of a company in which there had been originally several partners, but of which he was now the sole partner, *held* binding. *Campbell* v. *Baird*, 1827, 5 S. 335.

123. Liability—Outwith Firm Business—Guarantee.—A copartnery are not bound by a letter of guarantee granted by the acting partner for the price of goods to be furnished to himself and his mother, and not in the way of the company's trade. *M'Nair & Co.* v. *Gray, Hunter, & Spiers*, 1803, Hume 753.

124. Liability—Outwith Firm Business—Guarantee—Bill of Exchange.—A creditor, under an arrangement with his debtor, drew a bill on a company as "for value in soda," and the bill was accepted by one of the partners in name of the company as guarantee for the debtor, which was out of the ordinary business of the company, and the bill was not entered in their books. *Held* that the creditor could not recover from the company. *Kennedy*, 22 Dec. 1814, F. C.

125. Liability—Outwith Firm Business.—The partners of a concern for running a

coach *held* not liable for the rent of a coach office taken by one of their number, and used by him for selling tickets for the coach. *Jardine* v. *M'Farlane*, 1828, 6 S. 564.

126. Liability — Subscriptions to Charities. — Circumstances in which *held* that subscriptions by the managing partner of a branch of a company established abroad, to local charities and other public purposes, formed proper charges against the company. *Pollock, Gilmour, & Co.* v. *Ritchie*, 1851, 13 D. 640; 23 J. 284.

127. Novation — Dissolution of Firm. — Circumstances in which the court *held* that no *novatio debiti* had taken place, under an arrangement which the creditor of a dissolved company made with a partner appointed to wind up the company affairs. *Buchanan, Watson, & Co.* v. *Adam*, 1833, 11 S. 762.

128. Novation — Dissolution of Firm — Death of Partner—Bank.—A party kept an account with a bank, which was annually balanced, and the sum due carried to a new account for the following year. Between the balance in 1840 and 1841, a partner died; and at next balance the party signed a docquet in the books, bearing that the amount due to him had been paid, and received a deposit-receipt for the amount, which was then entered in a new account. The bank having become bankrupt before the next balance, a claim was made by the party on the estate of the deceased partner for the balance due previous to his death. *Held* that the original company was dissolved by the partner's death, and that the party had, by his course of dealing with the new company, accepted them as his debtors, and discharged the estate of the partner. *Ker* (*Dunlop's Tr.*) v. *M'Kechnie*, 1845, 7 D. 494; 17 J. 228.

129. Novation—Dissolution of Firm.— Circumstances which were *held* to afford no evidence that the creditor of a company, after its dissolution, had substituted the sole liability of the partner continuing to carry on the business, instead of the liability of the company; and that certain transactions of the creditor with that partner did not infer *novatio debiti*. *Campbell* v. *Cruickshank*, 1845, 7 D. 548; 17 J. 264.

130. Novation — Dissolution of Firm— Debt taken over by Surviving Partner.— Circumstances in which *held* that the surviving partner of a firm had taken over a company debt, and was liable to be sued therefor without the representatives of a deceased partner being called. *Price & Logan* v. *Wise*, 1862, 24 D. 491.

131. Novation — Dissolution of Firm — Obligation of Old Firm Carried to New.— An obligatory letter by a company consisting of four partners, binding themselves not to furnish any articles on sale to the servants of the grantee without his written instructions, is effectual against two of the partners, who, after the retiring of the other two, carried on the business within the same premises under a new firm. *Mackintosh* v. *Gibb & Co.'s Trs.*, 1828, 6 S. 992.

132. Novation—Dissolution of Firm— Bill of Exchange.—A firm was dissolved, and a new firm took over its assets and liabilities. *Held* that it was within the power of the new company to subscribe a docquet in name of the old firm, dispensing with presentation of certain bills. *Muir* v. *Dickson*, 1860, 22 D. 1070; 32 J. 495.

133. Novation—Partnership Debt—Bill by Partner.—A creditor of a company took a bill for his debt from one of the partners, but he failed to pay it. *Held* that the debt was not thereby innovated, and that he was entitled to insist for payment against the company. *Wilson & Corse* v. *Gardner*, 1807, Hume 247.

134. Novation—Transfer of Business.— Circumstances in which *held* that a party, who tendered delivery of goods as on the order of a copartnery, had agreed to supply the goods as to a new firm that succeeded the other in its business, and to take the new firm as indebted to him, and had discharged his claim for the price against the original copartnery. *Question*, whether the circumstances amounted to delegation. *Pearston* v. *Wilson*, 1856, 19 D. 197; 29 J. 94.

135. Novation—Transfer of Business— Debts of Old Firm.—A trader assumed his son as a partner. The stock-in-trade and whole assets of the going business were taken by the new firm, who continued the trade in the old premises. *Held* that the father's liabilities were also taken over. *Miller* v. *Thorburn*, 1861, 23 D. 359; 33 J. 180.

136. Novation—Transfer of Business.— A firm purchased goods, and before payment transferred their business to A B, which they advertised in the newspapers. Circumstances in which *held* that the sellers had not accepted A B as their debtors instead of the original purchasers. *Pollock & Co.* v. *Murray & Spence*, 1863, 2 M. 14; 36 J. 14.

137. Novation—Transfer of Business— Income-Tax.—*Held* that, though income-tax is strictly due by the beneficial recipient of income, it was the real understanding of the parties to an agreement dissolving a partnership, whereby one of the partners undertook the whole liabilities of the firm, that a sum of income-tax due by the firm should be discharged by the partner so undertaking the firm's liabilities. Effect given to this view in an accounting. *Dall* (*Hill's Tr.*) v. *Gowans*, 1872, 9 S. L. R. 397.

138. Process — Citation — Two Persons Cited without Averment of Partnership.— In an action against "J. and W. W.," citation was executed by leaving a copy of the summons with J., who entered appearance for himself and W., but without any evidence of authority from W.; and J. died. A decree taken against W. individually *held* inept, and proof not admitted to support it, that J. and W. were copartners. *Wordie* v. *M'Donald*, 1831, 10 S. 142; 7 Fac. 114.

139. Process—Citation—Place of Business—Sole Partner.—A party domiciled in one county carried on business in another, under a company firm. A partnership had once really existed, but it now consisted only of the party himself, and no notice of dissolution had been given. *Held* that he was barred from objecting to a citation served on the company at the place of business, and pleading that the sheriff of the county where it was had no jurisdiction. *Young* v. *Livingstone*, 1860, 22 D. 983; 32 J. 417.

140. Process—Decree against Firm—Defences Open to Latent Partner.—A person who had got decree against a company, in terms of an accountant's report, thereafter raised a supplementary action against a latent partner—having got first a finding that he was a partner. *Held* that the defender was allowed to state special objections to said report, but not general objections to his liability as a partner. *Edinburgh & Leith Shipping Co.* v. *Gillon*, 1832, 4 J. 507.

141. Process — Defenders — All Parties not Called. — Plea *repelled*, that all the partners of a company in an action *inter socios* were not called, the defenders having failed to condescend on the names of the other partners, though specially allowed time to do so. *Malcolm* v. *West Lothian Rly. Co.*, 1835, 13 S. 887; 10 Fac. 642.

142. Process — Defenders — All Parties not Called.—In an action by several joint contractors for carrying the London and Glasgow mail, against one who had acted as receiver of fares at Glasgow, for their respective shares, *held* not to be a good defence that other joint contractors were not parties, reserving to the defender to call them in a multiplepoinding. *Sherman* v. *Bain*, 1839, 1 D. 463; 14 Fac. 512.

143. Process — Defenders — Absconding Partner.—An action of constitution against two partners of a company, but to which the pursuer cited only one—the other having absconded—sisted till he was cited. *Johnstone* v. *Duncan*, 1824, 2 S. 625.

144. Process — Defenders — Bankrupt Partners—Action by Representatives of Deceased Partner.—It was stipulated in a contract of copartnery, that in the event of the death, withdrawing, or bankruptcy of a partner, the remaining partners should grant bond for his share of the last annual balance. One of the partners died, and thereafter all the remaining partners (with the exception of two) became bankrupt. An action was raised by the representatives of the deceased partner against the two solvent partners. *Held* that the claim of the representatives lay not against these two partners alone, but against all the other partners jointly, including those who had become bankrupt, and that these persons ought to have been called as defenders; and a remit made accordingly. *Bell* v. *Willison*, 1822, 1 Shaw's App. 220.

145. Process — Defenders — Bankrupt Firm.—It is no objection to a decree in an action against a company, that it was pronounced after the sequestration of the company and the death of the sole partner, without being transferred against the creditors or representatives, notice having been given to the former, who declined to appear. *Hamilton* v. *M'Gilp*, 1826, 5 S. 140.

146. Process — Defenders — Bankrupt Firm—All Partners to be Called.—In an action to constitute a debt against a company, although dissolved and bankrupt, all the partners must be called. *Dewar* v. *Munnoch*, 1831, 9 S. 487; 6 Fac. 344.

147. Process — Defenders—Constitution of Debt.—If a debt is not constituted against a company, all the partners must be called in an action for constituting it. *Geddes* v. *Hopkirk*, 1827, 5 S. 747.

148. Process — Defenders — Descriptive Name—Manager Directors and Partners.—A party raised an action on a policy of insurance before the Court of Admiralty against "The Sea Insurance Co. of Scotland," the manager and the directors, and partners *nominatim*, by whom the policy was signed, concluding for payment of its amount in respect of a loss; and having obtained a decree, and charged, a suspension was brought in name of the company, manager, and directors. *Held* (on an objection suggested by the court) that the libel and charge were competent. *Sea Insurance Co.* v. *Gavin*, 1827, 5 S. 375; 2 Fac. 221.

149. Process — Defenders — Descriptive Name — Private Banking Company — Partners — Reduction. — In an action of reduction of a disposition on the ground of usury and fraud against a private banking company, the partners as well as the manager must be called as defenders. *Scott* v. *Napier*, 1827, 5 S. 414.

150. Process — Defenders — Descriptive Name — Partners. — A firm carrying on business under a descriptive name may be sued under that name provided some of the partners are called as defenders. *Commercial Bank* v. *Pollock*, 1828, 3 W. & S. 365.

151. Process — Defenders — Descriptive Name—Partners.—Under a summons for a debt as due by the "agent or manager" of the "Highland Distillery," *held* that the partners should have been cited. *M'Millan* v. *M'Culloch*, 1842, 4 D. 492; 14 J. 208.

152. Process — Defenders — Descriptive Name—Unincorporated Banking Company—Act 7 Geo. IV. c. 67.—In an action brought by a railway company against the manager and cashier of an unincorporated bank (but whose officer was duly returned to the stamp office) for behoof of the bank, who were holders of shares, in which they concluded "that the said manager and cashier, for behoof of the said bank, should be decerned and ordained to pay" certain calls, *held* that

although the stat. 7 Geo. IV. c. 67 was not specially libelled, the action was competently brought against the defenders as representing the bank. *Glasgow & Monklands Rly. Co.* v. *Tennent*, 1848, 11 D. 212; 21 J. 50.

153. Process — Defenders — Descriptive Name—Unincorporated Banking Company —Act 7 Geo. IV. c. 67.—An unincorporated banking company, in the return given in by it to the stamp office, pursuant to the provisions of 7 Geo. IV. c. 67, set forth the name of its cashier as the officer in whose name it might be sued. By the contract of copartnery, it was provided that the company should be sued in name of its managing director or cashier. *Question*, whether the company could, in an action at the instance of a partner, be sued by its descriptive firm, and the name of its manager for its behoof. *Thom* v. *North British Bank*, 1848, 10 D. 1254; 20 J. 459.

154. Process — Defenders — Dissolved Firm—Individual Partner—Action of Constitution.—Although an action of constitution of a company debt must be directed against the company itself, and it is not competent to call an individual partner without also calling the company, yet if the debt be already constituted, or if the debt be illiquid and the company dissolved, it is competent to proceed against an individual partner or his representative wherever the court has jurisdiction over him; and it is not relevant in such a case for the representative to allege that he is an English administrator. *M'Tavish* v. *Saltoun*, 3 Feb. 1821, F. C.

155. Process — Defenders — Dissolved Firm—Individual Partner—Jurisdiction.—A partner of a dissolved company is not liable to be sued for a company debt in the jurisdiction where the company had their domicile, unless he reside within it. *M'Eachern* v. *M'Pherson*, 1824, 3 S. 211; 21 Fac. 565.

156. Process—Defenders—English Firm —Scots Partners—English Winding Up.—The creditor of an English joint stock company raised an action against shareholders in Scotland, individually, for payment of the company debt. *Held* not to be a good preliminary defence that he had not first constituted the debt against the company, in respect that by the law of England it is not competent to constitute a debt against a company; but an application having been made in England, subsequent to the raising of the action, for winding up the company under the statutes for that purpose, the court sisted procedure *in hoc statu*. *Edinburgh & Glasgow Bank* v. *Ewan*, 1852, 14 D. 547; 24 J. 273; 1 Stuart 445.

157. Process—Defenders—English Firm —Individual Partners.—An unincorporated English firm, against whom jurisdiction has been founded by arrestments, can be sued in Scotland in the company name without the individual partners being called, although it cannot be so sued in England. *Paton* v. *Neill, Edgar, & Co.*, 1873, 10 S. L. R. 461.

158. Process — Defenders — Firm Name —Partners' Names.—A mercantile company carrying on business under a proper firm, by which they grant obligations, may be called in an action and cited by the firm, without the name of any individual partner. *Forsyth* v. *Hare & Co.*, 1834, 13 S. 42; 10 Fac. 35.

159. Process—Defenders—Foreign Firm —Partners in Scotland.—An action of constitution of a debt alleged to be due by a foreign company against the partners of that company who resided in Scotland, *dismissed* as incompetent. *Reid & Maccall* v. *Douglas*, 11 June 1814, F. C.

160. Process—Defenders—Foreign Firm —Dissolved Firm—Individual Partner—Jurisdiction.—After a company carrying on business in Bombay had been dissolved, one of the partners came within the jurisdiction of the Court of Session, and was sued by a Scots creditor for a debt of the company. *Held* that the creditor was entitled to proceed against him without first constituting the claim against the company, and without calling his copartners, who were not within the jurisdiction. *Muir* v. *Collett*, 1862, 24 D. 1119; 34 J. 558.

161. Process — Defenders — Surviving Partner.—A defender who was sued as the surviving partner of a company *held* not entitled to object that the representatives of a deceased partner were not called, seeing that he declined to state who or where they were. *M'Braire* v. *Hamilton*, 1826, 2 W. & S. 66. Affg. 4 S. 24.

162. Process—Judicial Admission by one Partner—Relief.—In an action against a firm and the three individual partners as partners and as individuals, for payment of a firm debt, where two of the partners denied, and the third admitted, the liability of the company, *held* that decree could at once be pronounced against the admitting partner, reserving all claims of relief competent to him. *Elliot* v. *Aiken*, 1869, 7 M. 894; 41 J. 512.

163. Process—Title to Sue—Authority to Raise Action.—A summons was raised against a partner in name of a joint stock company, and a number of individuals as the partners, without producing the authority of a general meeting of the company, or committee of management, or of the individual partners, a few of whom disclaimed the action; and it was averred that there were six partners of the company whose names were not included in the summons. The court *refused* to allow an investigation as to this, *repelled* the defences to the title to pursue founded on these circumstances, and *sustained* the summons. *Shotts Iron Co.* v. *Hopkirk*, 1828, 6 S. 399; 3 Fac. 427.

164. Process—Title to Sue—Committee Appointed to Sue.—*Question* whether, when a contract of copartnery gives power to the treasurer to sue the partners, it is competent, after the death of a partner, to name a committee, with power to sue his representatives. *Reid* v. *Moir*, 1833, 11 S. 605.

165. Process—Title to Sue—Committee Appointed to Sue—Survivors.—A committee of a joint stock company authorised to sue actions, originally consisted of five members. *Question*, whether three were entitled to pursue, —the fourth being dead, and the fifth bankrupt. *Reid* v. *Moir*, 1833, 11 S. 605.

166. Process—Title to Sue — Criminal Complaint.—A company has no title to pursue a criminal complaint under the company firm. *Aitken* v. *Rennie*, 11 Dec. 1810, F. C.

167. Process—Title to Sue—Dissolution during Action.—If a partner raise an action during the subsistence and for behoof of a partnership which is afterwards dissolved, he is not thereafter entitled to insist, without special authority from the other partner; but *observed*, that this is not necessary if the other partner has merely retired, and been settled with for his share. *Gibson* v. *Stewart*, 1822, 1 S. 374.

168. Process—Title to Sue—Executor of Sole Partner.—The executor of an individual who had carried on business under a firm of which he was sole partner, *held* entitled to recover debts contracted to the firm. *Mills* v. *Hamilton*, 1830, 9 S. 111.

169. Process—Title to Sue—Executor-Creditor of Deceased Partner.—An executor-creditor of the deceased partner of a company, *held* not entitled to sue for payment of a debt libelled as a debt due to the company, although the sole surviving partner was stated to have disclaimed all right or interest therein. *Roger* v. *Jameson*, 1838, 16 S. 418.

170. Process—Title to Sue—Instance—Action to Settle Rights of Partners.—*Question*, whether a partner who has a good title to bring in his own name an action to have the rights of the other partners and of a manager settled, is entitled to bring it also in the name of the firm. *Beveridge* v. *Beveridge's Trs.*, 1872, 10 M. (H. L.) 1; 44 J. 171; L. R. 2 Sc. App. 183.

171. Process—Title to Sue—Instance—Cashier of Unincorporated Bank—Act 7 Geo. IV. c. 67.—Action *sustained* at the instance of a cashier for behoof of an unincorporated bank. *Cheyne* v. *Little*, 1828, 7 S. 110. *Drummond* v. *Halliday*, 1831, 9 S. 284.

172. Process—Title to Sue—Instance—Descriptive Name.—A partnership trading under a descriptive name is not entitled to sue under that name. *Culcreugh Cotton Co.* v. *Mathie*, 1822, 2 S. 47. *Kerr* v. *Clyde Shipping Co.*, 1839, 1 D. 901; 14 Fac. 1003. *London & Edinburgh Shipping Co.* v. *M'Corkle*, 1841, 3 D. 1045; 16 Fac. 1088.

173. Process—Title to Sue—Instance—Directors.—An action at the instance of the directors of an unincorporated association, The Edinburgh & Leith Shipping Company, on behalf of the association, *sustained*. *Downe* v. *Pitcairn*, 1829, 3 W. & S. 472.

174. Process—Title to Sue—Instance—Firm Name.—Objection to the instance in an action *repelled*, that the summons was raised in name of a company firm, without the individual partners. *Thomson* v. *Johnstone*, 1836, 15 S. 173; 12 Fac. 169. See also *Aitchison & Co.* v. *Burnside's Trs.*, 1832, 10 S. 296; 7 Fac. 235.

175. Process—Title to Sue—Instance—Manager.—The manager of a company with a descriptive firm has no title to sue in name of the company. *Robertson* v. *Anderson*, 1841, 3 D. 986; 16 Fac. 1029.

176. Process—Title to Sue—Instance—Manager, Directors, and Six Partners.—An action raised by a joint stock banking company (which by its contract of copartnery was authorised to sue in name of its manager) at the instance of the company, by its descriptive name, and the names of the manager, the directors, and six partners, was competent. *National Exchange Co. of Glasgow* v. *Drew*, 1848, 11 D. 179; 21 J. 37.

177. Process—Title to Sue—Instance—Treasurer.—The treasurer of a joint stock company *held* entitled to sue a shareholder for calls, in consequence of the provisions of the contract of copartnery. *Sturrock* v. *Thoms*, 1851, 13 D. 762; 23 J. 335.

178. Process—Title to Sue—Instance—Trustees Vest in Heritable Property—Partners.—In a petition for interdict in name of four out of seven trustees in whom the property affected was vested for behoof of a company, and certain members of the company, the other trustees and the remaining members of the company *allowed* to vest themselves to rectify the instance. *M'Culloch* v. *Wallace*, 1846, 9 D. 32; 19 J. 2.

179. Process—Title to Sue—Parties Libelled as Partners in one Firm and Condescended on as Partners of Another.—Circumstances under which an objection *repelled* to the title of parties setting themselves forth in the libel as partners of one firm, and condescended on as being partners of another, to which the rights of the latter were transferred. *Noble & Hunt* v. *Wood*, 1830, 8 S. 365.

180. Process—Title to Sue—Partner Appointed to Wind Up Affairs.—A company carrying on business under a descriptive firm was dissolved; and under the provisions of the contract a meeting of partners was held, at which A was appointed to wind up the affairs, with the power of suing and being sued. *Held*, in a reduction at the instance of A, of a deed granted by one of the partners to a third party, in defraud of creditors, that he had a good title to sue. *Jameson* v. *Watson*, 1852, 14 D. 1021; 24 J. 631; 1 Stuart 1090.

181. Process—Title to Sue—Partners.—In an action of damages for injury to a partnership all parties must be parties to the action. *May* v. *Matthews*, 1833, 11 S. 305; 13 S. 94.

182. Process—Title to Sue—Surviving Partner.—Action for furnishings by a company *sustained* at the instance of the surviving partner. *Royds* v. *Fraser's Trs.*, 1822, 1 S. 244.

183. Profits—Interest on Loans.—In ascertaining the amount of profits made on trust funds improperly invested by trustees in their partnership business, there must be taken into account, not only input capital of partners, but all other funds obtained on loan or otherwise, and invested in the partnership business; and the proportion which the trust monies bore to the whole funds so employed regulates the share of profits to be made over to the beneficiaries under the trust—periodical docquets fixing the interests of the partners *inter se* being of no importance. *Cochrane* v. *Black*, 1857, 19 D. 1019; 29 J. 549.

184. Profits—Private Adventure—Illegal Use of Firm Credit.—The partner of a firm used its name and credit in a private adventure. *Held* that the firm was entitled to the profits of this adventure. *Wallace, Hamilton, & Co.* v. *Campbell*, 1824, 2 Shaw's App. 467. Affg. 8 June 1821, F. C.; 1 S. 53.

185. Profits—Repairs—Sinking Fund.—A clause in the contract of a shipping copartnery, relative to the division of "free profits," *held* to imply gross profits under deduction of repairs on the vessels, etc., and of a sum equivalent to the loss caused by their annual deterioration from age, although a limited sinking fund was provided "for upholding the number of vessels necessary for carrying on the company's trade, and meeting any risks which the company may have incurred." *Flowerdew* v. *Dundee Shipping Co.*, 1832, 6 W. & S. 160. Affg. 9 S. 373.

186. Property—Administration—Reduction of Partnership as Illegal—Possession—Payment of Debts.—A and B entered into a contract of copartnery as to pawnbroking, by which it was provided that the business should be conducted in the name of A. On the bankruptcy of A, B obtained from the sheriff interim possession of the company's stock and funds, and while he was in possession a creditor of the company obtained decree for his debt, and the sum decerned for was paid by B. The trustee for A's creditors instituted a reduction of the contract of copartnery, and for count and reckoning against B, and decree of reduction was pronounced. *Held* that B was entitled to deduction of the company debt paid by him while administrator of the company funds. *Gordon* v. *Howden*, 1849, 12 D. 253; 22 J. 52.

187. Property—Assignation of Partnership Property—Title to Sue—Reduction of Assignation.—A debt due by a railway company to an unincorporated trading company was converted into railway shares. One of the partners of the trading company having died, his trustees by minute of agreement with the other partners of the company (which was insolvent, and existed only to the effect of winding up), purchased the whole property and assets of the company. The agreement stated that the parties subscribing were the only parties interested in the property, "it being believed" that a partner who had been previously sequestrated, and gone to America, had abandoned his interest therein. Prior to the agreement, the company, acting upon the advice of their agents, executed transfers of their railway shares. Subsequent to the agreement (the shares having become more valuable) the trustees brought a reduction of the transfers, on the ground that the agents had fraudulently deceived the company into the belief that the transfers were in favour of third parties, while in point of fact they were in favour of the agents themselves. The defenders objected to the pursuers' title to sue. *Held* that the transfers having been executed by parties all of whom were now represented by the pursuers, and the defenders not alleging or offering to prove the existence of the absent partner's interest, the agreement conferred a good title upon the trustees to challenge the transfers. *Balfour* v. *Kerr*, 1856, 18 D. 619; 28 J. 260.

188. Property — Fraudulent Sale by Partner — Accounting. — *Question* as to whether a partner was bound to account for the profits of part of the partnership subject sold to him, and which it was alleged had been so by fraud on his part. *Bayne* v. *Ferguson*, 1817, 5 Dow 151.

189. Property—Heritable and Moveable—Heritable Subjects Specially Destined and Subsequently made Partnership Property.—A father bought heritable subjects, and took the disposition to himself and wife in conjunct fee and liferent, and to his son and his heirs and assignees, reserving power to alter. Having afterwards entered into a partnership of shipbuilding with his son, and inserted the heritable subjects as part of the partnership stock in the inventory of stock, and used them as such, *held*, on the death of the father, that the heritable subjects had become moveable so as to form part of the fund out of which *legitim* was payable to a daughter. *Sime* v. *Balfour*, 1811, 5 Pat. 525. Affg. 1 Mar. 1804, F. C.; M. "Heritable and Moveable" App. No. 3; 11 S. 632 (reported as *Minto* v. *Kirkpatrick*).

190. Property—Heritable and Moveable—Partnership Stock.—The stock of a company, though consisting entirely of heritable property, is, in questions of succession, moveable. *Murray* v. *Murray*, 5 Feb. 1805, F. C.; M. "Heritable and Moveable" App. No. 4. *Minto* v. *Kirkpatrick*, 1833, 11 S. 632.

191. Property — Heir — Heir-at-Law or Heir in Moveables.—A contract of copartnery provided that on the death of a partner his share should belong to his heir, but in case the heir should happen to be a female or minor, there should be given in to the company by the executors of the deceased a list of three men, any one of whom the company might choose to

manage the share of such female or minor. *Held* that the term "heir" did not mean the heir-at-law, but the heir in moveables, and therefore that the share of a deceased partner belonged to the latter. *Irvine* v. *Irvine*, 1851, 13 D. 1367; 23 J. 635.

192. Property — Lease. — A tack may be validly granted to a company *socio nomine*. *Denniston, M'Nair, & Co.* v. *M'Farlane*, 16 Feb. 1808, F. C.; M. "Tack" App. No. 15.

193. Property — Property of Firm or Partner?—Procedure.—*Question*, whether a purchase of a cargo of tallow was made by a partner for himself alone or for the partnership, remitted by the House of Lords to the Court of Session for proof. *Bruce* v. *Ogilvy*, 1813, 1 Dow 38.

194. Property — Property of Firm or Partner?—Fraud.—John, James, and Thomas engaged in a joint purchase of land as partners, and John and James sold a part to Thomas, who was truly acting for a stranger; but the stranger having declined to take it, Thomas conveyed it to John, who, having sold it, realised a considerable profit. *Held*, in an action by James against John and Thomas, for a share of the profit, on the ground that they had acted fraudulently, that he was precluded from maintaining that the part sold formed part of the partnership stock. *Bayne* v. *Fergusson & Kyd*, 1817, 5 Dow 151.

195. Property — Property of Firm or Partner? — Goods Shipped during War — Evidence. — *Held* that certain shipments of goods to the Continent of Europe during the war between France and Britain, made by an individual partner of a company, who was a citizen of America, belonged to him exclusively, and that his partner, who was a subject of Britain, had no claim to them, in consequence of letters written by him disclaiming all connection with the goods, although he alleged that these letters were written to deceive the enemy. *Pollock's Reps.* v. *Buchanan*, 1826, 2 W. & S. 143. Affg. 2 S. 690; 4 S. 37.

196. Property — Property of Firm or Partner?—Circumstances in which property purchased by partners in a joint adventure, and used for the purpose of the concern, *held* not to be company property. *Wilson* v. *Threshie*, 1825, 4 S. 361.

197. Property — Property of Firm or Partner?—Debt.—Circumstances in which *held* that there was no sufficient evidence that a debt claimed by A, B, & Co., as due by a company of which A was also a partner, was a debt due to A, B, & Co., and not to A as an individual. *Wilson* v. *Laidlaw*, 1816, 6 Pat. 222.

198. Property — Property of Firm or Partner?—Circumstances under which *found* that, notwithstanding the publication of a dissolution of partnership, and the terms of invoices that goods belonged in property to a member of the partnership, yet the goods were truly the property of the partnership. *M'Gavin* v. *Stewart*, 1833, 11 S. 575.

199. Property — Property of Firm or Partner?—Property Leased to Partnership by Partner.—One of the two partners of a company let to the company a mill, with the large fixed machinery, and assigned the small machinery to the company, the value being to be placed at his credit in their books. He thereafter died in debt to the company, and the mill with its appurtenances was sold, and the full rent stipulated in the lease for the buildings and machinery was paid by the surviving partner, who by the lease was allowed to continue lessee, and take over the small machinery; and this party became bankrupt. *Held* that the trustee on his sequestrated estate was not entitled to appropriate the large machinery as company estate, and to obtain repetition of the rent paid since the death of the other partner, in so far as might effeir to this machinery. *Cox* v. *Stead*, 1834, 7 W. & S. 497. Affg. 11 S. 672.

200. Property — Property of Firm or Partner?—Special case involving a question, whether certain funds belonged to the estate of a company, or to the private estate of an individual member of the company. *Allan* v. *Allan's Trs.*, 1837, 15 S. 1058.

201. Property — Property of Firm or Partner?—Debt—Factory Held by Partner as Individual.—The proprietors of an estate appointed as their factor a party who was a law agent, and was in partnership with another individual. *Held* that although the factory transactions and accounts were entered in the books of the copartnery, yet, as it did not appear that the proprietors had recognised the firm as their factors, the trustee on the sequestrated estate of the firm was not entitled to claim a debt alleged to be due to the firm as factors on the estate. *Mabon* (*Bell's Trs.*) v. *Christie*, 1844, 6 D. 619; 16 J. 287.

202. Property — Property of Firm or Partner?—Evidence.—Three partners, who carried on a joint trade of shipping goods, were registered as part owners of the vessels belonging to the concern, each in the proportion of a third share of each vessel. The estates of one of the partners having been sequestrated, *held*, in a question between his trustee and the other partners, that as the vessels had not been registered in the name of the company as partnership property, and as the shares of the bankrupt stood in the register in his name individually, his copartners were not entitled to claim them as company property, to be dealt with according to the provisions of their contract, but that the shares passed to his trustee. *M'Arthurs* v. *M'Brair & Johnstone's Tr.*, 1844, 6 D. 1174; 16 J. 513.

203. Property — Property of Firm or Partner?—Evidence.—Where certain shares of a ship were registered in the name of a party individually, *held* incompetent to establish by proof *prout de jure* that they

were the property of a company of which he was partner. *Ord* v. *Barton*, 1846, 8 D. 1011; 18 J. 505.

204. Property—Value—Evidence.—In an action *inter socios*, a valuation of the stock of the company by one of the partners admitted in evidence. *Ewing* v. *Crichton*, 1827, 4 Mur. 184.

205. Rights of Partners—Accounting.—An action against one partner of a dissolved company, concluding for a balance as arising on certain branches of the business only, is competent at the instance of the remaining partners. *M'Intyre* v. *Maxwell*, 1831, 9 S. 284.

206. Rights of Partners—Accounting—Report. — In an accounting between the representatives of partners of a mercantile company, *held* that statements and balances of the books (which had been inaccurately kept, and were involved in confusion), prepared by accountants in the course of legal proceedings between the parties about twenty years previously, were final, and excluded a general accounting. *Carsewell* v. *Steele*, 1848, 10 D. 1528; 20 J. 578.

207. Rights of Partners—Accounting—Books.—In an accounting between partners, the books of the company must be produced; and the partner in possession of them cannot withhold them on the ground that he has since the dissolution made use of them for his private business. *M'Gregor* v. *M'Gregor*, 1823, 2 S. 461.

208. Rights of Partners—Accounting—Inspection of Books. — In an accounting between partners, the defender having been the managing partner and custodier of the company's books, *held* that the pursuer was entitled to the assistance of his law agent in inspecting the books. *Cameron* v. *M'Murray*, 1855, 17 D. 1142; 27 J. 597.

209. Rights of Partners—Accounting—Commission—Interest.—After the death of the managing partner of a pawnbroking concern, a latent partner entered upon the management, and continued to manage and wind up the affairs. The trustees of the deceased partner having succeeded in an action concluding for declarator that the copartnery was null under the Pawnbroking Act, in adjusting the accounts between the trustees of the deceased partner and the latent partner, *held* (1) that the latter was entitled to a commission on his intromissions; and (2) that the rate of interest in which he was liable was the current market rate. *Observed*, that "legal interest" does not necessarily mean the highest rate of legal interest. *Gordon* v. *Howden*, 1853, 15 D. 378; 25 J. 230; 2 Stuart 210.

210. Rights of Partners—Balance-Sheet — Date of Subscription. — A contract of copartnery provided for balances being struck and subscribed at certain times, in which case they should be "probative." In an action between representatives of partners, raised thirty years after the last docquet, *held* that the subscriptions being admitted, though not adhibited at the times fixed, the balances were obligatory. *Maclaren or Law, etc.* v. *Liddell's Trs.*, 1860, 22 D. 373; 32 J. 164.

211. Rights of Partners—Balance-Sheet — Action to Settle Balance-Sheets. — A contract of copartnery of a mercantile company having provided for a yearly balance of the company's books, an action was brought against one partner by his copartners, concluding (1) to have him ordained to concur with them in settling the balance-sheets which they had prepared of several bygone years; or (2) to have new balance-sheets adjusted at sight of the court. The court *dismissed* the action, on the ground that the pursuers had not alleged sufficient grounds to justify the interference of the court. *Beveridge's Trs.* v. *Beveridge*, 1871, 9 M. 886; 43 J. 479.

212. Rights of Partners—Bill of Exchange—Bill inter socios—Summary Diligence.—A, the drawer of a bill for £300, having charged B, the acceptor, for payment, B brought a suspension, in which it was proved that the bill charged on had been drawn and accepted for the purpose of retiring a previous bill for £300 drawn by B upon A, which had been discounted for behoof of a company in which A and B were the only partners, but which had been dissolved before the granting of the bill charged on. *Held* that the second bill must be regarded as a bill *inter socios*, and could not be the foundation of summary diligence at the instance of one partner against the other. *Hamilton* v. *Steele*, 1871, 9 M. 805; 43 J. 482.

213. Rights of Partners — Bill of Exchange—Sale—Interdict.—A party alleging that he was a partner of a company, interdicted from selling bills subscribed by him with the company firm by public auction. *Taylor & Sons* v. *Taylor*, 1823, 2 S. 157.

214. Rights of Partners—Bill of Exchange—Granting after Dissolution.—*Held* that a partner of a company had no power, after its dissolution, to grant a bill, in name of the firm, for a debt alleged to be due by the company, but which had never been constituted during its subsistence. *Snodgrass* v. *Hair*, 1846, 8 D. 390; 18 J. 176.

215. Rights of Partners — Charitable Allowance to Partner — Accounting. — The captors of a confiscated vessel having allowed one of the partners in the vessel to retain a portion of the proceeds of the sale of the vessel for his own behoof, *held* that his copartner had no right to call him to account in relation to these sums. *Gibson* v. *Stewart*, 1840, 1 Robin. 260. Affg. 14 S. 166.

216. Rights of Partners—Debt Due by Firm to Partner—Proportional Abatement. —If the partner of a company which has no company funds sue the other partners for a debt due to him by the company, his claim must sustain an abatement corresponding to the proportion which his share of the company

stock bears to that of the defenders. *Malcolm* v. *West Lothian Rly. Co.*, 1835, 13 S. 887; 10 Fac. 642.

217. Rights of Partners—Dissolution—Diligence by Partner on Decree Acquired from Creditor.—One of the two partners of a company which had been dissolved but not wound up, having been charged in name of a creditor holding a decree against the company, brought a suspension on the ground that the charge was insisted in solely for behoof of his copartner. Issue *granted* to try the question; and on the suspender having obtained a verdict, charge suspended on the ground that it is incompetent for the partner of a dissolved company, whose affairs have not been wound up, to use summary diligence against a copartner upon a decree acquired by him from a creditor of the company. *Pearson* v. *Lockhart*, 1867, 5 M. 301; 39 J. 132.

218. Rights of Partners — Discharge. — Circumstances under which it was *held* that an agreement between partners in trade relative to company matters, "to grant full and competent discharges to each other, in full of all bonds, etc., as individuals or partners," did not embrace a bond by one of the partners to another relating to a private transaction between themselves. *Crawford* v. *M'Cormack*, 1827, 2 W. & S. 569.

219. Rights of Partners — Evidence — Books Docqueted and Approved.—It was provided by the contract of copartnery of a company carrying on trade between Glasgow and Canada, that their partners in Canada should annually transmit to those in this country copies of their books docqueted as balanced at the end of each year, which, when approved of, should "be deemed and taken as an evidence in any question that might arise between the partners." The books were regularly transmitted by the managing partner for twelve years, at the expiry of which period an agreement was entered into at Glasgow, that he should retire on receiving payment of £49,600, under deduction of £5200, being the supposed balance due on his private account at the 1st of January preceding; and that if the latter balance should be found to be more or less than £5200, that balance should be paid by or to him. *Held* that it was not competent for the remaining partners to enter into an investigation of the books already transmitted to Glasgow, or to object to charges therein contained. *Pollok, Gilmour, & Co.* v. *Ritchie*, 1851, 13 D. 640; 23 J. 284.

220. Rights of Partners — Evidence — Books.—In a question between partners as to the copartnership arrangements, the books of the firm constitute the appropriate evidence as to such arrangements, and it requires exceptional circumstances to contradict such evidence. *Scott's Exrs.* v. *Gillespie*, 1869, 6 S. L. R. 656.

221. Rights of Partners—Fraud—Joint Adventure in Violation of Rights of Partners—Proceeds.—A, a partner of A & Co. (contrary to the copartnery articles) entered into a private joint adventure with B in which he employed the credit and name of A & Co. *Held* that, as acquisitions made by a partner with the funds or credit of the firm belong to the firm, and as B was aware of the fraud on A & Co., A & Co. had a claim against B and his assignees for payment of a sum due to the joint adventure. *Wallace, Hamilton, & Co.* v. *Campbell*, 1824, 2 Shaw's Apps. Affg. 8 June 1821, F. C.; 1 S. 53.

222. Rights of Partners—Fraud—Lease—New Lease by Partner of Dissolved Firm.—A lease of partnership premises and the contract of copartnery expired at the term of Whitsunday 1866. *Held* that one of the partners, who, before the expiry of lease, and without notice to his copartner, obtained a new lease of the premises in his own name, and on the termination of the partnership carried on the same business under it, was bound to communicate a share of the profits of the business to his former copartner. *M'Niven* v. *Peffers*, 1868, 7 M. 181; 41 J. 104.

223. Rights of Partners — Goodwill — Vested Interest—Newspaper.—A partner in a newspaper concern has a vested right to a share of the goodwill, and it may be sold by his representatives on his death, if not purchased by the surviving partners. *M'Cormick & Carnie* v. *Wilson's Exrs.*, 4 July 1822, F. C.; 1 S. 541.

224. Rights of Partners—Management—Damages.—*Held* that mere questions of disputed management and general disagreement were not sufficient to ground an action of damages between partners, especially where there had been manifest *mora* on the part of the pursuer. *Ferguson* v. *Mackenzie* (*Ferguson's Judicial Factor*), 1870, 8 S. L. R. 273.

225. Rights of Partners — Managing Partner — Remuneration. — Circumstances in which a partner in a concern, who acted as manager, *held* entitled to remuneration over and above his salary and interest in the concern. *Geddes* v. *Hamilton* (*Glasgow Glasswork Co.*), 1801, 4 Pat. 657.

226. Rights of Partners—Managing Partner—Remuneration.—One of the partners of a company, who in the contract was appointed manager, with a certain commission for his trouble, was employed by the others, but without any special agreement as to remuneration, to wind up the affairs of the concern, on the expiry of the partnership. Remuneration allowed him for his trouble by a commission, only at the same rate as was stipulated for in the contract during the subsistence of the company. *Berry* v. *Lamb*, 1832, 10 S. 792.

227. Rights of Partners—Managing Partner—Remuneration.—In a count and reckoning between two partners, the defender claimed, in addition to his share of the profits as partner, a certain allowance for his services in having managed the concern. In answer to the pursuer's statement that "it was part of the

arrangement that the partners were to have equal interests, but the defender was to take the management, without special remuneration therefor," the defender stated that "there was no understanding or undertaking, and no obligation upon him to do so, and he claims a reasonable compensation for his services." *Held* that, having regard to the nature of the action as one of count and reckoning, and seeing that the defender's answer, when read as relative to the pursuer's statement, was not inconsistent with the existence of a special agreement for remuneration to the defender as manager, he was entitled to a proof of his claim for salary. *Faulds* v. *Roxburgh*, 1867, 5 M. 373.

228. Rights of Partners—New Partners—Liability for Loss arising before their Assumption.—A company consisting of two individuals assumed four partners, without any stipulation or entries in the books to instruct a distinction betwixt the old and new firms, or to separate their claims and liabilities. *Held*, in a question of accounting among the partners, that the four assumed partners were not entitled, under the circumstances, to charge the two original partners with the whole loss arising out of a transaction which commenced with the original firm. *Mercer* v. *Peddie*, 1832, 10 S. 405.

229. Rights of Partners — Interest of Partner.—A partner of a company is bound to contribute a proportional share of the debts owing by the company. *Gray* v. *Douglas, Heron, & Co.*, 1779, 6 Pat. 800.

230. Rights of Partners — Interest of Partner. — The extent of the interest of a partner in a company, where this was not fixed by contract, *held* to be regulated by the amount of his input stock, as compared with that of the other partners. *Struthers* v. *Barr*, 1826, 2 W. & S. 153. Revg. 1 S. 124; 4 S. 118.

231. Rights of Partners — Interest of Partner.—The division of profits must be by equal shares, where it is not regulated by special agreement. *M'Whirter* v. *Guthrie*, 1823, 1 S. 319. *Fergusson* v. *Graham's Trs.*, 1836, 14 S. 871.

232. Rights of Partners — Interest of Partner.—When there is no deed of copartnery, there is no presumption of law of equality of interest. *Campbell's Trs.* v. *Thomson*, 1831, 5 W. & S. 16. Revg. 7 S. 650; 4 Fac. 921. *Aberdeen Town & County Bank* v. *Clark*, 1859, 22 D. 44; 32 J. 20.

233. Rights of Partners — Interest of Partner—Proof.—Where a question of the existence of a partnership is sent to a jury, there being no deed of copartnery, the proportional interest of each partner must be put in issue. *Aberdeen Town & County Bank* v. *Clark*, 1859, 22 D. 44; 32 J. 20.

234. Rights of Partners — Property — Removal of Occupying Partner.—One of the two partners of a company *held* not entitled in his own name, or that of the company, to pursue a summary process against the other for removing him from a house vested in the person of the party pursuing, but for behoof of the company, into possession of which he had been put as a partner and manager of the company. *Rutherford & Finlayson* v. *Finlayson*, 1828, 7 S. 10.

235. Rights of Partners — Property — Assignation to Bond by Partner to Firm—Right of other Partner to Recover. — A party obtained a cash-credit from a bank on a joint and several bond by himself and others. At a time when the credit was exhausted he entered into partnership with another, and shortly afterwards the debt due to the bank under the credit was paid up by the company on an assignation to the bond; and the company having been dissolved, and the party who obtained the cash-credit having died largely indebted to it, *held* that the other surviving partner was entitled, under the assignation to the bond, to recover from a co-obligant therein the full amount. *Child* v. *Fergusson's Trs.*, 1835, 13 S. 768; 10 Fac. 504.

236. Rights of Partners—Relief—Excise Penalties.—One of the partners of a distillery company having been found liable in excise penalties, in consequence of the other partners and the manager having, without his knowledge, engaged in illicit distillation, a jury *held* him entitled to relief against them. *Campbell* v. *Campbell*, 1839, M'L. & R. 387; 1 Rob. 1. Affg. 12 S. 573.

237. Rights of Partners — Relief in Favour of Partners Compelled to Pay Partnership Debt—Winding-Up in England. —An insurance company carrying on business both in Scotland and England, became insolvent, and a fiat of bankruptcy was issued against them in England under the Winding-Up Act, 7 and 8 Vict. c. 111. Thereafter several of the Scots partners were compelled to pay debts due by the company, and they brought an action of relief before the Court of Session against the other partners. The court *repelled* a preliminary plea in defence to this action, that the pursuers' action was incompetent, as involving a process for a general winding-up of the company's affairs, such as was depending in the Bankruptcy Court in England. *Richardson & Others* v. *Gavin & Others*, 1853, 15 D. 434; 25 J. 253; 2 Stuart 245.

238. Rights of Partners—Remuneration for Extra Trouble.—A partner is not entitled to an extra allowance for extraordinary trouble in the business of the company, without a special stipulation to that effect. *M'Whirter* v. *Guthrie*, 1821, Hume 760; 1822, 1 S. 319.

239. Rights of Partners—Use of Partner's Name.—A partner of a company consisting of two partners, carrying on business under a descriptive firm, *held*, in virtue of the mandate implied in partnership, entitled, in libelling a summons against his copartner for recovery of a company debt, to use his copartner's name, for the purpose of giving a good instance to the summons, without his authority. *Anter-*

mony Coal Co. v. *Wingate, etc.*, 1866, 4 M. 1017 ; 38 J. 517.

240. Rights of Partners — Vote for Management of Charity.—Where a firm subscribed to an infirmary only one partner was entitled to vote at meetings, but no written mandate was required. *Walker* v. *Law*, 1872, 11 M. 199 ; 45 J. 122.

241. Servant of Partnership — Agent — Obligation to Find Security. — It being provided in a contract of copartnery, that all the agents should be obliged to find security, and certain of the partners having been employed as agents under a special agreement, which contained no stipulation to that effect, *held* that these agents were not bound to find security. *Edinburgh & Leith Shipping Co.* v. *Downe*, 1832, 10 S. 557.

242. Servant of Partnership—Manager—Powers. — A party appointed by a written commission to act as manager under a committee of the partners, and to whom no conveyance of the funds has been made, is a mere officer or servant of the company, and has no right to object to their resolutions, or to resist assigning a claim on a sequestrated estate, made by him as manager, although it is declared in one of the resolutions, prior to his commission, that he was to be trustee. *Paul* v. *Taylor*, 1826, 4 S. 572.

243. Servant of Partnership—Salesman —Power to Hire.—Articles of a partnership, by which the committee of a trading society were found to have sufficient powers to hire a salesman for a twelvemonth. *Batchelor* v. *Dundee Commercial Society*, 1831, 9 S. 549.

244. Validity—Corrupt Agreement to Share Commission.—One of the two competing candidates for a trusteeship on a sequestrated estate retired in favour of the other, on an agreement that he was to have half the commission, and he afterwards drew part of the commission ; and the trustee elected having resigned without accounting for the funds of the estate, an action against the other candidate, founding on the agreement as constituting a partnership, and concluding for count and reckoning, or at least for repetition of the sums actually received from the trustee, *dismissed*. *M'Taggart's Reps.* v. *Roberton*, 1834, 12 S. 338 ; 9 Fac. 204.

245. Validity—Minor Partner—Jus tertii. —It is *jus tertii* for a person other than a partner to object to the validity of a partnership on the ground of the minority of one of the partners. *Blackwood* v. *Thorburn*, 1868, 7 M. 318 ; 41 J. 187.

246. Validity—Pawnbroking Business—Pawnbrokers Act.—A contract between two parties to carry on the business of pawnbrokers in the name of one of them alone, followed by the single name appearing on the business premises, and in the documents issued to and taken from the customers, was a contract for a secret partnership, and illegal and void, as being contrary to the provisions and policy of 39 and 40 Geo. III. c. 99. *Gordon* v. *Howden*, 1845, 4 Bell 254 ; 17 J. 329. Revg. 5 D. 698 ; 15 J. 321.

247. Validity—Pawnbroking Business—Pawnbrokers Act.—*Held* (1) that averments of partnership in a pawnbroking business, in spite of the alleged partner's name not appearing on the business premises as required by 39 and 40 Geo. III. c. 99, though there was no contract to conceal it, were relevant ; and (2) that he was not bound to take an issue laying on him the burden of proving a contract to conduct business as known partners. *Fraser* v. *Hair*, 1848, 10 D. 1402 ; 20 J. 509.

248. Validity—Pawnbroking Business—Pawnbrokers Act.—In an action of accounting by a party alleging himself to be a partner of "Alexander Hair & Co.," pawnbrokers, who carried on business under that firm, concealing the name of the pursuer and other partners, *held* that the partnership being in violation of 39 and 40 Geo. III. c. 99, the action could not be sustained. *Fraser* v. *Hair*, 1853, 1 Macq. 392 ; varying 14 D. 335 ; 24 J. 162 ; 1 Stuart 274.

249. Validity—Pawnbroking Business—Pawnbrokers Act.—A party averred that he was a partner in a pawnbroking concern, although his name did not appear in the pawntickets, the licence, or over the door, as required by 39 and 40 Geo. III. c. 99. *Held* competent to prove by parole or facts and circumstances the alleged partnership. *Fraser* v. *Bell*, 1854, 16 D. 789 ; 26 J. 368.

PASSIVE TITLE

Act, 1661, c. 24, 1–6.
1695, c. 24, 14–37.
1695, c. 41, 48.
Gestio pro hærede, 7–13, 72.
Intromission, 43–46.
Præceptio Hæreditatis, 49.
Service as Implying, 51–54.
Vitious Intromission, 48, 50, 55–77.

1. Act, 1661, c. 24 — Agreement — Adjudication.—An agreement by a person to convey his expected inheritance from his father within six months from his father's death, *held* null under the Act, 1661, c. 24, although adjudication in implement and sasine had followed on the agreement. *Paton* v. *Rennie*, 1835, 13 S. 509 ; 10 Fac. 304.

2. Act, 1661, c. 24—Deed in Favour of Ancestor's Creditor.—Within a year of his father's death a son granted a bond and disposition in security in favour of his father's creditor over lands inherited by him from his father in security of advances to him. *Held* that this security was null and void under the Act, 1661, c. 24. *Christie* v. *Royal Bank*, 1841, 2 Robin. 118. Affg. 1 D. 745 ; 14 Fac. 825. *Torrance* v. *Murdoch*, 1842, 4 D. 774 ; 14 J. 284.

3. Act 1661, c. 24 — Preference — Adjudication.—A general adjudication under the Bankruptcy Act of the estates of an heir, who has inherited property from an ancestor, within three years of the ancestor's death carries the estate so inherited and is diligence in the sense of the Act, 1661, c. 24, so as, without other diligence, to give the ancestor's creditors over the estate as against the heir's creditors. *M'Lachlan* v. *Bennet*, 1826, 3 W. & S. 449. Affg. 4 S. 712; 1 Fac. 689.

4. Act, 1661, c. 24—Preference—Inhibition.—*Held* that inhibition is not diligence in the sense of the statute, 1661, c. 24, and does not, though used against the heir by a creditor of the ancestor within three years after his death, create any preference in favour of the inhibitor over those creditors of the heir whose debts were contracted prior to the inhibition. *Menzies* v. *Murdoch*, 1841, 4 D. 257; 14 J. 101. See also *Campbell* v. *Gordon*, 1842, 1 Bell 563. Revg. 3 D. 629; 16 Fac. 694.

5. Act, 1661, c. 24—Preference between Creditors.—The Act, 1661, c. 24, does not affect the preference of the ancestor's creditors or of creditors and legatees *inter se*.

An insolvent heir *held* bound to pay a debt due by his ancestor (who died solvent) preferably to a legacy given by the ancestor. *Borthwick* v. *Hilson*, 1838, 16 S. 1158; 13 Fac. 787. See *Remington* v. *Bruces*, 1829, 8 S. 215; 5 Fac. 183; and *Bruce* v. *Bruce*, 1831, 9 S. 695; 6 Fac. 452.

6. Act, 1661, c. 24—Ranking.—A company consisting of A, A's son B, and C was dissolved by A's death. B and C carried on the business; and the company and the partners were sequestrated within three years of A's death. In continuing the business, debts of the old firm had been paid off with money obtained by the new firm. *Opinion*, as to lands which had descended from A to B, that under the Act 1661, the creditors of the first firm were to be ranked preferably on it, and that the creditors of the second firm, with whose money some of the creditors of the first firm had been paid, were not entitled to be ranked along with them as in right of an implied assignation from the creditors of the first firm who had been paid with their money. *Observations* on the Act, 1661, c. 24. *Hoskins* v. *Christie*, 1845, 8 D. 167; 18 J. 63.

7. Gestio pro hærede.—An heir-at-law concurred with a gratuitous disponee in heritage, in discharging an heritable debt which was not specially embraced in the disposition. *Question*, whether he had incurred the passive title of *gestio pro hærede*. *Gordon* v. *Clerk*, 1787, 3 Pat. 61.

8. Gestio pro hærede.—Circumstances in which a widow who derived title to a farm from her husband, was *assoilzied* from an action on the passive titles. *Macdonald* v. *Middleton*, 1822, 1 S. 531.

9. Gestio pro hærede.—A party who, as heir-at-law, made up titles to a property, settled by an antenuptial contract on the children equally, sold it. *Held* liable to one of the children for her share of the price. *Hutchison* v. *Hutchison*, 1822, 1 S. 295.

10. Gestio pro hærede.—An heir of entail *held* barred *gestione pro hærede*, from challenging deeds of entail. *Cunninghame* v. *Cunninghame*, 1825, 1 W. & S. 103. Affg. 2 S. 232.

11. Gestio pro hærede — Summons — Charge to Heir.—Under a summons libelling on a passive title by a charge to enter heir, together with the general averment of style as to passive representation, it is not competent to found on *gestio pro hærede*. *Fergusson* v. *M'Gachen*, 1829, 7 S. 580; 4 Fac. 846.

12. Gestio pro hærede.—An heir's getting up titles does not of itself infer *gestio pro hærede* so as to subject him in a passive title. *Fergusson* v. *M'Gachen*, 1829, 7 S. 580; 4 Fac. 846.

13. Gestio pro hærede — Service cum beneficio inventarii.—Charge to a jury that it was not sufficient to protect an heir who had immixed with the heritage of the deceased against the passive title of *gestio pro hærede*, that he had made up an inventory with the view of serving *cum beneficio inventarii*, but no service followed, and the heir renounced the succession. *Montgomerie* v. *Boswell*, 1841, 4 D. 332; 14 J. 104.

14. Heir-Apparent — Agreement — Act, 1695, c. 24 — Possession. — The parties interested in a succession entered into an agreement as to its division, with a view to avoid all disputes at law. The heir-apparent was a party to the agreement, and by virtue of it he obtained immediate possession of part of the heritage, which his father, by an imperfect writing, had burdened with a liferent, and he conveyed part to the widow in liferent, and her children in fee. It turned out that the title in the person of the heir-apparent was incorrectly made up, and therefore that the conveyance to the widow was ineffectual. *Held* that the son of the heir-apparent could not, by passing over his father, and making up titles to the whole heritage through his grandfather, repudiate the agreement, but was bound to implement it. *Duncan or Greig* v. *Duncan*, 1859, 22 D. 180; 32 J. 82.

15. Heir-Apparent — Altering Destination—Act, 1695, c. 24.—The destination of an estate, under a gratuitous bond, may be altered by the onerous deed of an heir-apparent three years in possession; and therefore heirs called under a marriage-contract, entered into by an heir-apparent three years in possession, preferred to heirs called under a prior gratuitous bond. *Smyth* v. *Murray*, 9 Dec. 1814, F. C.

16. Heir-Apparent—Benefit of Discussion —Act 1695, c. 24.—In an action at the instance of creditors of an heir who had possessed for three years on apparency, against the next heir, who had served to a remoter ancestor, *held* that the defender was not entitled to insist on the creditors in the first instance discussing their debtor's trust-dis-

ponees and executors. *Morris* v. *Beveridge*, 1867, 6 M. 60 ; 40 J. 40.

17. Heir-Apparent—Clare constat—Act, 1695, c. 24.—*Held* that the provision of the Act 1695, rendering an heir taking possession by a title from a remoter ancestor, liable for the debts and deeds of his immediate predecessor, more than three years in possession, applies where such title is made up by precept of *clare constat*, no less than where it is made up by service. *Brown* v. *Henderson*, 1852, 14 D. 1041 ; 24 J. 636 ; 1 Stuart 1088.

18. Heir-Apparent—Debts—Act, 1695, c. 24.—An apparent heir taking possession of an estate without making up titles is not bound by the deeds of his immediate predecessor who also possessed an apparency, the Act, 1695, c. 24, not applying to this case. *Grant* v. *Sutherland*, 1755, 1 Pat. 605. Affg. M. 9819.

19. Heir-Apparent—Debts—Act, 1695, c. 24—Liability of next Heir—Possession under Contract.—A debtor died in apparency, after having been in possession of an estate for three years. Decrees of constitution and adjudication were deduced against his infant son, who had been charged to enter heir without renouncing, in a reduction of the decrees. *Held* (1) that these decrees were so far effectual against the son as to attach the lands possessed by the father in apparency ; but (2) that possession by a liferentrix of part of the lands, in virtue of a right not flowing from the heir-apparent, is not accounted the possession of the heir-apparent ; and (3) that lands possessed by the heir-apparent under a contract of excambion with the liferentrix were not affected by the Act, 1695, c. 24. *Grant* v. *Sutherland*, 1749, 1 Pat. 416. Revg. Elc. "Minor" No. 12 ; M. 5265.

20. Heir-Apparent—Debts—Act, 1695, c. 24—Marriage-Contract.—The heir of an estate under a marriage-contract having died in apparency, after possessing for a few months, *held* that his son was entitled to pass him over, and serve heir to his grandfather, without being liable for his father's debts. *Blair* v. *Moncrieff*, 1766, 2 Pat. 126. Affg. M. 12871.

21. Heir-Apparent—Debts—Act, 1695, c. 24 — Entail. — When the institute in a tailzie, who is also heir of line, dies in apparency after the tailzie has been recorded and before infeftment has been taken on it, the next heir of tailzie by making up titles passing him by does not become liable for his debts under the Act, 1695, c. 24. *Dickson* v. *Syme*, 24 Feb. 1801, F. C. ; M. "Taillie" App. No. 7.

22. Heir-Apparent — Disposition — Act, 1695, c. 24.—An heir of entail who had been above three years in possession, disponed the entailed estate to a trustee for creditors, who took infeftment, and entered into a minute of sale of the estate. *Question*, in a reduction of these deeds after his death, whether, supposing part of the estate was free from the entail, and had been possessed merely on apparency, the next heir was barred from reducing *quoad hoc* by 1695, c. 24. *Lord Elibank* v. *Campbell*, 1833, 12 S. 74 ; 9 Fac. 55.

23. Heir-Apparent—Disposition in Trust —Adjudication—Act, 1695, c. 24.—Adjudication on a disposition containing an obligation in favour of a trustee for behoof of the granter, *held* to be in the same situation as an adjudication on a bond in contemplation of the Act, 1695, c. 24. *Murray* v. *Ramsay & Co.*, 17 Jan. 1811, F. C.

24. Heir-Apparent — Obligation — Act, 1695, c. 24.—An obligation was incurred by an apparent heir. The next heir, passing him by and serving to a remoter ancestor, *held* liable, so far as the obligation was onerous, without relief against the executry, or other separate estate of the apparent heir. *M. of Annandale* v. *Countess of Hopetoun*, 1739, 1 Pat. 225. Revg. Elc. "Mutual Contract" No. 12.

25. Heir-Apparent — Obligation — Act, 1695, c. 24. — The granter of an onerous obligation in relation to particular lands died in apparency after three years' possession. *Held* that his representative was not bound to relieve the heir passing by the granter seeing that the latter was liable in implement under the Act, 1695, c. 24. *Ogilvy* v. *Ogilvy*, 16 Dec. 1817, F. C.

26. Heir-Apparent—Obligation to Entail —Act, 1695, c. 24.—An entail being executed of (1) lands to which the entailer had made up no title but possessed as apparent heir and (2) other lands to which his titles were completed, his heir taking up the entailed lands becomes bound to make up proper titles and execute an entail of the lands possessed on apparency. This obligation is onerous ; and if not discharged by the institute who lies out unentered, it transmits under the Act, 1695, c. 24, against his heir passing him by and serving to the ancestor last infeft. *Carmichael* v. *Carmichael*, 15 May 1816, F. C ; 6 Pat. 155 ; Affg. 15 Nov. 1810, F. C.

27. Heir-Apparent — Onerous Deed — Provision—Act, 1695, c. 24.—A bond was granted by A to his granddaughter. *Held* that A's heir was liable in the sum seeing that the bond was onerous although A had possessed only on apparency and the heir had served to a remoter ancestor. *M'Lean* v. *M'Lean*, 1765, 2 Pat. 95.

28. Heir-Apparent — Onerous Deed — Act, 1695, c. 24.—A father who had not made up titles to a heritable estate, but of which he had been more than three years in possession on apparency, disponed it in his son's contract of marriage to the son and his wife in liferent, and the children of the marriage in fee. The son bound himself to pay 500 merks to such of his father's children as should survive him. There was no issue of the marriage, and the son disponed to a third party *mortis causa*. *Held* in a question between the disponee and the heir-at-law of the party last feudally vested, that the disposition to the son in the

contract of marriage was not onerous, and therefore not protected by the Act, 1695, c. 24; and the heir-at-law preferred. *Erskine* v. *Erskine*, 1805, Hume 431.

29. Heir-Apparent — Onerous Deed — Act, 1695, c. 24—Entail.—A liferent locality to a wife allowed by an entail, and granted by an heir dying in apparency after being three years in possession, is, by the Act, 1695, c. 24, binding on the subsequent heirs. *Countess of Glencairn* v. *Graham*, 1806, 5 Pat. 134. Affg. 23 May 1800, F. C.; M. "Heir-Apparent" App. No. 1.

30. Heir-Apparent — Onerous Deed — Act, 1695, c. 24.—A revocable conveyance by an apparent heir in possession, on the narrative of its being granted for "love, favour, and affection," and in consideration of "long services," was held to be onerous under the Act, 1695, c. 24, and binding on the next heir passing by the granter, without it being required to prove the verity of the narrative, many years having been allowed to elapse without challenge. *Adamson* v. *Inglis*, 1832, 11 S. 40.

31. Heir-Apparent — Onerous Deed — Act, 1695, c. 24.—A deed by an heir possessing on apparency bore to be "gratuitously" granted in favour of relatives, but contained a clause of absolute warrandice. An heir made up titles, passing over the heir-apparent, and brought a reduction. *Held* that the deed was, in the circumstances, to be presumed to have been onerous, and was protected by the Act, 1695, c. 24. *Taylor* v. *Hutton*, 1854, 16 D. 885; 26 J. 450.

32. Heir-Apparent — Onerous Deed— Act, 1695, c. 24.—*Held* (in conformity with *Russell* v. *Russell*, 1852, 15 D. 192; 25 J. 133) that rational provisions made in a trust-settlement by an heir who died after possessing an estate for three years upon apparency, in favour of his widow and children, were chargeable under the Act, 1695, c. 24, against the next heir completing a title to the property. *Orr*, 1871, 9 M. 500; 43 J. 264.

33. Heir-Apparent — Possession — Act, 1695, c. 24.—Trustees of a father possessed an estate after his death, without any feudal title, for the purpose of paying off the debts of the truster, for some of which the heir-apparent was jointly bound with the truster. *Held* this was not such possession by the heir-apparent as to create a representation under the first branch of the Act, 1695, c. 24, by the next heir, passing him over. *Donald* v. *Colquhoun*, 1835, 13 S. 574; 10 Fac. 365.

34. Heir-Apparent — Possession — Act, 1695, c. 24.—Two parties who were engaged in a competition of brieves as to which was entitled to be served heir to an entailed estate, entered into an agreement that, pending the competition, the rents should be levied by a joint factor, and equally divided between them without any claim for repetition by the successful against the unsuccessful competitor; and the rents were levied and divided accordingly for more than three years. *Held* that this constituted a possession by the successful competitor, who died without making up titles, sufficient to render a succeeding heir passing him by liable for a bond of provision executed by him in terms of the entail. *Corbet* v. *Porterfield*, 1839, 1 D. 1038; 14 Fac. 1059.

35. Heir-Apparent — Purchase for Behoof of—Act, 1695, c. 24.—Sale of an heir-apparent's reversionary interest by his assignees under a commission of bankruptcy, and purchase thereof by a third party for behoof of his son, the next heir, *held* not to infer a representation under the second branch of the Act, 1695, c. 24. *Donald* v. *Colquhoun*, 1835, 10 S. 574; 10 Fac. 365.

36. Heir-Apparent—Sale—Reversion of Price—Act, 1695, c. 24.—A decree of sale in a process of ranking and sale brought by an apparent heir, being an adjudication for the general behoof, is a sufficient title for the heir to take up and discharge the reversion of the price; and therefore *held* that an offer by him to obtain a precept of *clare constat* from the immediate superior, under a base holding and take infeftment, was more than he was bound in law to do. *Middlemore* v. *M'Farlane*, 2 Feb. 1803, F. C.; M. "Heir Apparent," App. No. 2; and 5 March 1811, F. C.

37. Heir-Apparent — Sale of Entailed Estate—Act, 1695, c. 24.—A deed of entail not made real by infeftment, *held* not to bar an apparent heir of line who is a substitute from bringing a judicial sale on account of the debts of the entailer, although the entail forbade alienation. *Mitchell* v. *Tarbutt*, 4 Feb. 1809, F. C.

38. Heir—Charge to Enter—Adjudication—Liability of Adjudgers for Burdens.—An ancestor infeft left a disposition (with procuratory and precept) in favour of his heir-at-law, but burdening him with payment of provisions to his younger children. *Question*, whether the creditors of the heir, not being creditors also of the ancestor, but giving the heir a charge to enter, and thereon adjudging the lands as *in hæreditate jacente* of the ancestor, could carry off the lands without incurring liability to fulfil the ancestor's provisions in favour of his younger children. *Paul* v. *Boyd*, 1833, 11 S. 292.

39. Heir—Charge to Enter—Renunciation—Adjudication.—*Question*, whether an heir who has incurred a passive title by not renouncing his ancestor's succession, when charged to enter is entitled to renounce after the estate has been adjudged. *Grieve or Dingwall* v. *Burns*, 1871, 9 M. 582; 43 J. 354.

40. Heir—Charge to Enter—Renunciation.—A party having been incarcerated on a decree for a debt of his father, proceeding on a charge to enter heir to his father, and refusing to renounce, bill of suspension and liberation without caution *refused*. *Richan* v. *Hill*, 1832, 11 S. 237.

41. Heir—Charge to Enter—Title to Sue Reduction.—A party who received a general

charge to enter heir to the debtor in an heritable bond, and against whom an action was raised on the passive titles, concluding for payment, *held* entitled to raise an action of reduction of the bond on the head of usury, and for count and reckoning, and repetition of the bygone interest. *Boswell* v. *Stobie's Trs.*, 1833, 11 S. 853.

42. Heir—Decree of Constitution.—*Held* that an action of constitution of a personal debt can be insisted in against the heir of the deceased debtor without calling his executors. *British Linen Co.* v. *Lord Reay*, 1850, 12 D. 949 ; 22 J. 416.

43. Intromission—Pleading in Action—Liability.—It is not sufficient to subject a party in a passive title, that, in a closed record, he has pleaded not only that he did not represent, but that the debt was not due. *Smith* v. *Drummond*, 1829, 7 S. 792 ; 4 Fac. 1076.

But a passive title *held* to be incurred by pleading peremptory defences. *Gilmour* v. *Campbell*, 1821, 1 S. 216.

44. Intromission—Sisting as Defenders.—*Held* that children, fiars of a fund, did not incur a passive title by sisting themselves as defenders in an action raised against their father, the liferenter, although decree was pronounced against them "as fiars, and as representing the liferenter." *Brown* v. *Stewart*, 1824, 2 S. 739.

45. Intromission.—A testator, by a settlement, conveyed his property to a party who was not the heir-at-law, under burden of legacies. The heir-at-law (who was the disponee's mother) made up titles to the testator, and thereafter executed a gratuitous disposition in favour of the disponee, who in the meantime intromitted with the funds of the testator. *Held* that the disponee was liable in payment of the legacies, although he alleged that his right was derived from the heir-at-law, and not from the testator. *Wylie* v. *Ross*, 1827, 2 W. & S. 576. Affg. 4 S. 172.

46. Intromission.—A father conveyed all his property to his eldest son, under burden of provisions to his younger son and a daughter. The eldest son granted an heritable bond over property of his own, not acquired from his father, to the husband of the daughter for her provision. He afterwards became bankrupt, and his estates were sequestrated and sold. Parts of them were purchased by the younger son, who retained the price to cover his own and his sister's provisions. *Held* that the younger son and his sister had not incurred a representation of their father. *Brunton* v. *Thomson*, 1832, 11 S. 190.

47. Next-of-Kin—Charge—Constitution of Debt.—*Held* that where some of the next-of-kin of a deceased party reside out of, and some within, the kingdom, it is competent to execute letters of general charge, and a summons of constitution on the same day against those out of the kingdom, and thereafter to execute at a later date the charge and the summons *simul et semel* against those within the kingdom, provided the summons be not called in court until after the *inducice* of the charge and of the summons have expired against all the next-of-kin. *Lyell* v. *Christie*, 1836, 15 S. 41.

48. Next-of-Kin—Charge to Confirm—Renunciation — Act, 1695, c. 41—Decree cognitionis causa. — Next-of-kin charged under the Act, 1695, c. 41, by a creditor of the deceased, having neither confirmed as executors nor renounced the succession, were pursued as vitious intromitters. The Lord Ordinary pronounced decree against them, but enforceable only to the extent of the succession devolving on them. In the Inner House the defenders gave in a minute renouncing the succession. The court *decerned* against them *cognitionis causa tantum*. *Davidson* v. *Clark*, 1867, 6 M. 151 ; 40 J. 82.

49. Præceptio Hæreditatis. — Circumstances not inferring a passive representation *præceptione hæreditatis*. *Mackenzie* v. *Matheson*, 1834, 13 S. 31.

50. Representation — Vitious Intromission.—A son, on the death of his father, in answer to an application by a creditor for payment of a debt due by the father, wrote, that although there were not at present any tangible funds, and he had interfered with the effects only in a legal way, yet he would regard the debt as a debt of honour, and would pay it out of his own pocket if there were no other means. *Held* that although he had not incurred general liability for his father's debts, he had undertaken a representation *quoad hoc*. *Edmonstone* (*Millar's Trs.*) v. *Hamilton*, 1842, 5 D. 414 ; 15 J. 186.

51. Service — Intromissions. — A party obtained himself served heir-male and heir of line of another, and intromitted with the rents of an estate, to which he had right as heir-male. He thereafter, within year and day of the death of the defunct, made up inventories, and brought a ranking and sale of the estate, and paid the debts of the defunct, taking assignations to them in favour of himself. *Held* that, by his service and intromissions, he became universally liable for the debts of the defunct ; that they were extinguished by his having paid them ; and therefore that his representatives could not, in virtue of the assignations, recover payment of them from an heir-male who afterwards succeeded to the estate. *Codrington* v. *Johnstone's Trs.*, 1824, 2 Shaw's App. 118. Affg. 11 Feb. 1818, F. C.

52. Service — Intromissions — Provision to Children.—A father conveyed his estates to his son *mortis causa*, subject to his debts, and a provision to his daughter, for the payment of which the son was to be personally bound by acceptance. *Held* that although he served heir, and entered into possession, and intromitted with his father's effects, he was not liable to any greater extent than to count and reckon with the daughter for his intromissions as a trustee. *Bruce* v. *Bruce*, 1826, 5 S. 119 ; 2 Fac. 85.

53. Service.—A general service, without taking any benefit thereby, does not infer a passive title or representation. *E. of Fife* v. *Duff*, 1828, 6 S. 698 ; 3 Fac. 720. *Mackay* v. *Campbell's Trs.*, 1835, 13 S. 246. See *Nisbet's Trs.* v. *Hacket*, 1839, 1 Robin. 53. Affg. 13 S. 497 ; 10 Fac. 293.

54. Service.—A, in the marriage settlement of his daughter, bound himself to provide her in one-third of his whole estate (reserving his power of disposal). Under his will his other two daughters took the other two-thirds. *Held* that service by these daughters as heirs-portioners for the purpose of conveying the estate in implement of the marriage settlement was such a representation as made the heirs-portioners liable for A's debts. *Kirkpatrick* v. *Irvine*, 1841, 2 Robin. 475. Affg. 16 S. 608.

55. Vitious Intromission.—A person died, leaving a widow and four daughters, one of whom was confirmed executrix ; but, previous thereto, various bills belonging to him had been discounted, and thereafter certain shares of a bank were sold under that confirmation by a nephew and brother-in-law, acting on behalf of the family ; and various payments were made by them out of the funds. *Held*, in a question with creditors, that no passive title had been incurred as vitious intromitters. *Gardiner* v. *Davidson*, 9 Dec. 1802, F. C. ; M. 9840.

56. Vitious Intromission.—A tenant of a farm for one year died, leaving two accepted bills in his repositories. His widow, to avoid a sequestration, put her initials to the bills as drawer and indorser, and delivered them to the landlord in payment of the rent. *Held*, in a question with a creditor arresting in the hands of the acceptors, that the widow and landlord were not liable as vitious intromitters. *Rae* v. *Weir*, 1803, Hume 437.

57. Vitious Intromission. — A, on the death of his mother, and while no witnesses were present, opened her repositories, burned papers, and carried away some things of small value, part of which he gave away. *Held* liable for her debts as a vitious intromitter. *Scott* v. *Lord Belhaven*, 1821, 1 S. 33.

58. Vitious Intromission.—A party intromitting without judicial authority with the moveable estate of his father, and recovering and paying debts, incurs a passive title, although done on inventory, and there is no fraud. *Forbes* v. *Forbes*, 1823, 2 S. 395.

59. Vitious Intromission.—Spouses had separated by contract. The wife, on her husband being on death-bed, and destitute, brought him into her house, furnished by herself, where he died ; and she continued in possession of the furniture. *Held* that she did not thereby become liable as a vitious intromitter. *Brown* v. *Stewart*, 1824, 2 S. 739.

60. Vitious Intromission.—A widow who held a liferent of her husband's estate, and was nominated an executor under a post-nuptial contract of marriage, and gave up an inventory of her husband's estate, *held* to have a sufficient title to exclude liability as a vitious intromitter. *Barbour* v. *Kelvie*, 1824, 3 S. 299.

61. Vitious Intromission.—A widow who had been decerned executrix *qua* relict, but had intromitted with her husband's effects without confirmation or inventories, subjected to the passive title of vitious intromission. *Cunningham & Bell* v. *M'Kirdy*, 1827, 5 S. 315.

62. Vitious Intromission. — A widow intromitted with her husband's effects, by directions of her husband's creditors. She intimated that she was not to represent him, and applied the funds in extinction of preferable claims. *Held* that she had not incurred a passive title. *Walker* v. *Home*, 1827, 6 S. 204 ; 3 Fac. 220.

63. Vitious Intromission.—A widow, by the advice of a law agent, intromitted with the effects of her husband, without previously obtaining any legal warrant to do so, and sold about one-half of them by public roup, and part privately. The whole were insufficient to pay death-bed and funeral expenses, and house rent. After being sued as a vitious intromitter, she was confirmed executrix-dative. *Held* not liable personally in the debts of her husband. *Gardner* v. *Stevenson*, 1830, 8 S. 600.

64. Vitious Intromission. — Sisters *held* liable to account to the creditor of a deceased brother for the value of annuities granted to them, under an arrangement with another creditor, by which they made up titles, and conveyed to him certain foreign property of the deceased, of which the chief part had been previously mortgaged to that creditor. *Lang* v. *Orr*, 1830, 9 S. 98.

65. Vitious Intromission.—*Held* that the fact of one acting under a factory granted by the relations of the deceased when the widow was by agreement confirmed as executrix, did not infer a passive title. *Young* v. *Marshall*, 1831, 9 S. 638.

66. Vitious Intromission. — A widow's continuance in possession of certain household furniture and machinery of her deceased husband *held* not to amount to vitious intromission, though she did not make up any legal title. *Thomson* v. *Miller*, 1834, 13 S. 143 ; 10 Fac. 105.

67. Vitious Intromission.—A widow in humble circumstances, and illiterate, who intromitted with and sold her husband's household furniture, which was confirmed by an executor-creditor, to whom she admitted she was liable for the value, *held* not liable on the passive titles to another creditor. *Dudgeon* v. *Dudgeon's Trs.*, 1844, 6 D. 1015 ; 16 J. 153.

68. Vitious Intromission.—A widow, who was liferented in her husband's house, and by the marriage-contract was entitled to a certain sum, after her husband's death occupied the house ; and also, without making up any title,

took possession of the furniture and all his effects. After nearly forty years, she assigned her claim under the marriage-contract, not having previously constituted the debt against her husband's heirs. In a question between them and the assignee, *held* that the widow had intromitted vitiously with her husband's estate, and that the claim under the marriage-contract was extinguished. *Simpson or Harper* v. *Barr*, 1855, 17 D. 33, 478; 27 J. 204.

69. Vitious Intromission—Bona Fides.—A brother and sisters, having right to the succession of a deceased brother, entered into a contract of collation for dividing the funds, and authorising the brother to procure himself confirmed executor. This he failed to do, and thereafter became insolvent. In an action by a creditor of the deceased brother against the sisters, on the ground that they had rendered themselves liable for all his debts as vitious intromitters, *held* that the character of vitious intromitters had not been fixed on the sisters, in respect that they had acted in good faith, and that there was no appearance of intention on their part to take up the *universitas*, but, on the contrary, that they had authorised their brother to act only on completing his title as executor.

Observations as to what is required to make a person liable as a vitious intromitter. *Adam* v. *Campbell*, 1854, 16 D. 964; 26 J. 500.

70. Vitious Intromission — Caution. — *Question* as to the effect of intromission in rearing up a passive title so as to render a party liable to implement a cautionary obligation as a vitious intromitter. *Kerr* v. *Bremner*, 1835, 14 S. 180. Remitted, 2 S. & M'L. 895; 1 D. 618; 14 Fac. 704. Altered, 1 Bell 280.

71. Vitious Intromission — Executor-Creditor. — Direction to a jury, that the confirmation by an executor-creditor of the whole moveable estate of the deceased does not protect from the passive title of vitious intromission a person intromitting with any part of the estate who does not claim under the executor-creditor. *Montgomerie* v. *Boswell*, 1841, 4 D. 332; 14 J. 104.

72. Vitious Intromission — Liability—Gestio pro hærede.—A father, by a *mortis causa* disposition, conveyed his estates, heritable and moveable, to his son and daughters, who, supposing that he had died solvent, intromitted both with the heritage and moveables without any other title than the disposition. *Held* not liable universally, but only *in valorem*. *Webster* v. *Greig*, 1802, Hume 436.

73. Vitious Intromission — Liability. — Where representatives intromit with the funds of a person deceased, they are liable *in solidum*, to the extent, at least, of their intromission. *Wilson* v. *Taylor*, 1865, 3 M. 1060; 37 J. 557.

74. Vitious Intromission—Minor.—*Question*, whether vitious intromissions by tutors and curators can subject a minor in representation. In this case the creditor *held* barred from pleading vitious intromission. *Galbraith* v. *Lockhart*, 1828, 6 S. 861.

75. Vitious Intromission — Minor. — A person *majorennitati proximus held* to have incurred a passive title. *M'Eachern* v. *M'Eachern*, 1833, 11 S. 441.

Question, whether a minor can, by intromitting, incur a passive title as a vitious intromitter. *Kerr* v. *Bremner*, 1835, 14 S. 180. Remitted, 2 S. & M'L. 895; 1 D. 618; 14 Fac. 704, 895. Altered, 1 Bell 280.

76. Vitious Intromission—Plea—Exception — Who may Plead? — Liability of Assignees—Heirs.—The plea of vitious intromission is competent to the heir of a person deceased, and may be pleaded by exception, not only against the intromitter, but against his heir, and also against his onerous assignees. *Simpson* v. *Barr*, 1854, 17 D. 33. *Held* that vitious intromission could not be pleaded by way of exception. *Buchanan* v. *Royal Bank*, 1843, 5 D. 211; 15 J. 54.

77. Vitious Intromission — Tutor. — Intromission by a tutor before making up inventories, but which were afterwards made up, does not subject him personally in payment of debts affecting the estate. *Wallace* v. *Anderson*, 1826, 5 S. 179.

PATENT

1. Alteration of Letters — Leave to Alter.—Where the holder of a British patent had obtained the leave of the Attorney-General of England, to whom the patent had been originally referred, to file a memorandum of alteration on his letters patent, *held* (upon a construction of 5 and 6 Will. IV. c. 83, and 15 and 16 Vict. c. 83, s. 39) that the leave of the Lord-Advocate or Solicitor-General for Scotland was not necessary to render the alteration available in Scotland. *Knox* v. *Paterson*, 1857, 20 D. 40; 30 J. 23.

2. Anticipation—Prior Use—Validity.—*Held* that, to invalidate a patent, prior use must not only be public, but must have been continued, not abandoned; and must have been continued to the time when the patent was granted—not the very exact period, but that it must have been known and used as a useful thing at the time. *Neilson* v. *Househill Coal Co.*, 1842, 4 D. 1187; 5 D. 86; 14 J. 174, 626. Rev. (11th exception); and *observed*, that if use or if trials had been made of the machine (which is the subject of the patent) in the eye and in the presence of the public, it is not necessary that the use should come down to the time when the patent was granted. 1843, 2 Bell 1; 15 J. 524.

3. Anticipation — Prior User — Scots Patent—Use in England.—A patent for an invention in Scotland is invalidated by proof of previous use in England. *Roebuck & Garbet* v. *Stirlings & Co.*, 1774, 2 Pat. 346; 5 Br. Sup. 522; Hailes 566. *Brown* v. *Annandale & Son*, 1842, 1 Bell 70. Affg. 3 D. 1189; 16 Fac. 1280.

4. Contract — Construction. — Construction of a clause in a contract between a patentee of a process for refining sugar, and a company who held his licence to use the process. *Few* v. *M'Leish & Co.*, 1831, 9 S. 732.

5. Date of Patent—Provisional Specification—Prior Use.—An inventor having filed a "provisional specification" under 15 and 16 Vict. c. 83, obtained within six months letters patent, which were dated as at the date of the provisional specification. Another party had made a similar invention prior to, but did not use it for his trade till after, the date of the specification being filed. The patentee brought an action of damages for infringement of his patent. *Held* (1) that in such questions the date of the patent is that of filing the provisional specification; (2) that there was not such prior use as to invalidate the patentee's right; (3) that it being not the discovery in which the public are interested, but the disclosure, the patentee was entitled to be protected. *Opinion*, that the use of his own invention during the period between the filing of the specification and the granting of the patent did not subject a party as an infringer. *Smith* v. *Davidson & Wilson*, 1857, 19 D. 691; 29 J. 327.

6. Infringement — Agreement — Averments—Relevancy.—A party who held a licence from the patentee of a hot-blast having made use of a process which he alleged did not fall under the patent, and therefore that he was not bound to pay the premium for the use of the patent, mutual actions were brought to settle the question, but they were afterwards abandoned, under a transaction and agreement by which the party became bound to pay one shilling per ton of iron to be smelted "by the application or use of heated air in any of the modes heretofore practised" by the party, "or in any other mode falling under the description of the said patent, or, in the specification thereof." *Held*, in a suspension of a charge for the premium, that as he did not allege that he now made use of a different process from that formerly used, it was not relevant to allege that the process which he used did not fall within the patent. *Baird & Co.* v. *Neilson*, 1842, 1 Bell 219.

7. Infringement — Anticipation — Prior Use.—Verdicts for the patentee in actions for infringement of a patent; and *observed* by the presiding judge (1) that it is not sufficient to establish prior use of a patent, that the invention patented had been employed in some different manufacture than that for which the patent had been taken out; and (2) that it is no evidence of prior use if, while the patentee is perfecting his invention, his workmen should divulge it, and a partial use of it should thereupon take place. *Wilson* v. *Black*, 1847, 10 D. 1. *Templeton* v. *Macfarlane*, 1847, 10 D. 4.

8. Infringement — Anticipation — Prior Use—Notice on Record.—*Held* that the defender, in an action of damages for infringement of a patent, was not entitled to lead evidence of prior use of the patent invention, at a particular place and in a particular way, on the ground that no proper notice was given in the record of the proposed line of inquiry generally, and no notice whatever of prior use of the invention at the particular place and in the special way; and this although, after the record had been closed, a note of objections was given in by the defender, stating these particulars. *Neilson* v. *Househill Coal Co.*, 1843, 2 Bell 1; 15 J. 524. Affg. 4 D. 1187; 5 D. 86; 14 J. 174, 626.

9. Infringement — Copyright — Issues — Form of—Fraud.—Form of issues to try a question of fraudulent invasion of the copyright of a design of a fire-grate registered in terms of the 5 and 6 Vict. c. 100. *Carron Co.* v. *Ritchie, Watson, & Co.*, 1857, 19 D. 281; 29 J. 137.

10. Infringement — Damages — Costs. — Circumstances in which damages were awarded for the infringement of a patent relative to the manufacturing of gas-tubes; and question as to the liability of the infringer of a patent for treble costs under the stat. 5 and 6 Will. IV. c. 83, s. 3. *Russell* v. *Crichton*, 1838, 1 D. 617, 893; 14 Fac. 1009; M'F. 180.

11. Infringement — Damages. — Damages awarded (in absence of a defender) for infringement of a patent. *Morton* v. *Barclay*, 1824, 3 Mur. 398.

12. Infringement—Exclusive Privilege. —An inventor patented improvements on fire-grates, of which the principal feature was an overhanging door of novel construction, causing a double draught. In this specification he claimed, as part of the invention secured to him by the patent, the "application and use" of a detent link or holder of a peculiar form to retain the door in its position. *Held* that the use of a similar detent link, when applied to an overhanging door, but which did not produce a double draught, was not an infringement of the patent. *Finlay* v. *Allan*, 1857, 19 D. 1087; 29 J. 493.

13. Infringement—Improvement—Prior Patent — Specification. — Circumstances in which *held* that a patentee of a machine had infringed upon a prior patent, notwithstanding some minor differences amounting to improvements in construction.

The title of a patent under the Act 15 and 16 Vict. c. 83, is explained by the provisional specification, and where it is pleaded that a patent is invalid in consequence of the final specification embracing too much, the final specification is to be compared with the title and the provisional specification read together.

A patent was objected to on the ground of misrepresentation in the specification, which set forth that the principle of the invention was expansion of boiler tubes by means of rollers which could be worked by the hand, whereby the use of mauls or sledge hammers could be dispensed with, while in point of fact the machine could not be worked without

the use of hammers. It was proved that the machine could not be inserted in the tubes without the force of hammers, and that though it was possible to work the machine afterwards without hammers it could not be used to advantage without the use of small hammers. *Held* that there was no such misrepresentation as to invalidate the patent. *Dudgeon* v. *Thomson*, 1873, 11 M. 863; 45 J. 528.

14. Infringement — Issues — Counter Issue—Prior Use.—Issues adjusted to try a question of violation of letters patent; and counter issues to try defences (1) that the pursuers were not the first and true inventors; (2) that the invention was publicly used prior to the date of the letters patent; (3) that the invention was not practically useful; and (4) that the description in the specification was not such as to enable workmen of ordinary skill to use the invention. *Sykes* v. *Wilson*, 1866, 4 M. 349; 38 J. 181.

15. Infringement — Issues — Form of — Contravention.—Form of issues adjusted to try a question of alleged contravention of an imperial patent, the alleged contravention consisting both in manufacturing and vending of ornamental fabrics. *Knox* v. *Paterson*, 1858, 20 D. 647; 30 J. 326.

16. Infringement—Issues.—Form of issues to try a question of alleged contravention of patent for "an improved wheel for carriages of different descriptions." *Smith* v. *Caledonian Rly. Co.*, 1857, 19 D. 672; 29 J. 307.

17. Infringement—Issues.—A patent was taken out for an "invention for the improved application of air to produce heat in furnaces," and the relative specification set forth that this invention for the improved application of air, etc., consisted in introducing atmospheric air into furnaces in a particular manner specified. *Held*, in an action of damages by the patentee against parties who had begun to use a process for the application of heated air differing somewhat in its details from that specified in the patent, that the leading question to be put in the issues should be, whether the defenders used machinery or apparatus substantially the same with the machinery or apparatus described in the specification, and not whether the patentee was the true and first inventor. *Neilson* v. *Househill Coal Co.*, 1843, 2 Bell 1; 13 J. 524. Affg. 4 D. 470; 14 J. 174, 626.

18. Infringement—Issues—Specification.—Issues adjusted in an action for infringement of a patent, the invention for which the patent was granted having been communicated from abroad, and the defence being based on the allegations (1) that the final specification differed from the provisional specification; (2) that the alleged invention had not been first published in Great Britain by the patentee; and (3) that the description in the final specification was insufficient to enable workmen of ordinary skill to use the invention. *Prale* v. *Millar & Sons*, 1863, 1 M. 450; 35 J. 273.

19. Infringement—Issues—Specification—Validity.—Issues in an action for infringement of a patent, the defence being that the patent was invalid, in respect (1) that the specification was insufficient to enable a workman of ordinary skill to construct the machine; and (2) that a machine constructed according to the description in the patent and specification would not be practically useful for the purpose therein set forth. *Burch* v. *Glen & M'Indoe*, 1857, 20 D. 648.

20. Infringement — Jury Trial — Construction of Terms in Pursuer's Specification—Evidence.—On the trial of issues as to whether the defender had infringed the pursuer's patent, the judge left it to the jury to say on the evidence whether the following words in the specification, "the heavy oil of tar, or dead oil, or crude carbolic acid, as it is sometimes called, or creosote, obtained in the destructive distillation of carbonaceous substances," did, in their ordinary meaning, as known in trade, comprehend oils produced from the destructive distillation of coal-tar of a specific gravity less than that of water, and particularly the oil used by the defender in the manufacture complained of as a contravention of the patent; and he directed them to find a verdict for the defender, if they should be of opinion that the said words did not comprehend such oils. Exception by the defender to this ruling *disallowed*. *M'Dougall* v. *Girdwood*, 1867, 5 M. 937; 39 J. 526.

21. Infringement — Procedure — Alleged Secret Process—Order for Inspection at Sight of Sheriff.—A patentee raised an action of damages for an alleged infringement of a patent, and after a condescendence and answers were lodged, he moved for an order of inspection of the defender's works by persons of skill, against which the defender objected that his manufacture involved a secret process, the value of which would be lost if inspection was allowed. *Held* that inspection must be allowed, otherwise any patent might be infringed with impunity; and therefore inspection ordered of the works and manufacture of both parties by viewers at the sight of the sheriff, and of the works in actual operation, so as to enable the viewers to give evidence at the approaching trial, the viewers being warned not to use any private information which they might acquire through that inspection, except for the purpose of so giving evidence. *Russell* v. *Crichton*, 1837, 15 S. 1270; 12 Fac. 966.

22. Infringement—Specification—Remit.—The Court of Session having found that the specification of a patent was not sufficiently expressed to entitle the patentee to pursue an action for violation of it, a remit made by the House of Lords, to ascertain this and other facts by a jury. *Astley* v. *Taylor*, 1821, 1 Shaw's App. 54.

23. Infringement — Specification — Substitution of Equivalent in Detail.—A party having obtained a patent for preparing wool "in a heated state by introducing cast-iron

heaters into rollers, and applying them in a particular manner," *held*, in a question with a party who substituted air for the iron heaters, entitled to be protected. *Hadden* v. *Pirie & Co.*, 1823, 2 S. 423.

24. Infringement—Substitution of Portion—Prior Use.—In an action for interdict of alleged infringement of patent, *held* (1) that the substitution of a mechanical equivalent for a portion of the patent process did not protect the respondent from committing an infringement; and (2) that he had failed in proving a case of prior public use. *Dubs & Co.* v. *Thomson*, 1873, 10 S. L. R. 332.

25. Interdict—Interim Interdict—Caution.—A patentee having applied for interdict against certain parties who, he alleged, were infringing his patent, they pleaded in defence that the patent was invalid, and, as altered by a disclaimer, covered no exclusive right. Interim interdict *granted* against those who could not find full caution for all loss and damage occasioned by the operations complained of. *Macnee* v. *Black*, 1855, 17 D. 837; 27 J. 431. *Macnee* v. *Whiteman*, 1855, 17 D. 982; 27 J. 498.

26. Interdict — Interim Interdict — Assignation of Patent.—An assignation of a Scots patent executed in England in the form of a mutual contract, but signed only by the cedent, *held* sufficient to entitle the assignee, upon caution, to interim interdict against an alleged infringer. *Grover* v. *Hunter & Barr*, 1854, 26 J. 543.

27. Interdict — Validity.—A party who had obtained a patent in England, and enrolled there the necessary specification of his invention, some months thereafter obtained a patent for the same invention in Scotland. Having applied for interdict against a party alleged to be infringing his Scots patent, that party objected that the enrolment in England had the effect of publishing the invention in Scotland previous to the Scots patent being applied for, and therefore that the Scots patent was invalid. Interdict *refused*. *Brown* v. *Kidston & Waters*, 1852, 14 D. 826; 24 J. 464; 1 Stuart 769.

28. Legacy Duty — Heritable or Moveable.—*Held* that the right to a patent is personal property, and being bequeathed for accumulation and distribution, was liable to legacy duty on the whole sums realised, whether by licences or damages for infringement, prior to distribution among the legatees. *Advocate-General* v. *Oswald*, 1848, 10 D. 969.

29. Principal and Agent — Obligation to Account.—*Held* that where an agent for the sale of a patent article was entitled to use it in his own trade, he was not bound to account for the net profits of each job in which he so used it, but only for the market value of the article as fixed by the patentee. *Ramage & Son* v. *Gilkison*, 1851, 14 D. 121; 24 J. 46; 1 Stuart 88.

30. Procedure—Notice of Objections—Record.—In an action by a patentee for infringement of his patent, *held* that the defender could not competently raise at the trial an objection of discrepancy between the title and the specification, of which objection no notice had been given on record; and therefore that the objection could not be competently stated as a ground for entering up the verdict for the defenders. *Kerr* v. *Clark & Co.*, 1868, 7 M. 51; 41 J. 34.

31. Procedure—Validity in Question—Alleged Anticipation — Suspension — Caution — No Interdict. — In a question between a patentee and a person who made use of the process specified in the patent, but denied the validity of the patent as not being an original invention, a bill of suspension *passed* to try the question, but interdict *refused*, on caution being found for damages. *Stirlings* v. *Black*, 11 Mar. 1803, F. C.; M. "Privilege" App. No. 2.

32. Procedure—Infringement—Damages Awarded in Absence of Defender. — Damages awarded, in absence of a defender, for infringement of a patent. *Morton* v. *Barclay*, 1824, 3 Mur. 398.

33. Production — Order to Produce — Specification. — Warrant granted to the director of Chancery to deliver to the patentee the specification of a patent to be produced at the trial in an action in England, on caution to return it within three months. *Bloxam* v. *E. of Roslyn*, 1825, 3 S. 428.

34. Reduction—Averments—Fraud.—A patentee having, under a contract, supplied certain apparatus patented by him, the purchasers refused to pay the price. They did not offer to restore the apparatus, but, in defence to an action for the price, they brought an action in which they proposed to pay the furnisher *quantum meruit*, challenging the validity of the patent on various grounds, and asking for reduction of the patent, and of the contract, as entered into on the faith of the existence of a valid patent. *Held* that the record contained no relevant allegations of fraud in regard to the patent; and that without such, a purchaser was not entitled to refuse payment. *Todd, etc.* v. *O'Reegan*, 1859, 21 D. 1320; 31 J. 725.

35. Specification—Disclaimer.—In giving judgment on a motion for a new trial, on the ground that a verdict in a cause relating to a patent was contrary to evidence, *observed* (1) that the description in the specification of an article patented must be sufficient not only to allow a skilled workman to construct it, but to show the public what they cannot use without infringing the patent; (2) that though disclaiming was the usual mode of showing what parts of the article patented were not claimed as new, it was not essential if the extent of the claim was otherwise intelligible; (3) that in the particular case the drawings lodged with the specification had been so referred to as to

be embodied in the description of the article claimed, and so as to limit the claim; (4) that the specification in question could be construed to claim as original, not the various parts of the article patented, but merely the combination or arrangement; (5) that the jury were the judges of the sufficiency and intelligibility of the description in the specification. *Morton* v. *Middleton*, 1863, 1 M. 718; 35 J. 542.

36. Specification — Improvements. — In the specification of a patent for "a new and improved mode of manufacturing silk, cotton, woollen, and linen fabrics," the invention was stated to consist in "weaving silk, etc., or other fibrous materials which were to be cut into stripes, and used as weft, somewhat in the manner of chenille weft," but with a certain difference, "and then reweaving such stripes on a ground" in a particular way mentioned in the specification. After describing the mode of manufacture, and disclaiming as new certain parts of the process, the specification concluded thus: "What we do claim is the mode herein before described of producing or preparing stripes of silk, etc., in such a manner that the weft or lateral fibres of both cut edges of each stripe are all brought up on one side, and into close compact with each other, and the reweaving of such stripes, with the whole fur or pile uppermost, into the surfaces of carpets, rugs, shawls, or other similar articles, at the same time that a groundwork or platform is woven for the same." Neither the mode of producing the stripes nor of reweaving them was disclaimed as new; nor was the patent expressly stated to be for the combination of these processes. *Held* (1) that the patent was to be construed as claiming both processes (and not their combination) as the invention of the patentee; and (2) that were one of the parts of the process proved to have been in previous use, it would not be sufficient to invalidate the patent. *Templeton* v. *Macfarlane*, 1848, 10 D. 796; 20 J. 263.

37. Specification — Scope of — Infringement.—The specification of a patent for an improvement on a mode of manufacturing gas pipes, *held* not to be too comprehensive, and not to include any method formerly practised; and damages found due for infringing it. *Russell* v. *Crichton*, 1839, 1 D. 893; 14 Fac. 1009.

38. Specification — Validity — Limitations—Improvements.—*Held*, in reference to the terms of a specification of a patent for the improved application of air to produce heat in fires, forges, or furnaces, where bellows or other blowing apparatus are required—(1) that it was a question for the jury, whether the specification contained a special, limited, and restricted description of one sort of apparatus, so that the patentee could not maintain that the patent applied to all varieties in the apparatus which might be employed in accomplishing the object of the patent; (2) that if the patentee had not limited himself to any particular description, then variances in the modes or kinds of apparatus were of no moment, provided that, in the processes referred to, the object of the particular contrivance or apparatus was accomplished; (3) that it was no objection to the validity of the patent, that it included every mode of applying the principle or agent so as to produce the specific result; (4) that the specification was not defective in not stating how the mouth of the furnace was to be guarded, or the end of the pipe conducting the heated air into the furnace was to be protected against the effects of the intensity of the heat; and (5) that the sense of the term "effect," in working on the specification, was for the jury, and not matter of law for the court. *Neilson* v. *Househill Coal Co.*, 1843, 2 Bell 1; 15 J. 524. Affg. 4 D. 1187; 5 D. 86; 14 J. 174, 626.

39. Title to Sue—Assignee of Patent—Absolute Assignation. — Where parties assigned a patent absolutely, who had right to assign for five years only, *held* that this was not a good objection by a third party to the assignee's right to pursue within the first five years. *Siddons* v. *Ryder*, 1825, 3 S. 576.

40. Title to Sue—Reduction—Concurrence of Lord Advocate—Statutory Requisites.—*Held* that a concurrence written on a summons of reduction of a patent by the Lord Advocate's clerk, without his Lordship having applied his mind to the case, was not such a concurrence as was required by the stat. 15 and 16 Vict. c. 83, authorising reductions of patents. *Gillespie* v. *Young*, 1861, 23 D. 1357; 33 J. 686.

41. Validity — Originality of Patent — Patent prima facie Evidence Itself.—In an action by the holder of a patent for damages on account of infringement, *held* that the patent was *prima facie* evidence of originality; and that if the defender denied the originality, he must take an issue to establish his defence. *Russell* v. *Crichton*, 1838, 16 S. 1155; 13 Fac. 191.

42. Validity — Purpose — Principle — Originality—Prior Use.—*Held* as to a patent for the improved application of air to produce heat in fires, etc., where bellows or other blowing apparatus are required—(1) that it was not void, as being merely for an abstract philosophical principle, because it combined a principle with a special purpose and important result; (2) that in order to support an objection to the patent on the ground of the want of originality in the invention, founded on an alleged discovery and use previous to its date, the evidence must show that the invention set forth in the specification was not only discovered, but publicly used and practised, prior to the date of the patent; and that no experiments, however nearly they might have approached to the discovery of the invention, could avail, unless that discovery had been perfected and applied to public use. *Neilson* v. *Baird & Co.*, 1843, 6 D. 51.

PAYMENT

AMOUNT, 1.
APPROPRIATION :—
ACCOUNT CURRENT, 2, 3.
AGENT, 4.
AGREEMENT, 5–7.
CIRCUMSTANCES, 8–12.
CREDITOR, 13–17.
DEBTOR, 18.
DECREE, 19–20.
DOUBLE DEBT, 21.
EVIDENCE, 22.
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SEQUESTRATION, 42.
BONA FIDES, see that title.
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PAYMENTS TO ACCOUNT ON BILLS AND PAYMENT OF BILLS, see title *Bills*.
PRESUMED, 44–60.
PROOF, 61–67.
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REFERENCE TO OATH, 74–90.
REPETITION, 91–102, and see title *Bona Fides*.
CONDICTIO INDEBITI, see title *Error*.
STIPEND AND TEIND, see title *Church*.

1. Amount — Place of Payment — Exchange.—A bond having been granted in the East Indies to pay money, and on failure an action being raised against the debtor's representatives in this country, *held* that the creditor was entitled to payment without deducting exchange, seeing the debtor had failed to pay in the East Indies. *Campbell* v. *Ramsay, Hannay, & Others*, 15 Feb. 1809, F. C.

2. Appropriation — Account-Current — General Rule — Circumstances. — Circumstances in which *held* (1) that an account between two parties was an account-current, to which the principle was applicable, that indefinite payments are by law appropriated to the extinction of the items of debit in their order in the account; and (2) that a promissory-note by the debtor in the account and another, the proceeds of which were entered in the account, was extinguished by the payments subsequently made by the debtor in the account-current. *Lang* v. *Brown*, 1859, 22 D. 113; 32 J. 64.

3. Appropriation — Account-Current — General Rule.—Where divers debts are due, the debtor paying money to his creditor may appropriate the payment to the discharge of any one of the debts; if the debtor does not make an appropriation, the creditor may do so; if there is no appropriation by either party, and an account-current between them, the law makes an appropriation according to the order of the items in the account. *Jackson* v. *Nicoll*, 1870, 8 M. 408; 42 J. 187.

4. Appropriation—Agent—Payment to Party Employed to Recover Debt.—A party receiving an indefinite payment from his debtor is not bound to apply it to payment of another, which he was employed to recover from the same debtor for a third party. *M'Leod* v. *M'Kenzie*, 1821, 1 S. 86.

5. Appropriation — Agreement — Indefinite Payment.—An indefinite payment is to be imputed most favourably for the creditor; but where payments have been made by the debtor and received by the creditor, on a general and mutual understanding that the same are applicable to a special account, the creditor cannot afterwards, on emerging circumstances, alter the application of such payments. *Bannatyne's Reps.* v. *Brown's Trs.*, 1825, 3 S. 593.

6. Appropriation — Agreement — Bankruptcy of Debtor—Attempt to Resile.—The drawer of a bill of £704, discounted with a bank, offered to retire it by transmitting another of £140, and applying, in payment of the balance, a sum at his credit in his account. The offer was accepted, and the new bill transmitted; but the drawer thereafter became bankrupt, while the bill of £704 remained with the bank. *Held*, in a question with the acceptor, that the bank could not impute the second bill, and the balance at the credit of the account, to other transactions with the drawer, so as to have recourse upon the acceptor of the bill for £704. *Allan* v. *Allan & Co.*, 1831, 9 S. 519.

7. Appropriation—Agreement.—*Held*, on the terms of a deed, that payments fell to be applied in reducing principal and not in discharging interest. *Sandeman* v. *Scott*, 1852, 1 Macq. 293. Revg. 11 D. 405.

8. Appropriation—Circumstances—Payment by Testamentary Trustees to Creditor of Deceased, whom they had also Employed.—A died in debt to B, and A's trustees employed B, and made remittances to account. *Held* that these remittances were applicable to the debts contracted by the trustees, and not to the debts due by A. *Lyon & Co.* v. *Sibbald's Trs.*, 1823, 2 S. 591.

9. Appropriation—Circumstances—Payments for a Definite Purpose.—A purchaser of heritable property from a burgh, to whom a disposition containing an absolute discharge had been delivered, having admitted that he did not pay the whole price on occasion of receiving it, *held* that he was not entitled to impute, in extinction of the price, payments arising out of private transactions with the town-clerk, who had been intrusted with the disposition—the price being payable to the treasurer, and the discharge bearing it to have

been paid to him. *Mags. of Nairn* v. *M'Intosh*, 1830, 8 S. 432.

10. Appropriation — Circumstances. — Circumstances in which *held* that rents of a property had been virtually appropriated by the proprietors towards payment of a particular debt due by their father. *Campbell* v. *Williams & Co.*, 1835, 13 S. 478.

11. Appropriation — Circumstances. — Circumstances in which *held* that a payment made was not indefinite, but had been specially appropriated. *Cullen* v. *Mitchell*, 1852, 15 D. (H. L.) 12; 1 Macq. 190. Revg. 22 J. 646.

12. Appropriation — Circumstances — Change of Ownership of Business Incurring Debt—Payments by New Proprietors.—A was owner of a newspaper till December 1857, when B, C, and D became proprietors of it. Payments were thereafter made by B, C, and D to the printer of the paper. The printer sued A for a debt due as at December 1857. *Held* that the payments made by B, C, and D were not to be set against this account, because (1) B, C, and D were not the proprietors of the paper when the account sued for was incurred, and (2) there was evidence that their payments were made to defray subsequent expenses. *Forsyth* v. *Daily Bulletin Co.*, 1862, 1 M. 28; 35 J. 11.

13. Appropriation—Creditor—Option.—If a debtor makes a remittance to account, which is quite general, he thereby leaves it in the option of the creditor to apply the sum towards extinguishing any part of his debt which he pleases. *Clyne* v. *Swanson*, 1830, 8 S. 391; 5 Fac. 325.

14. Appropriation — Creditor — Option—Law Agent—Professional Charges or Outlays.—A law agent who got an indefinite payment during the currency of his account, *held* entitled to apply it to his professional charges on which he was not allowed interest, and not bound to apply it to outlays on which he was found entitled to interest. *Bremner* v. *Mabon*, 1837, 16 S. 213; 13 Fac. 223.

15. Appropriation — Creditor's Actings — Extinction of Debt — Law Agent's Hypothec.—An agent was in the practice of transferring the balance due on business accounts annually to a current cash account between him and his client. He received a sum borrowed for the client, and entered it to the credit of the said cash account, thereby extinguishing the balance then due to the agent, including the amount of the business accounts. *Held* that although subsequent business accounts were contracted, the account could not be opened up so as to give a preference in virtue of the hypothec over the client's title deeds. *Campbell* v. *Montgomerie*, 1839, 1 D. 1147.

16. Appropriation—Creditor's Actings—Directions to Agent.—A, who was creditor of B, drew a bill on him in favour of his (A's) agent. A directed the agent to apply £200 of the sum in paying C. The agent acknowledged this direction and paid £50 to C. *Held* (A having become bankrupt) that these proceedings were equivalent to appropriation and payment of the whole £200 to C. *Brierly* v. *Macintosh*, 1846, 5 Bell 1; 18 J. 380. Affg. 5 D. 1100; 15 J. 440.

17. Appropriation — Creditor — Option—Alteration in Firm.—A payment having been made by a person to whom a business had been transferred towards liquidation of an account, the first parts of which had been incurred for goods purchased by his predecessor in the business, *held* that the sellers were not bound to impute the payment in extinction of the earlier items of the account, they not having accepted the person to whom the business had been transferred as their debtor instead of the original purchaser. *Pollock & Co.* v. *Murray & Spence*, 1863, 2 M. 14; 36 J. 14.

18. Appropriation — Debtor — Option — Preference.—A gave to B, his creditor, a letter addressed to auctioneers, instructing them to sell his furniture and pay the proceeds to B. B handed it to the auctioneers, who took possession of the furniture, and made an advance of £60 to account of the proceeds. *Held* that there had been a special appropriation of the furniture in favour of B, whose claim was thereby rendered preferable to that of an arresting creditor. *Mackenzie & Co.* v. *Finlay*, 1868, 7 M. 27; 41 J. 22.

19. Appropriation—Decree of Consent—Parties Bound.—An interim decree of consent was taken in an action of accounting, whereby the sums decerned for were appropriated in part towards payment of the principal sum. *Held* to bind parties, so that it could not afterwards be applied in extinction of interest only. *Campbell* v. *Falconer*, 1828, 6 S. 830.

20. Appropriation — Decree — Interim Payments to Account. — In an action of count, reckoning, and payment for alleged way-leave dues and interest, *held* that payments to account, obtained under interim decrees of the court, pronounced before the defender's liability for interest was determined or discussed, were applicable *primo loco* in extinction of the interest ultimately found due on the arrears claimed. *Wauchope* v. *N. B. Rly. Co.*, 1863, 2 M. 326; 36 J. 158.

21. Appropriation — Double Debt — Indefinite Payment — Prescription. — Action being raised on two bonds due to the same party after the lapse of the years of prescription, and the debtor in them having made an indefinite payment "to account" during the currency of the prescription, it was found that the prescription of both bonds was not thereby interrupted, but that the debtor might impute the payment to either of them. *Garden* v. *Rigg*, 1748, 1 Pat. 409. Affg. M. 10450.

22. Appropriation—Evidence.—A missive acknowledging receipt of "bills and cash to the amount of £55, 4s. 6d., which shall be placed to account of your rent," *held* evidence

that the bills were to be imputed to the rent. *Bennie* v. *Mack*, 1832, 10 S. 255.

23. Appropriation—Guaranteed Debt—Alteration in Creditor's Firm—Indefinite Payments.—A party bound himself as cautioner for all sums to be advanced to A by certain persons trading as a firm. The firm was dissolved, and at this date A was due £3000. A new company (consisting of different partners) was formed under a new firm, and obtained an assignation of the debts due to the old firm. The new firm continued to make advances to A and received payments from him. *Held* that the cautioner was entitled to have any payments made by A applied in extinction of the £3000 in preference to the subsequent debt (for which the cautioner was not liable). *Elton, Hammond, & Co.* v. *Neilson*, 24 June 1812, F. C.

24. Appropriation—Guaranteed Debt—Guarantee Limited by Time—Indefinite Payments.—A agreed to guarantee the price of all goods sold by B to C within six months. A sum of £141 was due for goods sold in that period. Subsequently other goods were sold, and C, after making a partial payment to B to account, became bankrupt. *Held* that A could not insist on B's applying the payments received from C to the balance of £141 (for which A was liable) and not to the debt contracted after the six months (for which A was not liable). *Cochrane & Co.* v. *Mathie*, 1821, 1 S. 80.

25. Appropriation—Guaranteed Debt—Guarantee Limited by Time.—A guarantee was given for payment of any purchases, "not exceeding £200 sterling in all, within four months." Within that period purchases were made to the amount of £377, and payments to the amount of £174. *Held* that the balance due was covered by the guarantee to the amount of £200, and that the payment did not *pro tanto* extinguish the guarantee. *Tennant & Co.* v. *Bunton*, 1859, 21 D. 631; 31 J. 342.

26. Appropriation—Guaranteed Debt—Indefinite Payments—Application by one of two Cautioners to Private Claims.—One of two cautioners after embarrassment of the principal debtor's affairs and after a consultation as to measures for the benefit of all, *held* not entitled to apply indefinite payments in extinction of his private claims. *Christie* v. *Reid*, 1826, 4 S. 368.

27. Appropriation—Guaranteed Debt—Indefinite Payments Subsequent to Termination of Guarantee in the Belief that it still Subsisted.—A guarantee was granted for a credit to be operated on for a course of years, by drafts which were to be provided for by remittances six days before they fell due, with a stipulation that the amount of accommodation should be reduced to a certain extent each year. The guarantee fell after one year, in consequence of a change in the mode of drawing, but the parties continued to operate on the credit, in the belief that their operations were still covered by the guarantee. *Held* that although there was at the end of the first year a large balance due on the amount, yet, in a question with the cautioners, it was extinguished by subsequent indefinite remittances. *Houston's Exrs.* v. *Speirs*, 1829, 3 W. & S. 392. Revg. 25 June 1824, F. C.; 3 S. 180; 1826, 4 S. 566; 1 Fac. 546.

28. Appropriation—Guaranteed Debt—General Remittance.—*Question*, whether remittances made generally to account by the granter of a letter of guarantee after its date, must be applied *primo loco* to the extinction of a balance which stood against the principal debtor before its date. *Houston's Exrs.* v. *Speirs' Trs.*, 1835, 13 S. 945; 10 Fac. 711.

29. Appropriation—Guaranteed Debt—Factor's Accounts—Indefinite Payments.—A cautioner for a factor *loco tutoris* died, leaving a child. At this date the factor was in debt to the estate; afterwards payments were made by the factor for specific purposes, and these were sufficient to extinguish this debt. On the factor's death a balance was found due by him to the estate. *Question*, whether the cautioner's child could claim that the payments should be imputed in the first place to the arrears at the cautioner's death? Answered in the negative. *Kerr* v. *Bremner*, 1837, 2 S. & M'L. 895. Altg. 14 S. 180; and afterwards, 1 D. 614; 14 Fac. 704.

30. Appropriation—Guaranteed Debt—Indefinite Payments.—A bond for a cash-credit having been granted by a company to a bank, *held* that a balance existing under the cash-credit against the company at the date of its dissolution by the death of a partner was extinguished by indefinite payments prior to a bond being granted by the succeeding company for a continuation of the credit. *Christie* v. *Royal Bank of Scotland*, 1841, 2 Robin. 118. Affg. 1 D. 745; 14 Fac. 825.

31. Appropriation—Illegal Debt—Payments not to be Appropriated Thereto.—The rule that a creditor may apply indefinite payments at his option suffers an exception as to debts contracted in violation of law, and therefore void.

Payments in violation of statute were made by a bank to the principal in a cash-credit bond. *Held* that the bank could not, as against the cautioner in the bond, appropriate payments by the principal debtor to the extinction of the advances by the bank which should be found to be illegal, but that these payments must be imputed to the lawful advances. *Swan* v. *Bank of Scotland*, 1839, 2 D. 78; 15 Fac. 73.

32. Appropriation — Illegal Debt — Tippling Act.—*Observed*, that a creditor cannot impute an indefinite payment towards a part of his debt which is struck at by the Tippling Act so as to preserve his right of action for the other and exceptionable part. *Johnstone* v. *Low*, 1843, 5 D. 1372; 15 J. 607. *Maitland* v. *Rattray*, 1848, 11 D. 71; 21 J. 1.

33. Appropriation — Joint Obligants — Payment by One.—*Question* as to the way in which a bank was entitled to apply indefinite payments made by one of two joint obligants in a cash-credit bond in extinction of the debt. *Reddie* v. *Williamson*, 1863, 1 M. 228; 35 J. 170.

34. Appropriation — Security — Wadset —Unsecured Debt—Rents.—A wadsetter is entitled to apply the rents of the wadset-subject in payment of personal debts due to him by the reverser, and that without regard to the priority of the different debts, or whether they are prior or posterior to the date of the wadset. *Sturgeon* v. *M'Lellan*, 20 Jan. 1813, F. C.

35. Appropriation—Security—Debt Less Secured than another Debt — Indefinite Payment.—A creditor *found* entitled to apply an indefinite payment to a debt less secured than another. *Cochrane & Co.* v. *Mathie*, 1821, 1 S. 80.

36. Appropriation—Security—Heritable Creditor in Possession—Rents.—A creditor in possession under a first heritable bond is entitled, after applying the rents to payment of the interest thereon, to pay the surplus to the proprietor, and is not bound to apply that surplus to extinction of the principal sum, notwithstanding the existence of a contingent heritable security. *Brown* v. *Rae*, 1835, 13 S. 256.

37. Appropriation — Security — General Advances — Specific Pledge — Interest — Life Policy.—A debtor assigned a life policy in security of advances and interest. *Held* that the sum in the policy uplifted on the debtor's death must be imputed, after satisfying the principal, in extinction of an arrear of interest due on it, and not in payment of other debts due by the deceased to the creditor. *Sandeman* v. *Shepherd*, 1837, 15 S. 416.

38. Appropriation—Security—Postponed Bond.—A creditor who held prior heritable bonds as an assignee, and one in his own name posterior to another heritable bond in favour of another creditor, *held* entitled to impute indefinite payments of interest to his postponed bond. *Mackenzie* v. *Gordon*, 1839, M'L. & R. 117. Affg. 16 S. 311; 13 Fac. 289.

39. Appropriation — Security — Interest or Principal.—The debtor in a personal bond bound himself to repay the principal sum after the death of a third party, "and the legal interest of the said principal sum from and after the date of the bond to the foresaid term of payment, and yearly and termly thereafter during the not-payment thereof"; and no interest was paid on the bond during the life of the third party. *Held* that although interest was not exigible till the death of the third party, it was due; and that dividends which were received during the currency of the bond, were to be applied to discharge an equal amount of interest, and not to be deducted from the principal as at the term of payment. *Watt* v. *Burnett's Trs.*, 1839, 2 D. 132.

40. Appropriation — Security — Secured or Unsecured Debt—Circumstances—Oath of Calumny.—A debtor to the same creditor in an heritable bond, and in prescribed bills, made payments, which were entered in a book kept by the creditor, but it was not specified to which debt they were made. Circumstances in which it was *held* that, notwithstanding the creditor deponed in an oath of calumny that the payments were made to account of the bills, it was proved that they were made to account of the interest on the bond. *Couper* v. *Young*, 1849, 12 D. 190; 21 J. 366; 22 J. 29. See also *Dickson* v. *Moncrieff*, 1853, 16 D. 24; 26 J. 26.

41. Appropriation — Security — Extinction of Debt.—*Held* that a debt, in security whereof A granted to B a bond and disposition over heritable property, had been extinguished by B's applying indefinite payments in extinction thereof, as instructed by entries made by him in an account-current in his ledger, and consequently that a subsequent assignation of the bond and disposition by B to C in security of another debt due by A, which was paid by C, was ineffectual. *Jackson* v. *Nicoll*, 1870, 8 M. 408; 42 J. 187.

42. Appropriation — Sequestration — Dividend on Debt Due by Instalments.—A creditor having drawn a dividend from the sequestrated estate of his debtor upon the sum total of a debt payable by four instalments of which the last two were not yet due, *held* that the dividend was not imputable towards the total extinction of the first and second instalments, but was to be considered as a payment of so much on each pound of the whole debt. *M'Nee* v. *Balmanno*, 1826, 2 W. & S. 7. Revg. 3 S. 60.

43. Interception — Sum Remitted in Letter Wrongously Opened.—A debtor forwarded the amount of his debt to his creditor, but the letter was opened by another, who delivered the sum enclosed to a private trustee for creditors. *Held*, in a question between the trustee and the creditor to whom the letter was addressed, that the latter was preferable to the contents. *Crawford* v. *Ker*, 18 Nov. 1807, F. C.; M. "Moveables" App. No. 2.

44. Presumed — Agency — Payment by Principal to Agent.—An agent purchased goods *factorio nomine*, and the seller, in his books, entered the goods as sold to the principal, and the principal remitted the price to his agent, who, instead of paying the seller, merely from time to time made payments to account. The seller pressed the agent for payment, and threatened to communicate with the principal, but did not do so for more than six months from the date of the sale. *Held* that the purchaser was not released from his obligation to pay the outstanding balance by reason of his having put his agent in funds to do so, nor by the seller

accepting the partial payments. *Williams & Co.* v. *Newlands & Co.*, 1860, 23 D. 1355.

45. Presumed—Balance—Circumstances.—Circumstances in which a claim for a balance of a sum, which had been put into the hands of a law agent by his client, an illiterate rustic, apparently for the purpose of immediate investment, not *held* extinguished by the client making no demand for the balance for the period of eleven years. *Robertson* v. *MacGill & Another* (*Hogg's Trs.*), 1840, 12 J. 272.

46. Presumed—Bill of Exchange—Bill Prescribed — Original Debt Still Due.—A was due to B £600 constituted by a clause of warrandice in a conveyance of lands. In payment A granted a bill which was protested and thereafter was prescribed. *Held* nevertheless that B could sue A on the original obligation, the prescription having merely extinguished the bill; and that there was no presumption of payment. *Sinclair* v. *Sinclair*, 1823, 2 S. 600.

47. Presumed—Bill of Exchange.—Unless a bill is expressly taken in payment of a debt it is not considered a payment until it is paid. *North British Insurance Co.* v. *Barker*, 1833, 6 W. & S. 323.

48. Presumed—Bill of Exchange—Rent—Renewal of Lease—Lapse of Time.—The tenant of a farm granted a bill to his landlord for arrears of rent. Four years thereafter the landlord died, leaving a pupil son. Nineteen years after the date of the bill, and upwards of twenty years after the date of the arrears for which it was granted, the son, on coming of age, brought an action for payment of the bill, the debtor in which still remained tenant of the farm, and in the interval had obtained a renewal of his lease. *Held* that neither the regular payment of the rents subsequent to the date of the bill, nor the absence of correspondence, raised a presumption of payment. *Patrick* v. *Watt*, 1859, 21 D. 637; 31 J. 343.

49. Presumed—Bond—Circumstances.—In an action for payment of a bond raised on the day preceding the expiration of forty years from the term of payment, *held* that circumstances which were not utterly irreconcilable with the idea of the bond being still due, were not relevant to infer payment. *Graham* v. *Veitch*, 18 Dec. 1823, F. C.; 2 S. 594.

50. Presumed—Bond—Circumstances.—Circumstances which *held* sufficient to infer that an heritable bond was extinguished without any regular discharge. *Thomson's Trs.* v. *Monteith's Trs.*, 1834, 12 S. 842; 9 Fac. 435.

51. Presumed—Bond—Circumstances.—A law agent, who lent his client £70 on heritable bond, was afterwards employed to sell the property, which he did, and signed the disposition acknowledging payment; and he admitted that he had got money to the amount of £70, but alleged that it was in payment of other separate loans; and he made no claim on the bond for twenty-nine years, or till an action of count and reckoning was raised against him. *Held* that, although the bond was still in his possession, it was to be presumed paid. *Mackie* v. *Watson*, 1837, 16 S. 73; 13 Fac. 82.

52. Presumed—Bond—Circumstances.—Circumstances in which it was *held* that a debt which had been acknowledged to be due by the debtor in a state of his affairs in 1807, and in a bond granted to him in 1811, was not to be presumed paid in 1842. *Johnstone* v. *Watson*, 1848, 6 Bell 245.

53. Presumed — Circumstances. — One brother remitted from abroad a draft on a house in London for £1000 to a brother in Edinburgh, for which the latter wrote he would, on receiving the money, send his promissory-note; and the draft was paid on his indorsement. *Held*, in an action brought five years after his death against his representatives, that although there was no direct evidence of the repayment of the money, yet as the brother to whom the money had been remitted survived for nearly twenty years, and no claim was made against him for either principal or interest, and he was habit and repute solvent, and during his lifetime a state of accounts was made out between them, which brought out a considerable balance in his favour, in which his brother acquiesced, and the promissory-note (if ever granted) was not forthcoming, the money was to be presumed repaid. *Ryrie* v. *Ryrie*, 1840, 2 D. 1210.

54. Presumed—Circumstances—Trial—Jury.—Legacies were granted by a party who died in 1812, and no demand was made for payment of them till thirty-one years after the time of payment. The legatees averred that the will was unknown to them up to the time when they demanded payment, though the deed was found in a trunk in their own custody. *Held* that the question of presumed payment ought to be left to the jury. *Seath* v. *Taylor*, 1848, 10 D. 377; 20 J. 128.

55. Presumed—Consecutive Receipts.—A series of consecutive receipts for rent, together with a receipt by the landlord for a specific half-year's rent, combined with delay, *held* to establish payment in a question with a party who had become liable for the rents, so as to exclude the landlord from proving that the latter had been paid by a bank draft, which was dishonoured. *D. of Buccleuch* v. *M'Turk*, 1845, 7 D. 927; 17 J. 483.

56. Presumed — Interest — Gratuitous Annuity by Debtor to Creditor.—In an action to constitute claims against a trust-estate, *held* that the interest of a bond prior to the death of the granter had been extinguished by a gratuitous annuity from him to the creditor. *Hunter* v. *Duff's Trs.*, 1832, 6 W. & S. 206. Affg. 9 S. 703.

57. Presumed—Legacy Left in Hands of Agents who Acted for all Concerned — Mora. — A testator left a legacy to the magistrates and minister of a burgh for behoof of the poor. The sole surviving executor directed his agents to uplift a bond, and so much of the proceeds as amounted to the legacy were

held by them for the purpose of paying the same. Payment was delayed by a claim by the parochial board to the legacy, which was decided under a submission in favour of the magistrates and minister. Throughout these proceedings the said agents acted for all parties concerned. A discharge was prepared, revised by the executor, and signed by the minister, but not by the magistrates, and remained in the agents'. hands. After the award an arrangement was made between the minister on the one hand—who assumed, though without express authority, to act for the magistrates as well as for himself—and the agents on the other, to the effect that the money should remain as a new investment in the agents' hands at a specified rate of interest until the expenses incurred should be replaced. For six years the magistrates by their actings acquiesced in this arrangement, though no formal resolution to this effect could be discovered in their books. The agents then became bankrupt, and the money was lost in their hands. No proceedings were taken by the magistrates and minister or their successors against the executor till eleven years after the bankruptcy of the agents, when the magistrates and minister then in office brought an action to recover the legacy from the representatives of the executor. *Held* that the legacy had been discharged, and that no claim in respect of it subsisted against the representatives of the executor. *Mags. & Minister of Kintore* v. *Tait's Exrs.*, 1873, 45 J. 376.

58. Presumed — Physician's Fees. — The fees of a physician presumed paid, except those for attendance during death-bed illness. *Sanders* v. *Hewat*, 19 Feb. 1822, F. C.; 1 S. 333.

59. Presumed—Provisions Under Settlement—Brothers Living Together.—A father settled his estate on his eldest son, giving his only other son a provision out of it of £4000, and appointed them joint executors. The inventory of the personal estate was given up by the two brothers, and the younger brother received out of it £2000, which was invested in bond, and the interest was drawn by him till he became insane, and was removed to an asylum. For a number of years after the father's death, the two brothers lived together, during the greater part of which period the younger brother was quite capable of managing his own affairs, but there was no evidence of any settlement having taken place between them. In a question between the *curator bonis* of the younger brother and the representatives of the elder, *held* that as the younger brother had lived with the elder, it was to be presumed that the elder had paid the interest on the provision of £4000 previous to the date of confinement. *Condie* v. *Peddie*, 1848, 10 D. 941; 20 J. 309.

60. Presumed — Tavern Bills. — *Observed*, that the presumption of tavern bills being paid when contracted, is not a *presumptio juris et de jure*, but a presumption so strong, that a tavern-keeper will not be entitled to decree by merely proving the original constitution, but must also prove the subsistence of the debt. *Barnet* v. *Colvill*, 1840, 2 D. 337.

61. Proof — Evidence. — Special circumstances in reference to a claim by a tenant for the value of ground taken off his farm, in which *held*, that although there were strong reasons for supposing that his claim had been satisfied, yet as there was no legal evidence of this, it must be sustained. *Hallyburton* v. *Blair*, 1837, 15 S. 750; 12 Fac. 700.

62. Proof—Evidence—Books of Creditor —Set Off.—*Held*, in an action by an executor-creditor against a party appearing on the books of the deceased to be debtor, that there was evidence of it having been settled by setting off a claim by the debtor against the deceased, and payment of a balance. *M'Donald* v. *Meldrum*, 1839, 1 D. 742.

63. Proof — Evidence — Books of Agent for both Debtor and Creditor. — A loan was transacted between two parties through the medium of an agent who acted for both, and who afterwards, on obtaining from the debtor a conveyance of his whole property, undertook to relieve him of all his debts. Having realised the property, the agent placed the amount of the loan to the credit of the creditor in his books and accounts. This was done without the creditor's knowledge, and without authority from him to the agent to receive payment or discharge the loan. The agent having become bankrupt, *held* that the loan had not been repaid, and that the borrower remained liable. *Falconer* v. *Dalrymple*, 1870, 9 M. 212; 43 J. 102.

64. Proof — Evidence — Deed Admitting Satisfaction.—In an action against the representatives of a party deceased for money lent, the defence was, that the money had been repaid by the deceased, in consideration of which the pursuer had granted a deed in favour of his own wife and children. Such a deed was recovered from the pursuer's custody. *Held* that, no reduction having been brought, it was evidence of the payment narrated in it, and excluded proof of averments that he had retained the deed because the payments were not made. *Forrest* v. *Wilson*, 1858, 20 D. 1201; 30 J. 714.

65. Proof — Evidence — Receipt Undelivered.—The agent for a creditor in an heritable bond paid him the interest on behalf of the debtor out of his own funds, and got receipts from him in favour of, but did not deliver them to the debtor; and the agent having got an assignation to the bond, *held*, in a question with the debtor, that the receipts, notwithstanding their unqualified terms, did not operate an extinction of the heritable security, *quoad* the interests, in respect they were never delivered to the debtor. *Wood* v. *Northern Reversion Co.*, 1848, 11 D. 254; 21 J. 67.

66. Proof—Onus.—A messenger admitting the receipt of money on behalf of a creditor, but alleging that he had paid it to the creditor

held bound to prove the alleged payment. *Waddell* v. *Morton*, 1825, 4 S. 170. See *Fraser* v. *Bruce*, 1857, 20 D. 115; 30 J. 70.

67. Proof—Onus—Presumed Application of Proceeds of a Bill Discounted by a Creditor—Proof by Writ or Oath.—The drawer of a bill of exchange "for value in furnishings," who is the creditor of the acceptor in an account for furnishings, though to a less amount than the sum in the bill, and who discounts the bill, is assumed to place the proceeds against the sum in the account. The onus of proving that it is not done, if denied, lies on the creditor, and the only competent evidence is the writ or oath of the debtor. *Cumming* v. *Hendrie*, 1861, 23 D. 1365; 33 J. 689.

68. Receipt—Payment by Cautioner—Receipt in Favour of Cautioner—Presumption of Payment by Debtor Overcome.—The creditor in a bond granted on payment a receipt in favour of the cautioner. *Held* that this receipt showed that payment was made by the cautioner and not by the principal debtor, though the latter had in his possession the retired bond. *Cutlar* v. *Maxwell*, 1731, 1 Pat. 58. See *Brown* v. *Kerr*, 1809, Hume 62 (Bill of Exchange).

69. Receipt—Payer not Stated—Presumption of Payment by Debtor.—A promissory-note having on the back of it a receipt by the holder, without mentioning by whom the payment was made, is presumed to have been retired by the debtor, or with his funds. *Webster* v. *Thomas*, 15 Jan. 1819, F. C.

70. Receipt—Receipt in Disposition—Admission of Unpaid Balance—Onus.—A purchaser of heritable property from a burgh, to whom a disposition containing an absolute discharge had been delivered, admitted that he did not pay the whole price on occasion of receiving it. *Held* that the onus lay on him to show that he had paid the balance. *Mags. of Nairn* v. *M'Intosh*, 1830, 8 S. 432.

71. Receipt—Indefinite Payments—Presumption.—C, who was indebted to A, granted an heritable bond to B *ex facie* absolute, but truly in trust for several parties, including A, for a loan of money partly advanced by A. Two indefinite payments were made to A. Thereafter the parties who had lent the money, including A, on occasion of a transfer of the bond, subscribed an improbative docquet, acknowledging that the sums had been paid up; but there was no evidence of any other payments than the two indefinite ones. *Held* that these must be presumed to have been the payments in consideration of which the acknowledgment was granted. *Haliburton* v. *M'Neill's Trs.*, 1830, 8 S. 747.

72. Receipt—Two Receipts for one Sum.—A sum of £2000 being admitted to have been paid by the debtor, *held* that no additional payment of the same amount had been made, though two separate vouchers were taken for a sum of that amount, the court being satisfied they were for one and the same sum. *Ainslie's Trs.* v. *Robertson*, 1841, 3 D. 476.

73. Receipt—Terms—Actings of Parties.—Terms of a receipt *ex facie* importing a trust in favour of A *held* to be in the interest of the payer, B, and overcome by the subsequent actings of parties. *Arnott* v. *Drysdale*, 1863, 1 M. 796; 35 J. 485.

74. Reference to Oath—Terms Affirmative.—A debtor, on a reference to oath, deponed that he had paid the debt to a "rider" of the creditor, that he did not know his name, and was not shown any mandate, had never seen him before or since, and that the payment was not entered in his books. *Held* not to be such a clear and definite assertion of payment to a person duly authorised as to extinguish the debt. *Smith* v. *Ivory*, 1807, Hume 462.

75. Reference to Oath—Terms Affirmative.—Terms of deposition under a reference to oath *held* to establish that a prescribed account had not been paid since the date of the last article and therefore that it was resting-owing. *Leslie* v. *Mollison*, 15 Nov. 1808, F. C.

76. Reference to Oath—Terms Affirmative.—A party, on a reference to oath, deponed that he believed a prescribed account had been paid by his factor, and was certain it was paid from having settled accounts with him; but these accounts did not show such payment. *Held* that the oath was affirmative of the reference. *Cooper* v. *Hamilton*, 1826, 2 W. & S. 59. Affg. 2 S. 728.

77. Reference to Oath—Terms Affirmative.—Oath on reference by a managing partner of a company, that, "to the best of his knowledge, a customer had paid all the articles furnished to him, and that all the furnishings were entered in the company's books, although an error may have occurred,"—*held* not exclusive of a claim for the price of furnishings proved to have been delivered, but omitted to have been charged in the books. *Gow* v. *M'Donald*, 1827, 5 S. 472.

78. Reference to Oath—Terms Affirmative.—Terms of oath *held* affirmative of payment. *Thomson* v. *Wyld*, 1840, 3 D. 150; 16 Fac. 92.

79. Reference to Oath—Terms Affirmative.—On a reference to oath, a defender deponed that he had paid to a relative with whom he had other pecuniary dealings, money to discharge the claim sued for, but had never seen a discharge, nor had he been told that the debt was paid. His relative had left the country, and died without any settlement of their accounts taking place. *Held* that the resting-owing was proved. *Crichton* v. *Campbell*, 1857, 19 D. 661; 29 J. 304.

80. Reference to Oath—Terms Affirmative.—In an action for repayment of an advance of money, the defender, on an oath of reference, deponed that he had received a sum of money, but that he had repaid it in flour. *Held* that the oath was affirmative of

the reference, because it was not deponed either that it was a part of the original transaction that the debt was to be so extinguished, or that the creditor afterwards agreed that it should be so. *Wilson* v. *Wilson*, 1871, 9 M. 920; 43 J. 510.

81. Reference to Oath—Terms Negative.—A party raised an action on a bond granted to his father in 1782, for the principal sum and interest from that date. The defenders alleged that the whole interest had been paid, but, being unable to produce stamped receipts for it prior to 1818, required the party to emit an oath of calumny, which he did. He declined to depone that he believed the interest was due, but swore merely that money to the extent sued for was due. The defenders paid the principal sum. *Held* that they were entitled to be assoilzied. *Duguid* v. *Mitchell*, 1825, 1 W. & S. 203. Affg. 3 S. 96.

82. Reference to Oath—Terms Negative.—*Question*, whether certain statements under a reference purporting the deponent's belief that payment of a prescribed account had been made through the medium of a third party, were sufficient to instruct his defence in an action for payment. *Mette & Carl* v. *Dalyell*, 1830, 8 S. 387. *Goodall* v. *Newton*, 1825, 8 S. 387, footnote.

83. Reference to Oath—Terms Negative.—*Held* that a deposition under a reference to oath as to liability for rent, that the deponent possessed a house belonging to the defender, but that the defender was paid by work done for him by deponent, was negative of the reference. *Thomson* v. *Thomson*, 1830, 8 S. 571.

84. Reference to Oath—Terms Negative.—A party, in an oath on reference as to a prescribed bill, admitted the original constitution, but deponed that he had paid a certain balance (which alone was claimed) to the eldest son of a family (the mother and younger children of which were in right of the bill), or to some one sent by him, without taking any receipt, seeing any authority on his part to receive it, or showing that he had accounted for it to the true creditors. *Held* that he was not liable for the balance. *Robertson* v. *Thomson*, 1830, 8 S. 810; 5 Fac. 628.

85. Reference to Oath—Terms Negative.—A party, on a reference to oath as to whether a debt for which he was sued was resting-owing, deponed that the debt had been settled by an arrangement entered into between his son and the creditor, whereby it had been agreed that the debt was to be retained from certain wages due by the latter to his son. *Held* that the statements amounted to an averment that the debt had been settled, and were negative of the reference. *Johnstone* v. *Law*, 1843, 6 D. 201; 16 J. 139.

86. Reference to Oath—Terms Negative—Intrinsic or Extrinsic.—In a petition for delivery of an assignation, which bore to be granted for payment of a certain sum, the question of payment was referred to the petitioner's oath. *Held* that although the petitioner deponed that he did not on the date of the assignation pay to the cedent the sum therein recited, as the consideration, but that the consideration was money advanced on several occasions, yet that the oath was negative of the reference. *Question* whether, had the oath expressly negatived the consideration stated in the deed, a deposition to another consideration would be extrinsic or intrinsic. *Burnet* v. *Morrow*, 1864, 2 M. 929; 36 J. 444.

87. Reference to Oath—Terms Probative of Subsistence of an Unsettled Claim.—The defender, in an action for payment of a balance of a prescribed account for work done, deponed that he had employed a tradesman (in whose right the pursuer was held to be) to perform the work on an estimate, that he afterwards paid a sum over and above the estimated amount, and stated that he would take an early opportunity of closing the account, but that he had afterwards satisfied himself that the work ought not to have exceeded the estimate. *Held* that this oath was probative of the subsistence of an unsettled claim, and that the amount must be fixed by the opinion of men of skill, and not by the defender's own estimation. *Turnbull* v. *Borthwick*, 1830, 8 S. 735; 5 Fac. 582.

88. Reference to Oath—Intrinsic or Extrinsic.—The acceptor of a bill referred to the oath of the drawer that he had conveyed to him property, from the proceeds of which the bill was paid. The drawer deponed that the property consisted of 2–16th shares of a vessel, "and that upon every 16th, after deduction of debts and expenses, the proceeds amounted to £43, some odd shillings." *Held* that the value as deponed to was an intrinsic quality. *Stewart & Co.* v. *Telfer & Co.*, 1821, 1 S. 101.

89. Reference to Oath—Intrinsic or Extrinsic.—A party gave the acceptor of a bill of £30 a charge for £15 as an unpaid balance, and, on a reference to oath, he admitted that he had received payments which, if applied to the bill, reduced the amount to £6, but stated that he had incurred expenses in relation to the bill which extinguished these payments. *Held* that the statement as to the expenses was extrinsic. *Wright* v. *Macfarlane*, 1837, 16 S. 67.

90. Reference to Oath—Intrinsic or Extrinsic.—On a reference to the defender's oath in an action on a prescribed bill for £200, he deponed that the bill was paid thus: the pursuer sold to him verbally a property for £600, which was required for a railway, and which the defender sold for £800; that the price due by the defender for the property and the amount of the bill were paid to the pursuer together, when he received £800 from the railway company. *Held* that the facts and circumstances deponed to by the defender in regard to the payment of the debt were

extrinsic of the oath. *Stewart & Others* v. *Robertson*, 1852, 15 D. 12; 25 J. 14; 2 Stuart 11.

91. Repetition—Gaming Debt—Bona fide Assignee of Bond Granted for Game Debt.—The debtor in a gaming debt granted three bonds therefor, two of which were assigned by the creditor to a third party for value. An action on the bonds by the third party having failed, the trustee for the third party's creditors sued the creditor in the bonds for repetition of the price paid for the assignation thereof. *Held* that the fact of the bonds being granted for a game debt was no bar to the action, unless the assignee had not been in *bona fide*, and that there was warrandice *debitum subesse*. *Ferrier* v. *Graham's Trs.*, 1828, 6 S. 818; 3 Fac. 879.

92. Repetition—Payment under Protest—Forged Receipt.—A writer who was employed to prosecute a debtor, was informed by the debtor that he had given money to his own agent to pay the amount, and got from him a receipt bearing the writer's signature; and the writer having challenged the receipt as forged, the debtor paid him the debt under protest. *Held* that the debtor could not insist for repetition. *Gray* v. *M'Dougall*, 1828, 6 S. 467.

93. Repetition — Payment in Error — Decree-Arbitral for Debt not Due—Payment to Agent.—An agent was employed to act for a client in a submission, and to recover payment of part of a debt due to him, in virtue of bonds under which it appeared to be still resting-owing; and on that assumption he stated his case, and obtained a decree-arbitral. Thereafter he was made aware that the debt had been fully paid; but, having no authority to reveal this, he received payment of the money, remitted it to another agent of the client, who paid part of it to the client, and agreed to pay the residue to other parties having interest; and it was found that the decree-arbitral could not be reduced. *Held* that the agent was not liable in repetition to those from whom he had recovered payment. *Keith* v. *Taylor*, 1824, 2 S. 252. Revg. 1 S. 55.

94. Repetition—Payment in Error—Process—Count and Reckoning.—An agent for the debtor in certain obligations, remitted to the agent for creditors the amount then understood to be due to them, including, by mistake, a sum due to another party. *Held* that an action for repetition of the sum so remitted by mistake (in which the record was closed) should not be sisted till the issue of an action of reduction and count and reckoning, intended to show that a greater sum was actually due than had been remitted, even including the sum remitted by mistake. *Ram* v. *Horne*, 1842, 5 D. 280; 15 J. 102.

95. Repetition — Payment in Error — Rates.—*Held* that police rates paid for four years in error could not be recovered because the rate of each year was applied to that year's expenditure, and the ratepayers of future years were not *lucrati*. *Bell* v. *Thomson*, 1867, 6 M. 64; 40 J. 43.

96. Repetition — Payment in Error — Rates—Special Agreement.—*Held* that under the terms of a special agreement a parochial board was liable in repetition of excess payments of poor-rates to a company assessed. *Glasgow Gas Light Co.* v. *Barony Parish*, 1868, 6 M. 406; 40 J. 194.

97. Repetition—Payment under Protest—Exorbitant Expenses.—An heritable creditor having threatened to sell the subjects, the trustee on the debtor's sequestrated estate paid the debt and expenses, taking an assignation to himself; and, after having done so, and on the same day, he intimated by protest that the expense was exorbitant, and reserved right to repetition of the excess. *Held* that he was not entitled to insist in an ordinary action for repetition, and that even in a reduction, fraud or error *in substantialibus* would require to be proved. *Turner* v. *Simpson*, 1838, 1 D. 57.

98. Repetition — Proof — Judicial Admission.—A granted his acceptance to B, for which B gave a back-letter, acknowledging that it was for B's accommodation. A was compelled, under diligence by B, to pay the bill, and raised an action of repetition against B, who, on being judicially examined, stated that he had retired another acceptance by himself to A, but in which he alleged that A was the true debtor, and which he (B) had destroyed. *Held* that as there was no evidence of A having been the debtor in this bill, he was entitled to repetition of the amount of the other. *Stephen* v. *Raffen*, 1833, 11 S. 387.

99. Repetition—Receipts in Possession of one Brother, but in Name of another Brother, the Real Debtor—Proof prout de jure.—Where one brother had in his possession receipts for payments in name of another brother—the real debtor—in an action of repetition, in which the former averred that he had made the payments from his own funds, proof *prout de jure allowed* him to redargue the presumption that the payments had been made by the real debtor. *Fairbairn* v. *Fairbairn*, 1868, 6 M. 640; 40 J. 332.

100. Repetition—Reduction—Restitutio in integrum.—A broker instructed to purchase shares on 15th October, of that date notified the purchase to his employer, who, on 6th November, paid the price and got the transfer. It turned out that fifty of these shares had been purchased on 6th November, and in regard to these the purchaser was held not bound to register. The purchaser now sued the broker for repetition of the price of the whole shares. Action *dismissed*, in respect there were no conclusions for reduction of the transaction, nor was there any offer made to restore the transfers. *Cullen* v. *Kerr*, 1857, 19 D. 969; 29 J. 453.

101. Repetition — Settlement — Repetition Stipulated for.—A transaction was

entered into, in the form of a decree-arbitral, by which one party was, for certain considerations, to pay to the other a sum of money, but declaring that, if the party, or his heirs, receiving the money, should ever challenge the decree, the money should be repaid. *Held* that the heir of the receiver, having successfully challenged the decree, was bound to repeat. *Maule* v. *Maule*, 1822, 2 S. 26.

102. Repetition—Settlement—Failure of Submission.—A party entered into an informal agreement with another, settling certain disputed claims, and containing a submission to an arbiter relative to others. He made payment in terms of the agreement, got into possession of an estate on the faith thereof, and acted on the submission. *Held* that although the submission failed from ambiguity, he was not entitled to insist in an action of repetition of the payments, on the assumption that the agreement was not binding, action being reserved in regard to the matter submitted. *Stirling* v. *Ker*, 1830, 8 S. 911.

PEERAGE

Arms, Coat of, see title *Lyon King*.
Attainder, see that title.

1. Abeyance.—There never was in Scotland a doctrine corresponding with the English doctrine of abeyance in peerage cases. *Herries Peerage*, 1858, 3 Macq. 585.

2. Claim—Lapse of Time.—Mere lapse of time is no bar to a claim to a peerage. *Dukedom of Montrose*, 1853, 1 Macq. 401.

3. Committee of Privileges.—Principles laid down as to allowing parties to appear and be heard for their interest before the Committee of Privileges of the House of Lords in peerage questions. *Roxburgh Peerage*, 1812, 5 Pat. 601.

4. Creation of Earldom—Evidence.—In the absence of the original patent or charter of creation, a certified copy of an enrolment of a commission under the Great Seal of Scotland and royal sign-manual, directing a baron to be created an earl, with confirmatory entries in the journals of the Scottish Parliament, *held* sufficient evidence of the creation of earldom. *Earldom of Perth*, 1853, 1 Macq. 776.

5. Descent—Heir-Male.—*Held*, by Committee of Privileges, that when in the creation of a peerage no express limitation of the grant appears, the dignity is always presumed to descend to the heir-male; that a charter of resignation of the estate and barony of Cassilis in favour of heirs-male, whom failing, of heirs-female of the body of the granter, "cum armis et dignitate familiæ de Cassilis," did not comprise or extend to the honours, but only to the estate. *Kennedy* v. *E. of Ruglen & March*, 1762, 2 Pat. 55.

6. Descent—Presumption.—It was always in the power of the sovereign to make an honour descendible on females as well as males. This general presumption will give way wherever there are circumstances sufficient to show in any particular case that females as well as males were included in the original destination. *Herries Peerage*, 1858, 3 Macq. 588, 600.

7. Descent—Presumption.—It is a settled rule of law as to Scots peerages, that when the origin of the honour is lost in antiquity, and so does not appear in any direct proof, the presumption is, that it was in its creation limited to heirs-male only. *Glencairn Peerage*, 1797, 1 Macq. 444. *Herries Peerage*, 1858, 3 Macq. 588, 600.

8. Exhibition of Documents.—Exhibition of documents *in modum probationis* of a claim to a peerage depending before the Committee of Privileges of the House of Lords *refused*. *Campbell* v. *Campbell*, 1869, 7 M. 759; 41 J. 397. *Barclay-Allardice* v. *D. of Montrose*, 1872, 10 M. 774; 44 J. 482.

9. Jurisdiction — Court of Session. — Remarks on the jurisdiction of the Court of Session in Scots peerage questions. *Dukedom of Montrose*, 1853, 1 Macq. 401.

10. Jurisdiction — House of Lords. — *Observations* as to how the House of Lords has come to acquire jurisdiction in Scots peerage questions. *Dukedom of Montrose*, 1853, 1 Macq. 401.

11. Objections.—In peerage cases, objections or contradictions will be allowed to intervene on grounds stated and established. *Montrose Peerage*, 1851, 1 Macq. 57.

12. Parliament—Right to Sit.—By the Scots peerage law, a husband may sit in Parliament *jure uxoris*. *Herries Peerage*, 1858, 3 Macq. 595, 607.

13. Precedency—Ground for Objection. — Disturbance of the order of precedence in the peerage has been repeatedly *held* a sufficient ground to admit an objection. *Montrose Peerage*, 1851, 1 Macq. 57.

14. Precedency—Rolls of Parliament. — The ordinary marking of the peers present on the rolls of Parliament has little regard to precedency; but in a commission from the Crown for holding a Parliament, the names would probably have been set down in their proper places. *Glencairn Peerage*, 1797, 1 Macq. 444.

15. Reduction of Service—Title.—*Held* that the Crown had an interest and title to sue a reduction of a service on which a person claimed to have right to certain peerages, etc., granted by the Crown. *Alexander* v. *Officers of State*, 1868, 6 M. (H. L.) 54; 40 J. 470; L. R. 1 Sc. App. 276.

16. Rescissory Act, 1488.—*Held* that the Rescissory Act of the Scots Parliament, 17 Oct. 1488, destroyed the Dukedom of Montrose created by James III., and that the Dukedom of Montrose created by James IV. was only for the life of the grantee. *Dukedom of Montrose* 1853 1 Macq. 401.

17. Resignation.—By the Scots peerage law, a peeress may resign her dignity in favour of her eldest son. *Herries Peerage*, 1858, 3 Macq. 585.

18. Restitution of Peerage—Crown.—As to the limits of the royal interposition in sanctioning the restitution of a Scots peerage, see *Earldom of Perth*, 1853, 1 Macq. 776.

19. Restoration—Statute.—When a peerage is rescinded by Parliament, it cannot be restored by the Crown. To effect restoration, another Act of Parliament will be necessary. *Glencairn Peerage*, 1797, 1 Macq. 444. *Dukedom of Montrose*, 1853, 1 Macq. 401.

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1. Acquiescence—Arbitration—Judicial Reference—Subsequent Demand for Hearing before Lord Ordinary.—The parties to an action lodged a minute by which they agreed to refer the conclusion of the action to a certain arbiter. They thereafter agreed that the arbiter need not take the proof *ad longum*, but should take such notes as might be requisite to guide him in framing his report. This was accordingly done, and the arbiter reported in favour of the defender. *Held* that the pursuer was barred from claiming to be heard on the proof before the Lord Ordinary. *Flounders* v. *Flounders*, 1826, 4 S. 464.

2. Acquiescence—Arbitration—Decree Pronounced without Hearing Parties—Knowledge—Failure to Apply for Hearing.—It was agreed between a party representing an association of archers and the tenant of grass parks in which they intended to hold a meeting, to refer to the award of a keeper of meadows on account of his particular skill and knowledge the damage thus occasioned. The arbiter examined the ground before, during, and after the meeting, and issued to the parties a statement of the opinion which he had formed. The party acting for the archers did not apply to be heard; and although intimation was made to him that a decree in terms of the opinion would be issued, he lodged no objections. An objection by him to the decree that it was void, having been pronounced without hearing parties, *repelled*. *Latta* v. *Macrae*, 1852, 14 D. 641; 24 J. 319; 1 Stuart 601.

3. Acquiescence—Abitration—Failure to Hear Parties.—A party complaining that an oversman had not allowed him sufficient time to answer a paper and comment on certain productions made by the opposite party, *held* barred from pleading he had not been heard by his previous actings in evading a request by the oversman to prorogate the submission, and throwing obstacles in the way of his completing the investigation necessary for a decision. *Paterson* v. *Sanderson*, 1829, 7 S. 616.

4. Acquiescence—Arbitration—Award—Objection—Proceedings in Knowledge of Objector.—Parties entered into an arbitration under which the arbiter was to carry out

alterations on a river and allocate the expense. One of the parties *held* to be barred from objecting to the award in respect that it was issued after expiry of the legal time, seeing that he had acquiesced in the operations going on during that time. *Johnston* v. *Cheape*, 1817, 5 Dow 247; 6 Pat. 339, 342.

5. Acquiescence—Arbitration—Appearance before Arbiter—Subsequent Objection to Devolution.—A party *held* barred from founding on an objection to the devolution in a submission, in respect that he had appeared and pleaded before the oversman. *Kirkcaldy* v. *Dalgairns' Trs.*, 16 June 1810, F. C.

6. Acquiescence—Arbitration—Lodging of Answers to Claim before Arbiter—Subsequent Reduction of Award on Ground that Arbiter had no Jurisdiction.—*Held* that a landlord by lodging answers to a claim lodged by the tenant with the arbiter named in a lease entered into between the tenant and the landlord's predecessor, had barred himself from reducing the arbiter's award on the ground that the clause of reference was not binding on singular successors. *Montgomerie* v. *Carrick*, 1848, 10 D. 1387; 20 J. 504.

7. Acquiescence—Arbitration—Reduction of Award on Informality in Submission—Appearance before Arbiter.—*Held* that the suspender of a charge on a decree-arbitral was barred from founding on an objection to the designation of a witness to the submission, by having appeared before the arbiter. *Taylor* v. *Grieve*, 25 Nov. 1800, F. C.; M. "Arbitration" App. No. 8.

8. Acquiescence—Arbitration—Objection to Title to Refer—Action to Enforce Award.—A person who had entered into a reference with trustees, but in the course of the proceedings objected to their power to refer, *held* not barred from pleading the incompetency of the reference by way of exception in an action to enforce the award. *Thomson's Trs.* v. *Muir*, 1867, 6 M. 145; 40 J. 84.

9. Acquiescence—Arbitration—Statutory Arbitration—Prorogation beyond Statutory Time—Homologation.—A submission was entered into between a railway company and the proprietor of lands through which the line passed, which empowered the arbiters, in the usual form, to prorogate the submission at their pleasure; and there was a declaration that the submission should be held to have been entered into under the Lands Clauses Act, which provides that if the arbiters do not pronounce a decree within three months, the submission shall fall. The arbiters did not pronounce their decree for two years. *Held* that the decree-arbitral, although not pronounced in terms of the statute, might be homologated; and circumstances held sufficient to infer homologation. *Dundee & Aberdeen Rly. Co.* v. *Richardson*, 1851, 13 D. 552; 23 J. 246.

10. Acquiescence—Arbitration—Reduction of Award—Failure to Prorogate—Subsequent Appearance before Arbiter.—One of the parties to a submission brought a reduction of the decree-arbitral, on the ground that the submission had fallen at a date prior to that of the decree, in consequence of the arbiter having neglected to prorogate it. *Held* that the pursuer was barred from pleading the want of prorogation, because the parties had continued to plead before the arbiter long after the date of the alleged lapse of the submission. *Paul* v. *Henderson*, 1867, 5 M. 613; 39 J. 307.

11. Acquiescence—Arbitration—Award Issued after Expiry of Year—Challenge—Appearance before Arbiter after Expiry of Year.—*Question*, whether a party to an arbitration was barred from objecting to the award on the ground that it was issued more than a year after the submission, by appearing before the arbiter subsequent to the expiry of the year. *Fleming* v. *Wilson & M'Lellan*, 1827, 5 S. 906; 2 Fac. 611.

12. Acquiescence—Principal and Agent—Husband and Wife—Arbitration—Decree—Settlement—Appearance by Agent—Husband and Wife—Challenge of Husband's Authority.—A claim for an arrear of teind being submitted to arbiters, and settled in terms of their award, and the husband of the claimant having acted in the submission in her name and right, *held* that the wife was not entitled afterwards to open up the question on an allegation that the terms of the award were only of an interlocutory character, and that the *jus mariti* was excluded by her marriage-contract. *Wallace* v. *D. of Portland*, 1830, 8 S. 572.

13. Acquiescence—Bankruptcy—Trust—Heritage—Expenditure by Trustee—Heritable Securities—Preference.—Heritable creditors *held* barred from objecting to a claim by a trust (holding the lands under a voluntary trustee) for a preference in respect of money expended by him on the lands, seeing that they had tacitly acquiesced in the trustee's possession of the lands. *Russell* v. *Goldie*, 1823, 2 S. 257.

14. Acquiescence—Burgh—Election of Magistrates—Error—Failure to Notify.—The town-clerks of a burgh included in the list of councillors to retire by rotation at an annual election one who had only been a year in office (on the assumption of his being a substitute to serve out the unexpired time of a councillor resigning); and an election took place, and those elected were inducted. *Held* that although no objection or protest was taken till the first meeting of the new council, when his vote was refused, that he and his constituents were not barred by acquiescence from asserting his right to continue in the council. *Scott* v. *Mags. of Edinburgh*, 1838, 1 D. 347; 14 Fac. 622.

15. Acquiescence—Burgh—Election of Magistrates—Illegality—Unanimous Election—Challenge by Party Taking Part in Election.—The constituent member of a

meeting for the election of magistrates and councillors of a burgh *held* not barred from complaining, under the Acts 7 Geo. II. c. 17, and 16 Geo. II. c. 11, of the proceedings of that meeting, although those proceedings were adopted unanimously, and although he concurred in them. *Lawrie* v. *Mags. of Edinburgh*, 6 June 1818, F. C.

16. Acquiescence—Company—Actings—Election of Directors—Objection by Party Concurring in Election.—A party whose proxy had been present at the election of directors of a railway company, and had seconded the motion for their election, *held* barred from objecting to their proceedings, on the ground that they were not the directors of the company. *Hutcheson* v. *Halkett*, 1847, 10 D. 150; 20 J. 43.

17. Acquiescence — Canal — Rates — Increase—Payment without Objection—Increase Subsequently Declared Illegal—Repayment.—A canal company were authorised under a statute to levy an additional penny per ton on vessels, in consideration of deepening the canal, and otherwise improving the line of navigation; but, before giving the full depth, they raised the rates in 1801 by one farthing, and in 1804 by an additional two farthings per ton. None of the traders objected to the want of depth of the canal; but one of them resisted the increase, up to 1804, on other grounds, which were judicially repelled. He then paid, without objection, until 1815, when the company increased the rate to one penny, against which he protested, alleging the want of depth; and it was ultimately found by the House of Lords that the company had no right to increase the dues till they had given the full additional depth. *Held* that he was barred from claiming repetition of all the bygone increased dues previous to the date of his protest. *Dixons* v. *Monkland Canal Co.*, 1831, 5 W. & S. 445. Affg. 8 S. 826; 5 Fac. 639.

18. Acquiescence — Company — Shareholder—Use of Privileges—Transferee of Share who had not Signed Register—Liability for Obligations Attaching. — A party who signed an acceptance of a transfer of a share in public gardens, and an obligation to abide by the regulations, attended meetings, and enjoyed the privileges of a shareholder during his life. *Held* liable to the other shareholders for his proportion of annual assessment, although the transfer of his share had not been signed by himself in the transfer-book of the co-proprietors, in terms of their regulations; and that his representative, who had also used the privilege of a shareholder, was liable for the assessments imposed after his death, although she did not make up a title to the share in the transfer-book, in terms of the regulations. *Bell* v. *Lady Ashburton*, 1835, 13 S. 920; 10 Fac. 683.

19. Acquiescence—Company—Borrowing Powers—Increase—Violation of Contract of Copartnery—Liability of Shareholder—Failure to Object. — The contract of copartnery of a joint-stock company provided that the capital should be £3000, and that the directors should have authority to borrow £500 on bond from a bank; and these were declared to be fundamental articles of the contract. It was afterwards resolved to enlarge the capital, and to increase the powers to borrow money; and large sums having been borrowed on the obligations of individual shareholders, a call was made upon the shareholders in order to relieve them. *Held* that a shareholder who had been present at the meeting where the resolution to enlarge the capital was proposed, had intimated no dissent, and had paid his original share after it had been adopted, but who had not been present at any subsequent meeting, had acquiesced in it. *Sturrock* v. *Thoms*, 1851, 13 D. 762; 23 J. 335.

20. Acquiescence—Company—Authorisation to Committee to Raise Money on Security of Profits—Application of Profits—Act of Parliament.—Partners of a canal company authorised a committee to raise money on the security of the rates, which the committee did, and expended the money on the canal. *Held* that the partners were barred by acquiescence from insisting that the rates should be applied *primo loco* in extending the canal in terms of the Act of Parliament constituting the company, instead of in repayment of money raised and expended on formation of the canal. *Houstoun* v. *Lady Montgomerie*, 1821, 1 S. 186.

21. Acquiescence—Contract—Mercantile — Correspondence — Failure to Reply. — *Observed*, that a merchant is *held* to acquiesce in proposals made by a correspondent unless he express his dissent within a reasonable time. *Serrays & Co.* v. *Watt*, 12 Feb. 1817, F. C. See *Jaffray* v. *Boag*, 1824, 3 S. 375 and *Watson & Co.* v. *O'Reilly, Hill, & Co.*, 1826, 4 S. 475.

22. Acquiescence—Contract — Construction — Payment for Period of Years — Relief.—A party holding land burdened with an annual sum towards payment of the stipend of a third minister of a burgh (who did not derive his stipend from teinds), subfeued, *inter alia*, for relief "of all cess, minister's stipend, and other public burdens"; and the subfeuar, for above fifty years thereafter, paid the proportion of the parish minister's stipend arising from tithe, while the granter of the subfeu paid the third minister's stipend as formerly. *Held* that the granter of the subfeu, having so long acquiesced in this construction of the contract, had no right of relief against the subfeuar. *Fraternity of Masters & Seamen of Dundee* v. *Wedderburn*, 1830, 8 S. 547.

23. Acquiescence—Contract—Sale—Cash or Credit—Bill of Exchange—Failure to Return.—The seller of a quantity of malt raised an action for the price on the allegation that the sale was a ready money sale. *Held* that he was barred by having previously received a bill for four months, and retained

it for some time. *Arnot* v. *Watt*, 1825, 4 S. 4.

24. Acquiescence — Contract — Breach — Sale of Subject of Contract without Opposition.—A became bound that when the value of the first flat in a building about to be erected should be ascertained, an offer of it at such value should be made to B; but when it was built, A, without ascertaining the value, offered it at £4200, which B rejected, and required A to have the value properly ascertained, which was not done. Thereafter it was advertised for public sale, and exposed at the upset price of £3000, and was sold with two other flats at a *cumulo* price, of which that effeiring to the flat was £3450; and B made no objection to the sale, nor demand to have the flat at the upset price. *Held*, in an action of damages, that B having allowed the sale to proceed without objecting, or claiming it at the upset price, was barred of his demand for damages. *Grahame* v. *Mure*, 1833, 11 S. 308.

25. Acquiescence — Contract — Sale — Cancellation—Sale of Heritage—Failure to Give Title.—A sold a superiority to B, but after difficulties had been raised as to the titles, wrote to B, that if he was not willing to take the titles as they stood, the transaction must be considered at an end. No answer was received by A, who then again intimated that he considered the transaction at an end. Some time afterwards B raised an action for implement. *Held* that he must be presumed to have acquiesced in the rescission of the bargain. *M'Neill* v. *Cameron*, 1830, 8 S. 362; 5 Fac. 305.

Circumstances *held* sufficient to infer acquiescence by a seller in the rescission of a contract of sale of a house. *Hutchison & Son* v. *Scott*, 1830, 8 S. 377.

26. Acquiescence — Contract — Sale — Failure to Deliver Timeously—Cancellation —Recovery of Price.—A stockbroker was employed to buy railway shares, and the employer after being notified of the purchase repudiated the bargain, in consequence of the broker's delay in delivering the shares. In an action by the broker, *held* that he was barred by the delay in delivery from suing for the price. *M'Callum & Co.* v. *M'Keand*, 1847, 9 D. 630; 19 J. 205.

27. Acquiescence — Contract — Sale — Abandonment—Bankruptcy of Purchaser—Resale by Seller.—A party sold an heritable subject by missives; but the purchaser failed, without implementing the purchase, and the seller thereupon wrote to the trustee on his sequestrated estate, requiring to know whether he was disposed to take the subject. The trustee having notified that the purchase was abandoned, the seller, without further consulting the trustee, and without applying for judicial sanction, resold the subject by public roup at a loss. *Held* that the seller had acquiesced in the abandonment, and had no claim for damages against the bankrupt's estate for non-implement of the sale. *Thomson's Trs.* v. *Monteith's Trs.*, 1835, 13 S. 411.

28. Acquiescence—Heritable Securities—Application of Rents.—Averments by B as to acquiescence on the part of A in a certain mode of applying the rents of an heritable subject over which there were several securities, which *held* irrelevant, and insufficient to entitle B to a proof. *Scott* v. *Fothringham*, 1859, 21 D. 737; 31 J. 397.

29. Acquiescence—Election Law— Freeholder — Enrolment — Payment of Public Burdens — Objection.—Two distinct lands, valued separately in the cess-books, were sold in four lots, and the separate valuations accumulated by the commissioners, and the *cumulo* sum divided into four parts, and apportioned to each lot. Cess and public burdens were paid agreeably to this division from 1806; and a purchaser of one of the lots was enrolled as a freeholder. *Held*, in a question with a singular successor of that purchaser, that the freeholders were barred by acquiescence from objecting to his being admitted to the roll. *Blackwell* v. *Smith*, 1822, 1 S. 539.

30. Acquiescence—Landlord and Tenant —Operations by Landlord — Damages — Failure of Tenant to Object Timeously.—A tenant *held* barred from claiming damages for operations by his landlord, alleged to have been injurious to the tenant, but of which he did not complain at the time. *Clugston* v. *Goold*, 1823, 2 S. 308.

31. Acquiescence—Landlord and Tenant — Violation of Lease — Miscropping — Penalty — Acceptance of Rent without Protest—Knowledge.—The lease of a farm for nineteen years prescribed a certain course of cultivation for the first sixteen years, and another for the last three, under penalty for paying an additional rent for the last nine years. In an action raised at the expiry of the lease for the additional rent, *held* that the claim was barred as to the first year by the landlord's acceptance of rent for that year without objection, but not as to the other two years by his knowledge that the tenant was departing from the course prescribed. *Miller* v. *Gwydir*, 1826, 2 W. & S. 52. Affg. 3 S. 65.

32. Acquiescence—Landlord and Tenant —Lease—Conditions as to Cultivation—Breach—Damages—Failure to Object.—The representatives of a landlord who, as well as his factor, resided in the neighbourhood of a farm, *held* not entitled, at the end of thirteen years, to claim damages from a tenant for not labouring the farm according to the stipulations in the lease, in respect of presumed acquiescence by the landlord in the mode of cultivation. *Murray's Trs.* v. *Gordon*, 1806, Hume 823.

33. Acquiescence—Landlord and Tenant —Contravention of Lease—Failure to Object. — The landlord of certain lands, which were let as a rabbit-warren and farm, *held* barred by acquiescence from objecting to an arrangement between the tenant and the

tenant of a neighbouring colliery, under which the latter constructed on part of the lands a railway for the transportation of his coals. *D. of Portland* v. *Samson*, 1843, 5 D. 476; 15 J. 248.

34. Acquiescence—Landlord and Tenant—Use of Subject Let—Mora.—The owner of a mill granted a lease of it in which he described it as a paper-mill. The tenant assigned the lease to a party who, in the knowledge of the landlord, used the mill as an oil-mill for six years. The lease was thereafter assigned to another party, who converted the mill into a flour-mill. *Held* that the landlord was barred from insisting that the mill should be reconverted into a paper-mill. *Young, Ross, & Co.* v. *Ramsay*, 1825, 1 W. & S. 560. Affg. 2 S. 793.

35. Acquiescence—Landlord and Tenant—Renewal of Lease—Conditions.—A tenant, by not objecting within a fixed time to certain conditions on which a verbal lease was agreed to be renewed, *held* to have acquiesced in them. *Morrison* v. *Campbell*, 1842, 4 D. 1426; 14 J. 518.

36. Acquiescence—Landlord and Tenant—Failure to Exact Payment Due under Lease—Mora.—By a lease of fifteen years, it was provided that buildings and fences should be erected on a farm, and if the landlord advanced the funds, the tenant should pay 6 per cent. interest during the lease. The landlord advanced the money, but did not draw the interest during the lease. *Held* not barred by taciturnity from demanding it after expiry of the lease; and *observed*, that effect cannot be given to mere taciturnity, unless the conduct of the party could not have been such as it has been, on any other supposition than that he did not intend to make a claim. *Brisbane's Trs.* v. *Lead*, 1828, 7 S. 69.

37. Acquiescence—Knowledge—Sequestration—Claim—Dividend—Action for against Trustee after Estate Exhausted.—A creditor, who in the knowledge that no dividends were to be paid by the trustee in a sequestration on his claim, raised no complaint until after the dividends (which exhausted the funds) had been paid to the other creditors. *Held* that he could not claim dividends from the trustee. *Jeffrey* v. *Ure & Miller*, 1825, 1 W. & S. 562. Revg. 2 S. 646.

38. Acquiescence—Knowledge—Right in Security—Knowledge of Posterior Creditor of Prior Unconfirmed Security.—A posterior heritable creditor duly confirmed *held* not barred by the knowledge of the existence of a prior unconfirmed security from claiming a preference over the prior security. *Leslie* v. *M'Indoe's Trs.*, 1824, 3 S. 48.

39. Acquiescence—Knowledge—Property—Title—Error in Title—Knowledge of Purchaser.—A strip of land described as bounded by a river was sold by A to the magistrates of a burgh. The magistrates made up no title, but built a quay on the river. Subsequently A's representative sold the lands, of which the foresaid strip had formed part (still describing them as bounded by the river), to B, who conveyed it to C. *Held* that C was barred from claiming the quay as belonging to him, seeing that B knew of the transaction between A and the magistrates and had acquiesced in the magistrates' operations. *Lang* v. *Mags. of Dumbarton*, 29 June 1813, F. C.

40. Acquiescence—Knowledge—Property—Title—Error in Description.—A joint stock company constituted by Act of Parliament for the formation of a new street according to a plan, having formed the street and made it over to the public, proceeded, in virtue of a new Act, to divide their remaining land among the shareholders. To one shareholder they disponed (with absolute warrandice) a lot of ground which was described in the disposition by the boundaries and measurements according to the original plan, which had been departed from in consequence of a slight divergence in the street, so as to cut off a portion of the lot in question. In the description of the boundaries in the disposition, reference was made, however, to a second plan, which showed the piece cut off. A purchaser from the shareholder raised an action against the company founding on the warrandice clause in their dispositions, and concluding for the value of the portion of ground so cut off. *Held* that the pursuer was in the same position as his author; that the latter being a shareholder of the company must be presumed to be aware of the actual condition of the property, which was a matter of public notoriety, and laid down on a plan specially referred to in his title; and defenders *assoilzied*. *Richmond* v. *Graham*, 1850, 12 D. 1163; 22 J. 517.

41. Acquiescence—Property—Qualification of Title.—*Question* as to the effect of acquiescence in qualifying or limiting a feudal title. *Sim* v. *Stewart*, 1827, 5 S. 841.

42. Acquiescence—Knowledge—Agent and Principal—Broker—Purchase of Shares—Deviation from Instructions—Signature by Principal of Transfer.—A person authorised a broker to buy shares for him on 15th October. The broker bought shares on 6th November. The principal received the transfer and signed it; in doing so he believed that the shares had been bought on 15th October. *Held* that the principal's acceptance and signing of the transfer did not infer acquiescence in the later purchase so as to bar him from repudiating the purchase. *Black* v. *Cullen*, 1853, 15 D. 646; 25 J. 387; 2 Stuart 370.

43. Acquiescence—Knowledge—Cautionary Obligations—Conditions—Non-Fulfilment—Knowledge of Creditor.—A agreed to become cautioner for B in advances to be made to him, on certain conditions to be performed by B, and which were expressed in an agreement between them. A also agreed to transfer certain timber and the lease of a forest to B, and gave him a letter to that effect, in which the conditions were not mentioned. *Held* that

a person who had knowledge of the agreement before advancing money on the letter and order was affected by the agreement; and that B not having performed the conditions, the party making the advances could not recover from A. *Grant* v. *Campbell*, 1818, 6 Dow 239.

44. Acquiescence—Mill—Barony Mill—Erection of Second Mill within Barony—Mora.—The proprietor of a barony mill having been in the knowledge of the erection of a mill by another within the barony, and having made no complaint against such erection or against the possession and use of the mill for twelve years, *held* barred by acquiescence from insisting on having the mill rendered unfit to compete with the barony mill. *M. of Abercorn* v. *Longmuir*, 20 May 1820, F. C.

45. Acquiescence — Property — Transfer —Building Erected on A's Ground by B—Knowledge of A.—*Question*, whether a party can be barred by acquiescence from vindicating property feudally vested in him, on which another has erected buildings in the belief that it belonged to him. *Observations* on the effect of acquiescence. *Melville* v. *Douglas' Trs.*, 1828, 7 S. 186; 8 S. 841; 5 Fac. 671.

46. Acquiescence—Property—Buildings Erected by Feuar beyond Limits of Feu—Knowledge of Superior—Failure to Object.—Circumstances in which *held* that a company who were feuars and tenants of minerals were not entitled to keep up certain works upon the property of the owner, beyond the limits of feu, although the owner's author had not objected to their construction. *Macintosh* v. *Hurlet & Campsie Alum Co.*, 1855, 28 J. 72.

47. Acquiescence — Property — Burying-Ground — Interference. — Circumstances in which *held* that a heritor was not barred by acquiescence from objecting to interference with his rights in his family burying-ground. *Hill* v. *Wood*, 1863, 1 M. 360; 35 J. 216.

48. Acquiescence — Property — Interference not Objected to by Proprietor for Thirteen Years.—The proprietor of an inn fixed a signboard on a tenement through which the only access to the inn could be got, and the signboard remained without objection from the proprietor of the tenement for thirteen years. *Held* that the proprietor of the tenement was not thereby barred from removing the signboard. *Buchanan* v. *Carmichael*, 1823, 2 S. 526.

49. Acquiescence — Property — Water-Works—Act of Parliament—Deviation—Failure to Object.—A landowner who had acquiesced in the original pipes of municipal water-works commissioners being laid at a greater vertical deviation than authorised by their statute, *held* not entitled in a suspension and interdict to object to additional pipes being laid in the same line under a power to increase, etc., the number of pipes. *Buchanan* v. *Glasgow Water-Works Commrs.*, 1869, 7 M. 853.

50. Acquiescence — Property — Mutual Wall—Alteration—Failure to Object.—A proprietor, while his property was possessed by a liferentrix, was aware of certain alterations made in a mutual wall by a conterminous proprietor, and, instead of objecting, expressed himself to neutral parties as satisfied that the alterations would do him no injury. *Held* that his conduct in this respect did not amount to such acquiescence as to bar him from insisting, within the possessory period, for the restoration of the wall to its original state. *Barton* v. *Richardson*, 1840, 16 J. 310.

51. Acquiescence — Right-of-Way — Obstruction.—Obstruction of an alleged public right-of-way during twenty-two years may be evidence to disprove the existence of such a right, but does not on the ground of acquiescence bar a claim for the removal. *Cuthbertson* v. *Young*, 1854, 17 D. (H. L.) 2; 1 Macq. 455; 26 J. 310. Affg. 1 Stuart 371.

52. Acquiescence—Road—Illegal Use—Railway Crossing.—The proprietor of lands intersected by a turnpike road, at various times formed railways on his property, crossing the surface of the turnpike road in different places, and extending one of these so as to form a new level crossing, which, by sufferance of the road trustees, he used for several years. The use of this railway having been discontinued, and the rails having become covered up with road metal, he, after a considerable time, raised and relaid the rails so as to fit them for being worked by locomotive power, instead of horse power as formerly; and the road trustees having objected to the use of the crossing being resumed, *held* that the trustees were not barred by *mora* and acquiescence from objecting to the crossing as illegal. *Hill* v. *Dixon*, 1850, 12 D. 808; 22 J. 348.

53. Acquiescence — Property — Street — Encroachment—Failure to Object.—A town feuar, whose northern boundary was a street, the *solum* of which belonged to the magistrates, obtained a warrant from the Dean of Guild to erect within his own ground an arcade with an open portico resting above it. The feuar subsequently made the erection, but projected the pillars of the arcade to the extent of two feet upon the street. No objection to the encroachment was taken by the magistrates. Upwards of thirty years after, the feuar applied to the Dean of Guild for a warrant to enclose the space between two pillars of the open portico, the proposed operation being entirely within the boundary of the feu. *Held* that, as the acquiescence in the encroachment had not been qualified by any conditions, the magistrates were not entitled to object to the alteration proposed, no damage being alleged. *D. of Buccleuch* v. *Mags. of Edinburgh*, 1865, 3 M. 528; 37 J. 266.

54. Acquiescence—Building Restrictions —Contravention—Decree of Lining from Dean of Guild.—A feuar whose titles precluded him from erecting buildings beyond

a specified height applied to the Dean of Guild for a decree of lining in respect of buildings which contravened the restriction. The petition was served on A, who was entitled to enforce the restriction, but without a copy of the plan or any information as to what the proposed erection was to be. Decree of lining was granted in absence. Thereafter A brought a reduction of the decree. *Held* that he was not barred by acquiescence. *M'Gibbon* v. *Rankin*, 1871, 9 M. 423; 43 J. 205.

55. Acquiescence—Building Restrictions—Superior and Vassal—Street—Contravention of Restrictions—Failure to Object.—Conditions regulating height and style of houses to be built were inserted in all the feu-contracts in a street. A number of feuars contravened these without objection. *Held* the superior could not afterwards enforce the conditions against a single feuar. *Campbell* v. *Clydesdale Banking Co.*, 1868, 6 M. 943; 40 J. 539.

56. Acquiescence—Building Restrictions—Implied Restriction.—*Held* by the Lord Ordinary, that the feuar of a building stance, in a street where the other houses had been built on a level with the street, without sunk storeys or areas, must be held to have acquiesced in this mode of building, and was not entitled to excavate, for the purpose of making a sunk area, more especially as the operation would be attended with danger to the adjoining tenement. *Murray* v. *Johnston*, 1834, 13 S. 119.

57. Acquiescence—Building Restrictions—Servitude—Infringement—Failure to Object.—The owner of property on one side of a street with a right of servitude *altius non tollendi* over the opposite side, *held* not to have lost his right to enforce the servitude as regarded buildings exactly opposite his property, by not having interfered when buildings in the same street, but not exactly opposite, were erected. *Gould* v. *M'Corquodale*, 1869, 8 M. 165; 42 J. 72.

58. Acquiescence—Property—Servitude—Contravention—Erection of Buildings—Sale of Dominant Tenement—Knowledge of Purchaser.—Where buildings had been erected in contravention of a servitude, with the knowledge and acquiescence of the owner of the dominant tenement, *held* that a singular successor, who purchased the dominant tenement in the knowledge of their existence, was not entitled to insist in having them removed. *Muirhead* v. *Glasgow Highland Society*, 1864, 2 M. 420; 36 J. 201.

59. Acquiescence—Property—Building—Interference with Neighbouring Property—Failure to Object.—The proprietor of a street flat, in 1774, carried a chimney in a horizontal line immediately under the windows of the flat above, and then perpendicularly to the roof, and formed an aperture at the angle to clean the horizontal part, which was filled up by a moveable stone; and the aperture was never challenged till 1819. *Held* that the proprietor of the flat above was barred by acquiescence from objecting to it. *Munro* v. *Jervey*, 1821, 1 S. 161.

60. Acquiescence—Riparian Proprietors—Interference with River—Mill-Lead—Failure to Object.—*Braid* v. *Douglas*, 24 Jan. 1800, F. C.; M. "Property" App. No. 3.

61. Acquiescence—Riparian Proprietors—Interference with River—Mora.—A stream was the boundary between two opposite proprietors, across which there was a dam-dyke, and the tenant of the one raised the dyke and made two water-cuts to supply a bleach-field, and returned the water into the stream below the dyke opposite to the lands of the other proprietor, who supplied turfs to the tenant to raise the dyke, and acquiesced in the operations from 1787 till 1795. *Held* that he was barred from insisting on having matters restored to their original position. *Aytoun* v. *Douglas*, 1 July 1800, F. C.; M. "Property" App. No. 5.

62. Acquiescence—Riparian Proprietors—Mill-Lead—Extension—Mora.—A proprietor on a stream, who was in the knowledge of certain operations being carried on by an adjacent proprietor to extend and enlarge a mill-lead, and who did not object to them till some years after they were completed, *held* barred from objecting to them. *Aytoun* v. *Melville*, 19 May 1801, F. C.; M. "Property" App. No. 6.

63. Acquiescence—Riparian Proprietors—Interference with River—Knowledge—Failure to Object.—Averments that an inferior heritor saw, well knew of, acquiesced in, and agreed to operations made by a superior heritor upon a stream passing through the lands of both parties, *held* not sufficient to support a plea of acquiescence stated by the superior heritor; the court disregarding the averment of agreement as not sufficiently specific, and holding that mere knowledge and silence on the part of the inferior heritor were not relevant to infer acquiescence. *Cowan, etc.* v. *Lord Kinnaird*, 1865, 4 M. 236; 38 J. 131.

64. Acquiescence—Riparian Proprietors—Interference with Stream—Knowledge.—A proprietor, whose embankments on a stream were challenged by the owners of mills, averred that their authors saw the operations carried on without objection, but did not allege that they remained silent after they found that the injury was thereby done to them. *Held* that these averments would not support an issue of acquiescence. *Johnston* v. *Scott*, 1834, 12 S. 492.

65. Acquiescence—Riparian Proprietors—Pollution of Stream—Chemical Work—Abandonment—Subsequent Erection of new Work.—*Held* that the alleged acquiescence of a lower heritor in pollution caused by a chemical work which had ceased to exist for twenty-eight years did not bar him from objecting to the pollution caused by a chemical work recently erected on the same site.

Rigby & Beardmore v. *Downie*, 1872, 10 M. 568 ; 44 J. 297.

66. Acquiescence—Riparian Proprietors—Pollution of Stream—Process—Pleading Averment.—In an action between riparian proprietors regarding pollution of a river, the court *repelled* a plea of acquiescence, where it was merely averred that there had been acquiescence and no facts inferring it were condescended on. *D. of Buccleuch, etc.* v. *Cowan, etc.*, 1866, 4 M. 475 ; 38 J. 217.

67. Acquiescence—Riparian Proprietors—Interference with River—Knowledge.—*Observations* as to the effect of acquiescence on the part of a riparian proprietor in expensive operations for the purpose of diverting the stream, executed by parties with a special reserved right over the stream *ex adverso* of his lands. *M'Intyre, etc.* v. *Orr, etc.*, 1868, 41 J. 112.

68. Acquiescence—Riparian Proprietors—Supply of Water from Canal to River—Regulation of Supply—Right of Proprietors—Delay in Asserting—Mora.—A reservoir was formed, in terms of a statute, by canal shareholders, to supply water to a river, on the banks of which there were several mills belonging to different proprietors. The key of the sluice was delivered to a servant of the canal shareholders, who was, however, paid by a corporation (proprietors of mills on the river), and acted under their orders from 1776 till 1816, in regulating the supply to the river. The other mill proprietors never expressly acknowledged the exclusive control of the corporation, nor abandoned their right to regulate the supply. *Held* that these proprietors were not barred by acquiescence, and that the supply must be regulated by the majority of all the mill proprietors, or by a committee appointed by them. *Proprs. of Kelvin Mills* v. *Bakers of Glasgow*, 1821, 1 S. 70.

69. Acquiescence—Riparian Proprietors—Interference with River—Landlord and Tenant — Acquiescence by Landlord — Limitation to Duration of Lease. — Circumstances *held* sufficient to infer acquiescence by the proprietor of lands through which a stream passed, in the diversion thereof by a superior riparian proprietor for the purposes of a distillery, by a pipe of a certain bore. Circumstances *held* insufficient in regard to a further diversion of a larger quantity.

Question how far acquiescence by a landlord in operations by his tenant, is limited to the duration of the lease. *Stirling* v. *Haldane*, 1829, 8 S. 131.

70. Acquiescence—Superior and Vassal—Prohibition against Trading — Conversion of Premises into Shop without Objection.—A superior granted a feu-right declaring that the vassal should not deal in merchandise, and the rights of the adjacent feuars were qualified by a similar prohibition, but they converted their premises into shops, without objection by the superior. *Held* that the superior was barred from objecting to shops erected by the vassal. *Browns* v. *Burns*, 1823, 2 S. 298.

71. Acquiescence—Superior and Vassal—Reservation of Right to Fish—Operations of Vassal Inconsistent with Exercise of Right.—A superior, in feuing lands, reserved to him and his heirs liberty "of drawing and drying their fishing-nets at the side of the said water of Tay, upon the ground of the said lands, and fixing and placing the necessary trees for that, and conform to use and wont." At this time the part of the river where the lands lay had not been fished for many years, and could not, without certain expensive operations, be fished. The successor of the vassal enclosed the lands down to the riverside without objection by the superior or his successors, who were heirs of entail, and no fishing had been attempted for more than forty years. *Held*, in an action by the heir of entail, successor of the superior, for removal of the enclosures, and declarator of right to fish in the river opposite the lands, that, in relation to a claim such as that in question, an heir of entail can homologate so as to bind future heirs, and that the superior was barred from challenging the enclosures. *E. of Kinnoul* v. *Keir*, 18 Jan. 1814, F. C.

72. Acquiescence—Superior and Vassal—Division of Superiority with Consent of Vassal—Subsequent Division after Extinction of First.—*Held* that a vassal by consenting to one multiplication of superiors is not barred from challenging a subsequent division of the superiority when the first is extinguished, but that he is not entitled to challenge a transmission of the right of a superior whom he had recognised. *Mure* v. *Westrena*, 1824, 3 S. 17.

73. Acquiescence—Process—Advocation—Agreement to Hold Letters Executed—Objection to Citation in Subsequent Execution. — The agent of the respondent in an advocation agreed to hold the letters executed or to proceed by way of protestation. He put up no protestation, and thereafter the letters were executed. *Held* that the respondent was barred from objecting to the citation. *Wilson* v. *Pattie*, 1826, 4 S. 623.

74. Acquiescence—Process—Summons—Acknowledgment of Receipt—Objection to Citation. — A party who acknowledged by letter addressed to a messenger receipt of a summons served on him *held* barred from objecting to the citation. *Fraser & Another* v. *Reid*, 1826, 4 S. 773.

75. Acquiescence—Defective Summons—Lodging of Defences—Subsequent Objection to Summons.—An objection to a summons, that it bore to be "given under our signet, at Edinburgh, the 27th day of January, in the second year of our reign, 1823," whereas it was the third year of the reign, *held* excluded by the defender having lodged peremptory defences without objecting to the regularity of the summons, and various procedure having followed, at long intervals, during a space of

above ten years. *Henry* v. *Mather*, 1837, 15 S. 676; 12 Fac. 646.

76. Acquiescence—Process—Title to Sue—Objection not Stated Timeously.—In a case remitted from the House of Lords the pursuer *held* barred from stating an objection to the title of the defender, the trustee on a sequestrated estate (namely, that the petition for his appointment was at the instance of only one creditor), in respect that the trustee was respondent in the House of Lords and the pursuer had joined issue with him. *Dick* v. *Cuthbertson*, 1831, 5 W. & S. 712.

77. Acquiescence—Process—Amendment—Failure to Object.—The pursuer in an action lodged an amendment of his libel, and the defenders took no objection to it. *Held* that objection in the Inner House on a reclaiming note was barred. *Johnstone* v. *Elliot*, 1824, 2 S. App. 461. Affg. 1 S. 51.

78. Acquiescence — Process — Death of Pursuer—Sist of Unconfirmed Representatives — Consent of Defender — Objection after Decree.—A defender who, without objection, allowed representatives of the pursuer to be sisted, and in whose favour decree was pronounced, *held* barred from objecting to a charge on the decree that they ought to have been confirmed. *Kewley* v. *Andrew*, 1843, 15 J. 597.

79. Acquiescence—Process—Diligence—Objection—Failure to Take Objection in Bill Chamber.—A party is not barred from pleading an objection to diligence on a bill by not having stated it in the Bill Chamber, the diligence not having been produced till after the letters were expede. *Russell* v. *Kirk*, 1827, 6 S. 133; 3 Fac. 128.

80. Acquiescence — Process — Proof in Inferior Court—Objection in Advocation on Ground of Irregularity — Attendance of Objector at Proof.—A proof in an inferior court was led by the pursuer, and the diets were attended by both parties, but several of the depositions were unauthenticated by the commissioner's signature. *Held*, in an advocation by the defender, that he was not barred from objecting to the regularity of the proof, it being *pars judicis* to enforce the objection to the proof. *M'Phun* v. *Reid & Co.*, 1836, 14 S. 339.

81. Acquiescence—Process—Preliminary Objection — Failure to Take in Inferior Court.—In a competition between a poinding creditor of the tenant of a farm and the landlord who had sequestrated the tenant's effects, *held* that the creditor was barred by the proceedings in the sheriff court from founding in an advocation on an irregularity in the sequestration. *Cooper* v. *E. of Eglinton's Trs.*, 1829, 7 S. 831.

82. Acquiescence—Process — Account—Audit — Failure to Appear before Auditor—Subsequent Objections.—One of the parties to a cause refused to appear before an auditor appointed by the court to examine objections to the particular accounts or items of a previous audit, on the ground that he meant afterwards to object to the appointment of this auditor. *Held*, on advising the report, that he was not entitled to state objections to the accounts or items. *Mackenzie* v. *Williamson*, 1842, 4 D. 469; 14 J. 216.

83. Acquiescence—Process—Suspension—Reference to Oath—Examination—Objection on Ground of Error in Commission.—In a suspension of a charge, a commission to take the charger's oath was dated, by a clerical error, 21st October, in place of 21st November. The suspender used the commission, and examined the charger under it, without objection. *Held* not entitled thereafter to plead that the proceedings were inept, in consequence of the erroneous date. *Rutherford* v. *Robertson*, 1834, 12 S. 391.

84. Acquiescence—Process—Suspension — Caution — Crave for Passing without Caution.—A suspender *found* barred (by his own actings while his note of suspension was before the Lord Ordinary) from maintaining, under a reclaiming note, that his note of suspension should be passed without caution. *Thomson* v. *Henry*, 1840, 2 D. 672.

85. Acquiescence—Process—Application to Sheriff for Interdict—Refusal—Subsequent Application to Court of Session for Removal. — A applied to a sheriff for interdict against road trustees making a road through his farm, and for damages, and the sheriff refused the interdict on caution for damages, whereupon the road was made. Afterwards raised an action of ejection and damages, alleging that in the meantime his proceedings had been prevented by poverty. *Held* that he had not acquiesced in the judgment of the sheriff, so as to cut off the second action. *Grant* v. *Gordon*, 1833, 12 S. 167; 9 Fac. 116.

86. Acquiescence—Process — Church — Erection of Manse—Petition to Presbytery—Charge on Heritors—Suspension—Failure to Oppose Petition.—A clergyman, by application to the presbytery, obtained the erection of a new manse by the heritors on a piece of ground not originally the glebe of the parish. After a possession of upwards of thirty years, he gave it up to a party claiming right to it, without dispute or intimation to the heritors, and obtained decree from the presbytery for a second manse to be built on the old glebe. *Held* that the heritors were not barred from bringing a suspension after the clergyman had nearly erected the manse out of his own funds, no demand having ever been made on them, and they being non-resident. *Officers of State* v. *Bremner*, 1826, 4 S. 832.

87. Acquiescence — Process — Illegal Poinding — Objection by Debtor.—Circumstances in which a debtor was *held* barred by acquiescence from objecting to certain poindings as irregular in form and proceeding. *Scott* v. *Dunlop*, 1838, 14 Fac. 303.

88. Acquiescence — Action Concluding Alternatively against two Defenders —

Consent of Pursuer to Jury Trial between Defenders — Right to Sue Successful Defender.—A pursuer in an action concluding against two sets of defenders, for decree that one or other of them was liable in payment to him of a certain sum, agreed to an arrangement whereby the question as to which of the defenders was liable was determined in a jury trial between them. *Held* that he was not thereafter entitled to proceed against the successful defender. *Kippen* v. *Cairns*, 1825, 4 S. 212.

89. Acquiescence—Process—Appearance as Respondent in Petition — Sist as Petitioner.—A party who has appeared and litigated as a respondent in a petition against an election of magistrates, cannot sist himself as a complainer. *M'Bean* v. *Innes*, 1827, 5 S. 505. See 2 W. & S. 528.

90. Acquiescence—Process—Action by Trustee for Creditors—Subsequent Reduction of Trust by Defender — Failure to Object to Trustee's Title to Sue.—*Held* that a party who lodged defences to an action at the instance of a trustee for creditors, without objecting to the trustee's title, was not thereby barred from subsequently pursuing a reduction of the trust deed. *Mackie* v. *Mackinnel*, 1822, 1 S. 465.

91. Acquiescence — Process — Compulsory Powers — Procedure — Notice of Trial—Failure to Give Ten Days' Notice — Suspension — Appearance before Sheriff when Day Fixed.—A party entitled to compensation in respect of his interest in premises taken compulsorily under the Lands Clauses Consolidation (Scotland) Act, 1845, objected to the trial proceeding on the day fixed by the sheriff, and brought a suspension and interdict on the ground that he had not received ten days' notice in writing in terms of s. 40 of the Act. *Held* that he was barred from maintaining his objection by *inter alia* having appeared before the sheriff and agreed to the fixing of the day. *Lang* v. *Glasgow Court House Commrs.*, 1871, 9 M. 768; 43 J. 422.

92. Acquiescence — Decree in Absence — Reduction — Acquiescence Proved by Letters.—*Held* that the representatives of a defender against whom a decree in absence had passed were barred from pursuing a reduction of it, in respect that the defender had not challenged the decree during his life though he had opportunities of doing so, and that he, and after his death his representatives, had written letters on the footing of the decree being good, and suggested a settlement on that footing. *Gillespie* v. *Dods*, 1857, 19 D. 475; 29 J. 219.

93. Acquiescence—Decree in Absence—Charge for Expenses—Suspension.—Circumstances in which a bill of suspension of a charge for the expenses of a decree in absence, offered on caution or consignation, was *refused*, the suspender having acquiesced in it. *Ewing* v. *Cheape*, 1835, 13 S. 515.

94. Acquiescence — Imprisonment on Decree in Absence—Personal Citation—Action of Damages for Wrongous Imprisonment.—A party personally cited in an action allowed decree to pass in absence, and was charged and imprisoned. *Held* that he was barred from bringing an action of damages for wrongous imprisonment, upon technical objections to the instance of the action upon the *ex facie* regular decree on which he was imprisoned. *Bell* v. *Gunn*, 1859, 21 D. 1008; 31 J. 556.

95. Acquiescence — Decree — Bill Granted for Sum Due under Decree—Challenge of Decree.—A party against whom judgment was pronounced by an inferior court granted his bill for the amount decerned for. *Held* that he was barred from resisting payment of the bill on a ground impeaching the judgment. *Dunlop* v. *Sutherland*, 1829, 7 S. 320.

96. Acquiescence — Decree — Incarceration on Decree — Disposition omnium bonorum—Reduction of Decree.—A party was incarcerated on a sheriff court decree, and when in prison executed a disposition *omnium bonorum* in favour of his creditor. He thereafter raised a reduction of the decree. Plea that he was barred by the disposition *repelled*. *Lamont* v. *Johnstone* (O. H.), 1866, 3 S. L. R. 35.

97. Acquiescence—Poinding and Sale—Payment of Debt by Third Party—Discharge — Subsequent Action of Damages for Irregularities in Poinding.—A creditor holding a decree for his debt proceeded to enforce it by poinding and sale. Before the sale had been carried through a third party granted a bill for the debt and the expenses of poinding, in consideration of which the proceedings were stopped and the diligence delivered up to the debtor. After the bill had been paid, the debtor raised an action of reduction and damages on the ground of irregularities in the diligence. *Held* that the action was barred. *Grigor* v. *Robertson*, 1856, 18 D. 1313; 28 J. 667.

98. Acquiescence — Interlocutor — Challenge. — *Question*, whether parties by their actings had barred themselves from challenging an interlocutor. *M. of Queensberry* v. *Wright*, 1836, 14 S. 1021; 11 Fac. 843.

99. Acquiescence — Succession — Settlement with Heirs—Disclaimer by Heir Acting as Factor—Subsequent Claim for Share of Inheritance.—A law agent who had right to part of a succession having, in reference to certain judicial proceedings against a factor on the subject, disclaimed all interest, and allowed a compromise to take place without objection between the factor and others having right, and having also acted himself as factor, *held* to be barred from claiming from the factor his share of the succession. *Gray* v. *Kerr*, 1837, 15 S. 494.

100. Acquiescence — Trust — Church — Union—Objection by Minority—Action for Restitution.—Property was held by certain persons "as trustees and managers appointed

by and in trust for behoof of" a congregation of Seceders "adhering to the original principles of the Secession." A majority of the trustees, with the congregation, united with the Free Church. Circumstances in which certain of the trustees and other members of the congregation *held* barred from insisting in an action to obtain restitution, on the ground that the defenders had, by their union, ceased to be members of or trustees for the congregation. *Cairncross & Others* v. *Meek*, 1860, 22 D. (H. L.) 15; 3 Macq. 827; 32 J. 711.

101. Acquiescence — Trust — Trustee Acting as Law Agent—Charges for Work—Knowledge of Beneficiary.—A beneficiary under a trust was aware that one of the trustees acted as law agent to the trust, and that the only funds available for payment of the accounts so incurred would be funds falling mainly to himself. *Held* that he was not entitled to object *ex post facto* to the law agent's business charges as illegal. *Scott* v. *Handyside's Trs.*, 1868, 6 M. 753; 40 J. 387.

102. Actings—Arbitration—Sequestration — Application for Trusteeship — Previous Submission to Arbitration.—Two candidates for the trusteeship in a sequestration submitted their claims to an arbiter, who found them both ineligible. *Held* that this barred either applying for confirmation as trustee. *Hamilton* v. *Haldane*, 1828, 6 S. 884.

103. Actings—Judicial Admission—New Plea Founded on Contradiction of Admission.—A party in a summons of reduction of a decree, and in the record, having set forth that it had been pronounced in two processes, which were conjoined, *held* barred from afterwards stating (although it was the fact) that the processes had never been conjoined. *Kerr* v. *Martin*, 1836, 14 S. 444.

104. Actings—Judicial Admission—Admission in Joint Case for Opinion.—Parties to a cause prepared a joint case for an English opinion, in which they stated that the Court of Session had found that a certain claim for interest must be determined by the law of England. *Held* that the party, whose claim was cut off according to the English opinion, was barred from afterwards contending that the claim for interest should be judged of by the law of Scotland. *Royal Bank of Scotland* v. *Broughton*, 1830, 8 S. 424; 5 Fac. 352.

105. Admission—Judicial Admission—Action against Two Defenders—Admission Inconsistent with Liability of One—Relevancy.—The inspector of poor of a parish, the pursuer of an action against two other parishes alternatively, concurred in an allegation inconsistent with the liability of one of them. *Held* not excluded from asking decree against that defender, the allegation having been found irrelevant as against the other. *Turnbull* v. *Kemp, etc.*, 1858, 20 D. 703; 30 J. 370.

106. Actings — Judicial Admission — Arrestment — Furthcoming — Objection to Arrestment. — Cautioners in a loosing of arrestment *held* barred by the tenor of their defences in an action of furthcoming, and by delay, from availing themselves of an objection to the arrestment. *Anderson & Child* v. *Pott*, 1829, 7 S. 499; 4 Fac. 641.

107. Actings — Admission — Subsequent Claim in Contradiction of Admission.—A bank agent, who was proprietor of the office in which the business was carried on, had, on the close of the agency, entered in the inventory a safe as the property of the bank. *Held* that he was barred from interdicting the bank from removing it on the footing that it was a fixture. *Waldie* v. *Commercial Bank*, 1842, 14 J. 583.

108. Actings—Admission—Correspondence—Action Raised on Allegations Contradicting Pursuer's Letters.—A foreign commission agent advised his correspondents that he had disposed of a cargo and shipped returns for it, and charged commission on both transactions. He afterwards raised an action against his correspondents on the allegation that he had sent his own goods but had not received the proceeds of theirs. *Held* that he was barred from proving facts in contradiction of the correspondence. *Tham* v. *Sheriffs*, 1725, Robert. 534.

109. Actings — Admission — Decree of Consent—Subsequent Claim Inconsistent with Decree.—A, an assignee of ground-rents, *held* barred from pleading a preference as to them against B, seeing that in an action to which A was a party B had by consent obtained decree for part of the ground-rents. *Scott* v. *Bain*, 1825, 3 S. 583.

110. Actings — Admission — Process—Charge on Protestation—Defective Designation—Designation taken from Summons.—A pursuer called as defenders "the trustees of A." They lodged defences and put up and extracted protestation under that designation. *Question*, whether the pursuer was barred from challenging a charge to pay the protestation money because given in name of "the trustees of A." *Bell* v. *Trotter's Trs.*, 1841, 3 D. 380; 16 Fac. 348.

111. Actings—Admission—Presbytery—Removal of Schoolmaster—Reduction of Decree—Objection to Title—Acknowledgment.—In an action of reduction of a decree of a Presbytery removing a schoolmaster from his office, *held* that the Presbytery were barred from objecting that the schoolmaster had never been duly appointed, by their having acknowledged him as such and removed him from office "as schoolmaster." *Ross* v. *Findlater*, 1826, 4 S. 514; 1 Fac. 445.

112. Actings — Admission — Church—Presentation—Acceptance by Presbytery—Subsequent Objection on Ground of Invalidity.—A presbytery who had agreed to receive a presentation by a patron, who was a Papist, *held* barred from afterwards pleading that it was invalid and refusing to complete it. *Presbytery of Inverness* v. *Fraser*, 1823, 2 S. 384.

113. Actings—Admission—Settlement of Accounts—Principal and Agent—Disbursement by Agent.—Circumstances in which a factor who had settled accounts with the proprietor without including therein sums incurred in extraordinary repairs, and who had corresponded with the proprietor's father on the footing that the latter was to be liable for these sums, *held* barred from suing the proprietor. *Hunter* v. *Falconer*, 1835, 13 S. 252.

114. Actings — Admission — Triennial Prescription—Judicial Admission.—A party barred from pleading the triennial prescription, by judicially stating that he was ready to pay whatever might be due by law, notwithstanding the neglect of the pursuer. *Maule* v. *Sommers*, 1822, 1 S. 514.

115. Actings — Triennial Prescription—Judicial Reference within Triennium—Action Subsequent to — Plea of Prescription.—A party who has entered into a judicial reference of a disputed claim within three years, *held* barred *personali exceptione* from pleading the triennial prescription in an action raised after the three years, and rendered necessary in consequence of the referee's death before pronouncing decree. *Dunn* v. *Lamb*, 1854, 16 D. 944; 26 J. 494.

116. Actings—Statutory Limitation to Action — Agreement within Prescribed Period to Refer—Subsequent Action—Plea Founded on Statute.—A certain claim could, under a statute, be made only within six months of its arising. An agreement entered into within six months to refer, which ended in an informal award beyond the six months, *held* not to bar the defender, where an action was brought, from pleading the limitation. *Dudgeon* v. *Roberton*, 1859, 21 D. 351; 31 J. 193.

117. Actings—Division of Commonty—Claim by Party Formerly Claiming Property in Whole.—*Held* to be no objection to a party claiming a share in the division of a commonty in respect of several separate estates, that he originally maintained that he had an absolute right of property in the whole of it in virtue of his titles to a certain piece of land. *Gilchrist* v. *Houston's Trs.*, 1828, 7 S. 18.

118. Actings—Lien—Claim in Multiplepoinding as to Price of Burdened Property — Extinction of Lien.—A party in right of a real burden over certain lands *held* not barred from insisting that the lands should not be declared disencumbered by having claimed in a multiplepoinding for the price, and allowed a judgment finding the sale valid to be pronounced. *Little* v. *Wightman*, 1829, 7 S. 224; 4 Fac. 281.

119. Actings—Husband and Wife—Declarator of Marriage—Previous Concealment and Acknowledgment of Third Party as Wife.—A having lived publicly for twenty years with B as his wife, *question*, whether after A's death C was barred from pursuing a declarator of a prior marriage with A, by having concealed her alleged marriage during A's life, and by having met him in company with B, and acknowledged her as his wife. *Cochrane* v. *Campbell*, 1753, 1 Pat. 519. Revg. Elc. *voce* Proof, No. 7; 5 Br. Sup. 789; M. 10456.

120. Actings—Declarator of Marriage—Previous Action for Breach of Promise.—A pursuer *held* not barred from bringing a declarator of marriage founded on promise *subsequente copula*, by having previously, but after the date of the alleged *copula*, brought an action of damages for breach of promise, in which action the defender had been assoilzied. *Ross* v. *Macleod*, 1861, 23 D. 972; 33 J. 501.

121. Actings—Husband and Wife—Declarator of Marriage—Conduct of Pursuer Inconsistent with Idea of Marriage.—Plea of personal bar founded on the conduct of the pursuer of an action of declarator of marriage *repelled*. *M'Neill or Jolly* v. *M'Gregor*, 1825, 4 S. 254; 1 Fac. 59. Rev. on other grounds, 1828, 3 W. & S. 85.

122. Actings—Minority—Plea Founded on—Prior Affidavit of Majority made for Collateral Purpose. — The defender in an action on a cautionary obligation, granted during his minority, *held* not barred from pleading minority by having made an affidavit of his being major in order to obtain a degree of M.D., and by having assumed the title of doctor. *Sutherland* v. *Morson*, 19 May 1825, F. C.; 3 S. 449.

123. Actings—Declarator of Right of Way and Servitude of Bleaching — Opus manufactum interfering with—Remit of Consent on Footing that opus should Remain—Subsequent Objection.—In the course of an action which concluded for declarator of a public right of footway, and of a servitude of bleaching and drying clothes, with which a patent slip erected by the defenders was said to interfere, the pursuer, on the defenders admitting the right of way, concurred with them in having a remit made by the court to a referee as to how the line of road should run, and thereafter lodged special objections to the report of the referee—the remit, report, and objections all proceeding on the footing that the slip should not be removed. Subsequently, on the trial of an issue relative to the servitude of bleaching, a verdict having been given affirming the pursuer's right thereto, and finding that the defenders had wrongfully interfered therewith, *held* that the pursuer, having transacted with the defenders as to the right of way on the footing that the slip should remain, was not entitled thereafter to demand its removal in respect of its interference with the servitude of bleaching. *Rattray* v. *Tayport Patent Slip Co.*, 1867, 5 M. 944; 39 J. 523.

124. Actings—Principal and Agent—Acceptance by Agent of Debts Due to Principal—Subsequent Objection to Principal's Title.—*Held* that an agent of a company who had received freights for a vessel which belonged in part to the company could not, in defence to an action by the company,

plead that it could not sue, as the share of the ship stood not in its name but in the name of an individual member of the company. *Lumsden* v. *Allan*, 1823, 2 S. 585.

125. Actings — Company — Director — Election—Action on Ground of Negligence —Disqualification as Director.—In an action by a bank and its liquidators against a shareholder who had been elected and occasionally acted as a director, for loss said to have been caused by his gross negligence, *held* that the defender, having assumed the position of a director and acted as such, could not plead in bar of the action a clause of the contract of copartnery by which he was disqualified from being a director. *Western Bank* v. *Baird's Trs.*, 1872, 11 M. 96 ; 45 J. 54.

126. Actings—Heritable Bond—Death of Debtor—Acceptance of one Representative as Debtor — Subsequent Action against another Representative — Mora. — The granter of a bond died solvent. The creditor for thirty years dealt with the heir and general representative as the sole debtor, by taking the interest from him, and accepting a bond of corroboration from him. *Held* that, on the bankruptcy of the general representative, the creditor was not entitled to claim against the representative of a younger son of the granter, who represented his father, by taking up an estate *titulo lucrativo*. *Threipland* v. *Campbell*, 1855, 17 D. 487 ; 27 J. 215.

127. Actings—Company—Dissolution—Accounts—Discharge—Action of Accounting—Aquiescence.—The partner of a company which had been dissolved, and the affairs of which had been wound up, *held* barred by acquiescence from insisting in an action of accounting against the partners who had formed the committee of management for winding up the affairs. *Flowerdew* v. *Laing*, 1843, 5 D. 440 ; 15 J. 220.

128. Actings — Partial Discharge — Review of Decree quoad Part of Claim not Discharged.—A sheriff pronounced a decree sustaining part of a claim, and awarding a partial sum of expenses. The party took payment of the sums so awarded, and granted a discharge. *Held* that the discharge of what was awarded to him did not bar him from bringing the decree under reduction, in so far as adverse to him. *Wright* v. *Burns*, 1832, 11 S. 49.

129. Actings — Bill of Exchange — Due Negotiation — Delay in Payment Asked and Granted. — The drawer of a bill who knew of an objection to its negotiation, but asked and got time to meet it, *held* barred from pleading the objection. *Shepherd* v. *Reddie*, 1870, 8 M. 619 ; 42 J. 316.

130. Actings—Bill of Exchange—Delay in Presenting at Request of Drawer—Plea of no Due Negotiation.—The drawer of a bill induced the holder to delay presenting it for payment when due. Afterwards the holder, at the request of the drawer, sent the bill to him to recover payment, and the drawer protested it for non-payment, but neglected to use diligence against the acceptor, who became insolvent. *Held* that the drawer was barred from pleading want of due negotiation. *Cairns' Trs.* v. *Brown*, 1836, 14 S. 999 ; 11 Fac. 830.

131. Actings — Bill of Exchange — Informality—Charge—New Bill Granted—Objection to First Bill.—A party accepted a bill blank in the drawer's name, and sent it to be delivered to the person intended as the drawer, who could not write, but whose son signed it for him, as alleged, by procuration. The drawer charged on the bill ; and the acceptor delivered to him another bill in security of this first bill, but thereafter brought a suspension, in which, after stating that the only question between the parties was, whether the second bill was given in security or part payment, he pleaded that a bill signed by procuration could not be the ground of summary diligence. *Held*, in the circumstances, barred from maintaining that plea. *Mackintosh* v. *Macdonald*, 1828, 7 S. 155 ; 4 Fac. 169.

132. Actings — Bill of Exchange — Request by Drawer for Delay—Subsequent Challenge on Ground of Failure to Negotiate.—The drawer of a bill wrote to the holder two years after it had become due and had been dishonoured, requesting delay, and stating that he would not deal with the bill in any but an honest way. *Held* that he was barred from subsequently pleading, after delay had been granted, that the bill had not been duly negotiated. *Allhusen & Sons* v. *Mitchell & Co.*, 1870, 8 M. 600 ; 42 J. 294.

133. Actings — Bill of Exchange — Informality—Acceptor Acting as Agent of Drawer.—A bill of exchange was so framed as to afford a legal objection to its validity. *Held* that the acceptor, having been confidential lawyer to the drawer, was barred *personali exceptione* from pleading the objection. *Garden* v. *Rigg*, 1748, 1 Pat. 409.

134. Actings — Claim for Aliment of Children — Breach of Interdict against Removal of Children.—A widow, residing in England, with a family of three children, brought an action for aliment against her deceased husband's father. *Held* that as she had improperly withdrawn them from Scotland, and taken them to England in defiance of an interdict of the court, she was barred from claiming aliment. *Lady Cardross* v. *E. of Buchan*, 1842, 5 D. 343 ; 15 J. 139.

135. Actings—Bankruptcy—Removal of Trustee — Irregularity — Acquiescence. — *Question*, whether creditors be barred by acquiescence from founding on the irregularities and deviations from statutory rules by the trustee in a petition for his removal. *Mitchells* v. *Mein*, 1830, 9 S. 115 ; 6 Fac. 82.

136. Actings — Bankruptcy — Concurrence of Creditors—Subsequent Measures in their own Interest.—Creditors *held* barred by concurring in a course of management for the common behoof from adopting separate measures of their own. *Macdougall* v. *Stevenson*, 1834, 13 S. 55 ; 10 Fac. 29.

137. Actings — Bankruptcy — Concurrence by Creditor in Measures Generally Agreed on—Subsequent Diligence for own Behoof.—A creditor who had concurred with the other creditors of a bankrupt in the expediency of adopting joint measures and preventing individual preferences, *held* barred *personali exceptione* from creating a preference for himself by separate diligence. *Bett* v. *Smith*, 1837, 16 S. 207.

138. Actings — Bankruptcy — Concurrence by Creditor in Measures Generally Agreed on—Subsequent Diligence for own Behoof.—*Held*, in a question between a postponed heritable creditor, who had executed a poinding of the ground, and a prior heritable creditor, who thereafter raised a summons of poinding the ground, that the postponed creditor was barred by personal objection from founding on his diligence, in respect of a general arrangement entered into among the creditors, to which he was a party, to do no diligence to the prejudice of each other. *Smith* v. *Beveridge*, 1839, M'L. & R. 806. Affg. 16 S. 381.

139. Actings — Bankruptcy — Offer of Compromise—Diligence Pending Consideration.—A creditor who had agreed to consider an offer of composition *held* not barred from executing diligence against the bankrupt before disposing of the offer. *Neilson* v. *Russell*, 1843, 5 D. 475.

140. Actings — Bankruptcy — Accession by Creditor to Measures for Prevention of Preferences — Preference in Virtue of Previous Arrestment. — The agent of a creditor who had executed an arrestment of the funds of his debtor, attended a general meeting of creditors held within sixty days from the date of the arrestment, and concurred in directions given to a trustee to prevent preferences being acquired. *Held* that the creditor was barred from claiming a preference over the other creditors in virtue of his arrestment, though used previous to the meeting. *Lea* v. *Landale*, 1828, 6 S. 350 ; 3 Fac. 364.

141. Actings — Bankruptcy—Agreement to Supersede Diligence — Petition for Appointment of Judicial Factor.—*Held* that a creditor of a railway company, who was a party to an agreement that all diligence and legal proceeding against the company at the instance of individual creditors should be superseded for a specified time, was barred from presenting a petition for the appointment of a judicial factor on the railway, before the expiry of that time. *Baird* v. *Caledonian Rly. Co.*, 1850, 13 D. 36 ; 22 J. 596.

142. Actings—Bankruptcy — Preference —Waiver.—A landlord *held* to have waived his preferable claim for arrears of rent against the creditors of the tenant, who took up the lease, by acceding to a trust deed executed by the tenant, and conducting himself as if he intended to claim as an ordinary creditor. *M'Gregor* (*M'Lean's Tr.*) v. *Hunter* (*M'Lean's Tr.*), 1850, 13 D. 90 ; 23 J. 22.

143. Actings—Bankruptcy—Trust Deed — Diligence by Trustee qua Creditor.— Terms of a trust deed for creditors which were *held* not to bar the trustee thereunder, who was also a creditor of the bankrupt in certain bills, from doing diligence thereon. *Paterson* v. *Barclay*, 1868, 5 S. L. R. 503.

144. Actings — Bankruptcy — Trust — Accession — Arrestment. — *Held* that a creditor who, though he had not formally acceded to a trust for behoof of creditors executed by his insolvent debtor, had verbally expressed his approval, and had made purchases at a sale of the debtor's effects by the trustee, was barred from acquiring a preference over the other creditors by arrestment in the hands of the trustee. *Marianski* v. *Wiseman*, 1871, 9 M. 673 ; 43 J. 325.

145. Actings — Bankruptcy — Accession to Trust Deed—Diligence—Principal and Agent.—The accession by an agent to a trust deed by the debtor bars the agent's constituent from availing himself of an arrestment of a debt due to the debtor subsequently executed by the agent. *Anderson* v. *Starkey*, *Fletcher & Co.*, 2 Mar. 1813, F. C.

146. Actings — Bankruptcy — Accession to Trust—Trust Carrying Heritage only—Payment from Moveable Estate.—A creditor by acceding to a trust for creditors which carries only the debtor's heritable property is not barred from taking payment from the debtor's moveable estate. *Lockhart* v. *Turner*, 1842, 4 D. 1253 ; 14 J. 403.

147. Actings — Bankruptcy — Trust — Testamentary Trust—Insolvency—Administration by Trustees — Concurrence of Creditors — Diligence.— Trustees under a testamentary settlement continued, after it had been discovered that there was a deficiency of funds, to administer the estate under the supervision and with the concurrence of the creditors. Circumstances in which *held* that one of the creditors was not barred by co-operating with the trustees and other creditors from obtaining a preference by diligence. *Globe Insurance Co.* v. *Scott's Trs.*, 1850, 7 Bell 296 ; 22 J. 625. Affg. 11 D. 618.

148. Actings—Bankruptcy—Trust Deed —Subsequent Poinding by Creditor Taking Part in Bankruptcy Proceedings.—A party who attended meetings of creditors, and did other acts both before and after the execution of a trust deed for the general behoof, *held* barred, although he did not sign the deed of accession, from poinding certain effects which he alleged had remained in the hands of the bankrupt. *Borthwick* (*Grant's Tr.*) v. *Shepherd*, 1832, 11 S. 1.

149. Actings—Bankruptcy—Poinding—Sale of Poinded Goods by Trustee—Purchase by Party Poinding—Retention of Price.—A party who had executed a poinding of the furniture of a party, by whom a disposition of all his goods was executed in favour of a trustee for creditors, purchased the furniture from the trustee without disclosing the poind-

ing. *Held* that he was barred from withholding payment to the trustee and applying the price to his debt. *Munro* v. *Hogg*, 1830, 9 S. 171.

150. Actings — Bankruptcy — Composition—Acceptance by Heritable Creditor—Security—Subjects not Reckoned in Composition-Contract — Subsequent Poinding in Virtue of Personal Obligation.—A party who held an heritable bond, and was separately a personal creditor, having acceded to a composition-contract, from which the heritable debt and subjects were excluded, *held* not entitled to poind the moveable effects of the debtor in virtue of the personal obligation in the heritable bond. *Mitchell* v. *Cuddie*, 14 June 1822, F. C.; 1 S. 496.

151. Actings — Bankruptcy — Sequestration—Petition for Recall by Creditor Availing himself of Sequestration.—A creditor who became a candidate for the office of trustee in a sequestration, and otherwise took part in the proceedings, *held* barred from applying for recall of sequestration on grounds inferring no radical defect in it, nor injury to the general body of creditors. *Ure* v. *M'Cubbin*, 1857, 19 D. 758; 29 J. 353.

152. Actings — Bankruptcy — Sequestration—Appeal by Creditor Concurring in—Objection to Validity of Sequestration.—*Held* that a creditor who had taken part in a sequestration could not, in support of an appeal on an incidental point, plead that the sequestration was null in respect of a prior sequestration still subsisting. *Inglis* v. *Anderson*, 1859, 21 D. 1290; 31 J. 674.

153. Actings—Bankruptcy—Action by Discharged Bankrupt for Debt Due Prior to Sequestration—Failure to Include in State of Affairs.—A bankrupt discharged under a composition-contract, *held* not barred from pursuing a debt alleged to have been due prior to the sequestration, by his not having given it up in his states of affairs in the sequestration, sworn to by him in the usual manner. *Baillie* v. *Young*, 1835, 13 S. 472; 10 Fac. 279.

154. Actings—Bankruptcy—Sequestration—Acquirenda—Creditors' Claim Barred by Conduct of Trustee — Acquiescence.—*Held* that a claim for behoof of creditors for a conveyance of property acquired by a bankrupt subsequently to his sequestration may be barred by the conduct of the trustee and commissioners implying acquiescence in a course of trading by the bankrupt for his own behoof. *Christie* v. *Louden*, 1835, 14 S. 191.

155. Actings — Bankruptcy — Sale of Heritage—Reduction by Bankrupt—Concurrence by Bankrupt in Sale—Mora.—The trustee in a sequestration purchased at a public roup the bankrupt's heritable property. The bankrupt acted as the trustee's attorney when infeftment was given to the trustee, concurred with the creditors in getting the court's sanction for applying the price to the payment of a composition and in getting the trustee discharged, and afterwards took a lease from the trustee of part of the lands. Thirty-nine years later he sought to reduce the sale. *Held* he was barred from doing so by his actings and by *mora*. *Fraser* v. *Hankey & Co.*, 1847, 9 D. 415; 19 J. 164.

156. Actings — Bankruptcy — Imprisonment—Foreign Discharge—Appearance of Creditor — Subsequent Imprisonment in Scotland.—A domiciled Scotsman incarcerated while in Dublin at the instance of a Scottish creditor, obtained a discharge under the Irish Insolvent Debtors Act, which discharge specially referred to the debt of the Scottish creditor, who appeared and opposed the granting of the discharge. The creditor became assignee under the statutory trust assignation of the debtor's effects. *Held* that the creditor was barred from afterwards imprisoning the debtor in Scotland in respect of the same debt. *Nicholson* v. *Binks*, 1832, 11 S. 153.

157. Actings—Bankruptcy—Composition—Part Payment—Reduction of Decree Approving Composition.—A creditor of a bankrupt who had not ranked on the estate presented a petition for recall of a decree approving a composition. It appeared that the creditor was aware of the whole proceedings in the bankruptcy at the time; that he had received part payment of the composition in furnishings and had subsequently demanded payment of part in cash. *Held* that he was barred from insisting in the petition. *Scott* v. *Ross*, 1822, 1 S. 480.

158. Actings — Bankruptcy — Composition — Part Payment — Subsequent Objection to Approval.—A creditor of a bankrupt under sequestration, who had not sanctioned, but was aware of a composition-contract having been agreed to and approved of, got by his partner part payment of the composition, and demanded the rest; and the estate, on the faith of the approval, was converted into money. *Held* that he could not object to decree of approval. *Dixon* v. *Edington*, 1822, 1 S. 480.

159. Actings — Bankruptcy — Composition — Subsequent Objection to Debt Ranked.—A party who obtained a discharge on a composition-contract, on the understanding that a certain debt was to be ranked, *held* not entitled afterwards to object to that ranking, or to plead that he had a claim against the creditor for the amount of the composition received by him. *Thomson* v. *Izat*, 1841, 4 D. 136; 14 J. 52.

160. Actings — Bankruptcy — Sequestration—Claim Lodged and Recognised in Application for Discharge — Subsequent Objection—Mora.—A party lodged in a sequestration a claim and oath of verity, founded on an account specifying the items, and no objection was stated to it; and he was counted as a creditor in various proceedings, and particularly in an application by the bankrupt for discharge; but the bankrupt never was discharged. *Held*, in an action raised against the

bankrupt about twenty years after the account was first lodged, that he was not entitled to object to a particular item of it as not sufficiently specific, and to throw the burden of establishing it upon the creditor. *Duncan* v. *Cunninghame*, 1834, 1837, 2 S. & M'L. 984. Affg. 12 S. 678; 9 Fac. 356.

161. Actings — Bankruptcy — Composition — Discharge with Concurrence of Creditor Founding on Decree-Arbitral—Subsequent Reduction—Reservation of Challenge.—A creditor who, without objection, was ranked, and drew a dividend under a sequestration, gave his concurrence to the petition of the bankrupt for his discharge on a composition, which was granted. *Held* that the bankrupt was thereafter barred from reducing a decree-arbitral, which was the creditor's ground of debt, although a right of challenge was reserved in the trustee's certificate, appended to the bankrupt's petition; but this reservation was not communicated to the creditor. *Adam* v. *Wyllie*, 1842, 5 D. 391; 15 J. 177.

162. Actings — Bankruptcy — Composition—Debt Reckoned in Acceptance of Offer — Objection by Cautioner. — The cautioner for a composition in a sequestration is not entitled to object to any debt which is admitted without question to be reckoned in the acceptance of the offer of composition; and this rule is not altered, although the objection to the debt is only discovered after the offer has been accepted. *Morrison* v. *Balfour*, 1849, 11 D. 653; 21 J. 188.

163. Actings—Bankruptcy—Petition for Sequestration—Acknowledgment of Debt — Challenge by other Creditors. — An acknowledgment in a bankrupt's petition for sequestration of the concurring creditor's debt does not bar the other creditors from disputing the debt in the sequestration. *Crawford* v. *M'Kerrow*, 1838, 16 S. 1197; 13 Fac. 817.

164. Actings — Bankruptcy — Trustee — Petition for Sequestration of Third Party —Diligence on Bill of which Bankrupt had Undertaken to Relieve Third Party.—A's trustee in bankruptcy presented a petition for the sequestration of B. *Held* that he was not entitled to found on diligence done on a bill drawn by A and accepted by B, but of which A had granted an obligation of relief to B. *Cormack* v. *Lawrie*, 1828, 7 S. 221; 4 Fac. 265.

165. Actings—Cautionary Obligation—Septennial Limitation—Payment of Interest Subsequent to septennium—Right to Plead Statute.—*Held* that a cautioner was not barred from pleading the septennial limitation by having paid interest and acknowledged intimation of an assignation subsequently to the expiry of the seven years. *Scott* v. *Yuille*, 1831, 5 W. & S. 436. Affg. 8 S. 485; 5 Fac. 382.

166. Actings — Error — Corporation — Payment of Entrance Fee Induced by Error—Sanction of Exaction from Subsequent Intrants—Repetition.—A party *held* not barred from demanding repetition of a sum paid as entry money to a corporation, which he did in error, by having, while under the influence of the error, sanctioned its exaction from others. *Porteous* v. *Cordiners of Glasgow*, 1830, 8 S. 908. See *Master & Seamen of Dundee* v. *Cockerill*, 1869, 8 M. 278; 42 J. 130.

167. Actings — Fraud — Assignation — Failure to Intimate—Failure Induced by Fraud of Cedent.—An assignation to trustees granted by one of their number (who was the managing trustee), *held* effectual as against the cedent's creditors although there was no intimation of the assignation, seeing that the absence of intimation was due to the cedent's fraud. *Grant* v. *Gray*, 1828, 6 S. 489.

168. Actings — Fraud — Cautioner — Assignation by Creditor for Behoof of Debtor —Charge on Bond of Caution.—A being charged on a bill, brought a suspension in which B was his cautioner. The suspension having been refused, the charger had A apprehended, whereupon C granted a bond of presentation under which he had ultimately to pay the amount of the bill. C obtained from the charger an assignation to the debt, and then charged B under his cautionary obligation. *Held* that, the transaction being a collusive one between A and C, C was not entitled to relief from B. *Smith* v. *Ogle*, 11 Dec. 1811, F. C.

169. Actings—Fraud—Heritable Security—Misrepresentation as to Rent—Maills and Duties.—A father, who was the tenant of premises belonging to his son, concurred with his son in stating, on occasion of the son borrowing money on security of the premises, that his rent was £20. *Held*, in a question with the heritable creditor, that he was not entitled to plead that the premises were worth less, and had been let to him for £8. *M'Niven* v. *Hunter*, 1836, 14 S. 685.

170. Actings — Fraud — Property — Representation as to Ownership.—The elder of two brothers, on their father's death, allowed the younger to enter into possession of a feu belonging to the father, with houses thereon, and for twenty years to act as proprietor, he living in the same village, talking of his younger brother as the owner, and suffering him to be so talked of in his presence. The younger became bankrupt, whereon the elder claimed the property. *Held*, in an action by creditors of the younger brother, that the elder had fraudulently colluded with the younger so as to induce the creditors to trust him as proprietor of the houses, and that he was liable for the debts. *Dougall* v. *Marshall*, 1833, 11 S. 1028.

171. Actings — Fraud — Concealment — Succession—Passive Title—Heir Induced to Intromit by Concealment of Claim against Estate.—The curators of a minor heir of entail, who was desirous of paying

his father's debts, employed the factor to obtain a valuation of the moveables, so as to judge by comparison with the debts whether he would undertake the payment of them, and requested the factor to lodge his own claim along with the other creditors. The factor gave in a claim for a small sum, and thereafter the heir took possession of the moveable funds, and paid the debts out of the rents of the entailed estates; and the factor, on his subsequent dismissal, claimed £3000 from the heir, founding on the passive title, which claim he had altogether concealed, when the heir intromitted. *Held* that the factor was barred from founding on the passive title, or from insisting for decree *cognitionis causa*. *Galbreath* v. *Lockhart*, 1828, 6 S. 861.

172. Actings — Fraud — Concealment — Heritable Creditor — Heritable Bond by Party not the Owner—Knowledge of Owner —Mora.—A party executed a *mortis causa* disposition in favour of a lady, reserving his liferent, and power to alter, sell, or burden the subjects. Thereafter he married her, and had a son by her, after whose birth he executed a second disposition, revoking his former deed, and disponing to her in liferent, and his son in fee. After his death his widow was infeft on the first deed; and the instrument of sasine, which was recorded, made no mention of the reserved power, and she thereupon granted heritable securities. Her son acted for her, as proprietrix, in obtaining some of the loans; and for thirty years after his father's death, and until the subjects were about to be brought to sale by a heritable creditor, he did not disclose the existence of the second deed. *Held*, in a competition for the price between the creditor and the son, who maintained that the fee was in him, and that the securities granted by his mother were ineffectual, that the son was barred from maintaining any claim to the subjects in virtue of the latent deed. *Galloway* v. *Grant*, 1851, 13 D. 756; 23 J. 332.

173. Actings — Fraud — Concealment — Assignation Granted in Error—Action by Assignee Founding on Assignation.—An English creditor of a party in Scotland authorised an agent to do diligence for recovery of his debt, which he proceeded to do; and while it was in progress, another agent, professing to act for all the creditors, induced the creditor to assign his debt to a trustee, and then applied for an interdict against the execution of the diligence. Thereafter the creditor recalled the assignation, and sanctioned the proceedings of his agent. *Held* that, as the agent who had got the assignation had not declared all the facts to the creditor, he was barred from founding on that in applying for the interdict. *Railton* v. *Gray*, 1837, 15 S. 487; 12 Fac. 444.

174. Actings—Fraud—Entail—Disentail by Act of Parliament with Consent of Substitute Heirs — Error — Subsequent Challenge. — An entailed estate was sold for payment of debts by virtue of an Act of Parliament, which was applied for and obtained with the concurrence of the substitute heirs of entail. The substitutes, having afterwards discovered that the alleged debts were fictitious and did not affect the estate, raised an action concluding for an application of the residue of the purchase money after payment of any debts really affecting the estate. *Held* that this action was not barred by their concurrence in the application to Parliament or by the Act of Parliament. *Mackenzie* v. *Stewart & Others*, 1754, 1 Pat. 578. Revg. M. 1549.

175. Actings—Fraud—Representation—Contract Induced by—Master and Servant. —A workman holding himself out as bound with an English company for a term of years, having entered into an agreement in England with a Scottish company to exchange with another workman in their employment, and entered on his service accordingly, *held* not entitled to plead the Scots law, that a verbal contract of service is binding for one year only. *Dale* v. *Dumbarton Glass Co.*, 1829, 7 S. 369; 4 Fac. 457.

176. Actings — Fraud — Fraud by Defender on Third Party Resulting in Loss to Pursuer—Parties—Parties in Fraud by Pursuer.—A pursuer in an action founded on a fraud alleged to have been committed by the defender on a third party, to the loss of the pursuer, but in which the pursuer was participant, *held* not entitled to maintain the action. *M'Ghie* v. *Butter*, 1829, 7 S. 797.

177. Actings—Fraud — Error — Implied Discharge — Homologation. — The eldest son of a marriage made up titles to an heritable property, which was provided by an antenuptial contract to the children equally, and sold it. One of the sisters was led to believe that her share was secured over the property (which it was not), and took payment from the purchaser of several years' interest, and he died bankrupt. *Held* that the eldest son was liable to her for her share, and that she was not barred by homologation. *Hutchison* v. *Hutchison*, 1822, 1 S. 295.

178. Actings — Fraud — Reduction on Fraud—Mora—Knowledge.—A shareholder in a joint stock bank which had gone into liquidation raised an action for reduction of his purchase of shares from the company seven years previously, and for *restitutio in integrum*, on the ground of fraudulent misrepresentations by the directors contained in the annual report as to the capital of the company. The pursuer, who during the seven years had drawn dividends and taken part in various proceedings affecting the bank, averred that he had only acquired knowledge of the fraud after the stoppage of the bank. The court allowed the pursuer an issue as to fraud, and the defenders a counter issue "whether the pursuer had barred himself from repudiating the purchase." *Graham* v. *Western Bank*, 1864, 2 M. 559; 36 J. 272.

179. Actings—Ultra vires—Contract—Plea by Party Acting ultra vires.—Parties styling themselves "the committee and congregation" of a religious association, having granted a bill, "conjunctly and severally," in payment of the rent of a place of worship, *held* not entitled to plead that, as a committee, they had no *persona* to bind themselves, or that they were not personally liable. *Ross* v. *Albion Joint Stock Co.*, 1831, 9 S. 275.

180. Actings — Ultra vires — Trust—Deed in Violation of—Consent of Beneficiary — Challenge. — Where trustees executed a deed with the consent of the liferent beneficiary and the deed was null as inconsistent with the terms of the trust, *held* that the consent given did not bar the liferenter or her children (the fiars) from challenging the deed. *Freen* v. *Beveridge*, 1832, 10 S. 727 ; 7 Fac. 553.

181. Actings—Ultra vires—Contract—Trust—Church — Heritable Bond Granted by Trustees — Reduction by President of Meeting Authorising Bond.—A dissenting congregation, at one of their meetings, authorised the trustees in whose favour the title to their chapel was taken, to borrow money on the security of the chapel, which they did, and granted a bond and disposition in security over the chapel. Ten years afterwards, the person who had acted as preses of the meeting, and had in that capacity signed the minute which authorised the loan, raised a reduction of the bond and disposition in security, as being contrary to the constitution of the chapel. *Held* that he was barred from insisting in the reduction. *Brown* v. *Thomson*, 1849, 11 D. 1182 ; 21 J. 467.

182. Actings — Law Agent — Heritable Security—Agent Acting for Creditor and Debtor—Failure to Disclose Interest under Prior Bonds.—In a competition between an heritable creditor and the law agent of the debtor, who claimed a hypothec over the titles and who held assignations from two prior bondholders in respect of interest paid by him, it appeared that the law agent had acted as the agent of both parties in effecting the loan ; that it was by means of his acquaintance with the creditor that the law agent succeeded in effecting the loan ; that almost the whole loan was applied in extinction of obligations due to the agent or in which the agent was bound jointly with the debtor ; and that these facts were not communicated to the heritable creditor. *Held* that the agent was barred from setting up his claim in competition with that of the heritable creditor. *Wilson* v. *Lumsdaine's Reps.*, 1837, 15 S. 1211 ; 12 Fac. 1113.

183. Actings — Law Agent — Heritable Securities—Agent Acting for Borrower and Lender—Subsequent Assignation to Agent of Prior Bond not Disclosed to Lender.—A proprietor granted over his lands a bond and disposition in security, which, to the extent of one-third, and subject to a liferent, was in his own favour. Some time afterwards he granted, through an agent who acted both for him and for the lender, a bond and disposition in security, making no allusion to the prior right. Subsequently he assigned to the agent his interest under the earlier bond. *Opinion*, that the agent was barred *personali exceptione* from claiming a preference in respect of the assignation in his own favour of the earlier security. *Love* v. *Storie*, 1863, 2 M. 22 ; 36 J. 10.

184. Actings—Law Agent — Heritable Security—Agent Acting for Borrower and Lender—Hypothec over Title Deeds.—An agent who prepares a bond and disposition in security, and who acts as agent for both lender and borrower, is barred from claiming retention of the title deeds as against the lender, until payment of accounts due to him by the borrower, whether incurred before or after the loan, and notwithstanding that the business for which they were incurred relates to the subject of the security, if the agent has failed to inform the creditor, at the time the bond is granted, that he means to claim retention for the accounts then due, and has not obtained the consent of the creditor to the proceedings for which subsequent accounts are incurred. *Paterson* v. *Currie*, 1846, 8 D. 1005 ; 18 J. 503.

185. Actings — Law Agent — Heritable Security—Agent Acting for Lender and Borrower—Hypothec.—As between a law agent, founding on his hypothec over titles, and heritable creditors, *held* that as the agent acted as trustee for the borrower, was cautioner for payment of the interest, and was agent for both parties in the loan, he could not avail himself of the hypothec. *Allan* v. *Sawers*, 1842, 4 D. 1356.

186. Actings — Law Agent — Heritable Security—Concealment of Hypothec over Titles.—A law agent for the proprietor of a subject over which there was an heritable bond, wrote to a person for a loan of money on the property to pay up the bond, and stated that the property was valued by a valuator at double the amount of the proposed loan, and, on the request of the party, he sent a search of encumbrances, but said nothing as to an account due to himself, for which the title deeds were hypothecated ; and the money was lent, and the security granted. *Held* that although the property proved inadequate to pay the money, the agent was not barred, in a question with the lender, from claiming his hypothec over the titles. *Clark* v. *Morrison*, 1837, 16 S. 133 ; 13 Fac. 168.

187. Actings—Action in Sheriff Court against Firm—Sole Partner Resident outwith Jurisdiction Carrying on Business under Firm Name within Jurisdiction—Jurisdiction—Citation.—The firm of A. L. & Son, both partners of which were domiciled in the county of E., carried on business in E. and also in the county of H., where they had a branch. After dissolution of partnership, A. L. continued the business under the firm name without giving notice of the dissolution of partnership to those with whom he dealt.

In an action in the sheriff court of H., served on the company at their place of business in that county, *held* that A. L. was barred from pleading no jurisdiction and that the citation was inept. *Young* v. *Livingstone*, 1860, 22 D. 983; 32 J. 417.

188. Actings—Parent and Child—Obligation of Parent for Child's Debts—Payment of Similar Debts.—A father *held* liable to tailors for clothes supplied to his son, as he had previously paid accounts of his son's and had not intimated that he would no longer be liable. *Knox & Wilson* v. *Hay*, 1813, Hume 351.

189. Actings—Concealment—Bankruptcy—Statement by Creditor that he Held no Security—Preference Founded on Previous Arrestment.—A Scots creditor who proved in an English Commission of Bankruptcy, stating that he held no security for his debt, *held* to be precluded from taking advantage of a previous arrestment by him in Scotland of the bankrupt's estate there. *Selkrig* v. *Davies*, 1814, 2 Dow 230.

190. Actings—Bankruptcy—Illegal Sale of Debt Due to Estate—Action by Assignee against Debtor who was also Creditor on Estate—Title to Sue—Objection.—The trustee and commissioners in a sequestrated estate sold privately (and thereby in contravention of the Bankruptcy Act) a debt due to the estate by a company, and applied the price in payment of dividend. The assignee of the debt raised an action for payment against a partner of the company who was also a creditor on the estate. *Held* that the defender was not barred from objecting to the pursuer's title on the ground of the illegality, by having drawn his share of a dividend which in part consisted of the price paid for the debt by the pursuer. *Crichton* v. *Bell*, 1833, 11 S. 781.

191. Actings—Bankruptcy—Sale—Objection by Trustee who had Offered.—One of two trustees, under a trust deed for payment of creditors, having, at a meeting where the property was sold, offered a less price than the purchaser, and insisted that the lands were sold to him, *held* not entitled to object to the sale, on the ground that he had not interponed his consent. *Brisbane's Trs.* v. *Crawford*, 1826, 4 S. 442.

192. Actings—Contract for Repairs—Failure to Intimate Objections.—A party who took back his carriage from the yard where it had been repaired, and used it for a considerable time without objection, *held* barred from refusing to pay the coachbuilder's account in respect of alleged insufficiency in the repairs. *Clerk* v. *Sir W. Elliott*, 1836, 15 S. 253.

193. Actings — Sale — Acceptance of Goods — Part Payment — Objections to Charges.—A party to whom goods were sent, and an account rendered, having used the articles, and made a partial payment to account, and been repeatedly pressed for payment for some years without objecting to the rates of charge, not allowed afterwards to object to them. *George* v. *Scott*, 1832, 10 S. 443. See also *Bruce* v. *M'Kenzie*, 1821, 1 S. 77. *Pitcairn* v. *Brown*, 1823, 2 S. 576.

194. Actings — Sale — Price — Objection—Retention of Goods.—A purchaser of goods furnished to him, and accompanied with accounts, *held* not entitled to object, after the lapse of a year, that the prices charged were above the market prices at the time. *Mills* v. *Hamilton*, 1830, 9 S. 111.

195. Actings—Heritable Bond—Obligation not to Call up if Interest Punctually Paid—Demand and Acceptance without Objection of first two Terms' Interest a few Days after Term—Subsequent Interest not Paid or Demanded for two Days after Term—Adjudication.—A creditor in an heritable bond bound himself not to call up the loan for five years if the interest was punctually paid. At the first and second terms the creditor sent to the borrower's agent for the interest a few days after the term, and received it when demanded without making any complaint as to delay. Two days after the third term, the interest not having been paid or demanded, the creditor intimated that he would call up the bond, on the ground that the interest had not been regularly paid, and thereafter raised an action of adjudication. *Held* that the creditor was barred by his actings from founding on the two days' delay. *Paterson* v. *Tod*, 1828, 6 S. 1062.

196. Actings — Heritable Creditor — Delay in Taking Infeftment.—*Held* that the holder of an heritable bond was not barred by delaying to take infeftment from claiming the preference he was entitled to in respect of his bond, in a question with other creditors. *Cormack* v. *Anderson*, 1829, 7 S. 868; 4 Fac. 1165.

197. Actings — Agreement — Contract Varying Agreement.—Two parties, as a speculation, purchased an estate under an agreement, by which it was provided that the portions remaining unsold after a certain date should be valued by neutral men, mutually chosen. In the course of a process of accounting between them, one proposed to the other that he should name a price for a certain portion remaining unsold, which he would be willing either to give or take for it; and he named a price accordingly. *Held* that the party making this proposal was barred from thereafter insisting on the mode of settlement by valuation pointed out by the agreement. *Hunter* v. *Cochrane's Trs.*, 1829, 8 S. 171.

198. Actings—Account—Settlement—Deduction—Bill of Exchange—Failure to Meet—Failure Due to Payee.—A law agent agreed to take a bill for £85 at four months, as full payment of business accounts, amounting, as rendered and untaxed, to about £120. A few days before the bill became due the acceptors sent pictures to an auctioneer to be sold, in order to provide for payment of the bill. The agent used arrestments in the hands of the auctioneer, attended the sale, and

purchased pictures to the value of £148. The pictures were delivered to him. The bill fell due on a Friday, and was not then paid. Payment was tendered on the Monday by the auctioneer, on condition of the agent withdrawing the arrestment. This tender was declined. The agent then sued for the full amount of his account, on the ground that the agreement to receive a bill for £85 in full payment was conditional upon its being paid on the day when it fell due, and that this not having been done, the agreement was at an end. *Held* that the pursuer having used arrestments, and so prevented the defender from paying the bill, was barred from founding upon the delay as annulling the agreement. *Cullen* v. *Wright*, 1863, 1 M. 734; 35 J. 414.

199. Actings — Curator — Accounting — Failure to make up Statutory Inventories.—Circumstances in which *held* that the pursuer of an action of accounting against her curator had by her conduct barred herself from objecting to items for legal expenses in the curatorial accounts, on the ground that inventories had not been made up conform to the Act, 1672, c. 2. *Macturk* v. *Greig*, 1830, 8 S. 995; 5 Fac. 815.

200. Actings—Diligence — Messenger-at-Arms—Delay in Executing Charge—Retention by Creditor of Execution without Intimating Objections — Discharge of Debtor — Action against Messenger in Respect of Delay in Executing. — A creditor who employed a sheriff officer to execute a charge against a debtor received the execution of the charge and retained it without stating objection to it for some time. Meanwhile the creditor wrote to the debtor withdrawing the charge, without communicating with the messenger. *Held* that the creditor was barred by his actings from suing the messenger for loss alleged to have been incurred in consequence of the messenger's delay in executing the charge. *Couper* v. *Bain*, 1868, 7 M. 102; 41 J. 39.

201. Actings — Lease by Trustees — Termination in Event of Reduction of Settlement — Subsequent Reduction by Trustee.—A party having, by his deed of settlement, conveyed his estate to trustees, they let part of his heritage on a ten years' lease, under a reservation that, if the trust deed should be reduced *ex capite lecti*, the lease should be at an end, so far as incumbent on the trustees. One of the trustees, by the predecease of a nearer heir, afterwards became nearest heir of the truster, and reduced the trust deed *ex capite lecti*. *Held*, in respect of the reservation in the lease, that he was not barred from insisting in a removing against the tenant. *Macniven* v. *Murray*, 1847, 9 D. 1138; 19 J. 482.

202. Actings — Lease — Possession on Missives—Challenge of Granter's Title.—An heir having acknowledged the right of trustees to a lease, as falling under a general conveyance to them by possessing the farm for several years on a missive from them, *held* barred from claiming the lease in his character of heir. *Munro* v. *Munro*, 1825, 4 S. 328.

203. Actings—Railway—Conveyance of Cattle—Damage by Overcrowding—Superintendence by Owner of Loading—Railway and Canal Traffic Regulation Act, 1854, s. 7. —Owner *barred* from recovery from railway company for injury to cattle from overcrowding in waggon, in respect that owner had himself bespoken a waggon of the particular dimensions, had superintended the loading thereof, and had signed special conditions of carriage, which in the circumstances were "just and reasonable" in the sense of the Railway and Canal Traffic Regulation Act, 1854, s. 7. *Rain* v. *Glasgow & S.-W. Rly. Co.*, 1869, 7 M. 439; 41 J. 237.

204. Actings—Legal Expenses Affecting Estate — Sale of Estate — Liability of Purchaser.—Several heritors entered into an agreement to defray the expenses of an action relative to fishings, in which they were interested in respect of their estates; and one of them sold his estate to another, who took the benefit of the proceedings, both in relation to his original and his acquired estate. *Held* that he was liable in payment of the share corresponding to the latter estate. *Watson & Stotts* v. *E. of Selkirk*, 20 Feb. 1817, F. C.

205. Actings — Superior and Vassal — Nuisance—Removal — Contribution to by Pursuer.—The superior who was in possession of a vacant piece of ground on which a nuisance existed, caused by a sewer from the houses of his feuars in the vicinity being discharged into a drain, *held* bound, in an action at the instance of an inhabitant of the neighbourhood, to remove the nuisance. *Opinion*, that the pursuer would not be barred from insisting in such an action even if the sewage from the tenement occupied by him had contributed to the nuisance. *Mackay* v. *Greenhill*, 1858, 20 D. 1251; 30 J. 746.

206. Actings — Decree — Reduction on Ground that Clerk of Court not Qualified—Reduction at Instance of Party who had Acted as Judge.—A defender in a small debt action before a justice of peace court, having repeatedly acted as a justice in that court when A officiated as clerk, *held* barred from stating, as a ground for reducing the decree against him, that A had no legal title to act as clerk. *Nicolson* v. *M'Leod*, 1843, 5 D. 1428; 15 J. 636. See *Smith & Tasker* v. *Robertson*, 1827, 5 S. 848; 2 Fac. 572.

207. Actings — Salmon-Fishing — Illegal Method—Challenge by Representative of Party Granting Right to Use Method.—A grant of yairs with warrandice by an ancestor *held* no bar to his representative challenging the use of the yairs for catching salmon as illegal. *Fraser* v. *Duff*, 1829, 1831, 5 W. & S. 57. Affg. 8 S. 14; 5 Fac. 19.

208. Actings — Titles to Land — Title Granted by Author of Party Founding on

Error Therein.—A party holding an express title to a feu, which included several lots of ground, sought to dispossess from a part thereof one who claimed right, and had had long possession under a title which was inapplicable to the subjects, but had been intended to apply to them, and had been granted by a party who was represented by the pursuer. *Held* that the pursuer was bound to do whatever might be necessary to complete the defender's title, and was therefore not entitled, even assuming the subjects in dispute to be embraced in his title, to dispossess the defender. *Burke & Carmichael* v. *Mackay*, 1865, 3 M. 799 ; 37 J. 374.

209. Actings—Contract—Delay in Fulfilling—Delay Caused by Party Founding on.—Under a minute of agreement between A and B, relating to an estate, it was provided that the estate should be valued for purposes of accounting at Whitsunday 1816. Counter actions were raised by A and B, and A pleaded that the provision as to valuation had become inapplicable, with the result that the litigation was prolonged till 1819, when the court decided that the estate fell to be valued in terms of the above provision, and remitted to a valuator. *Held* that A was barred from objecting to the valuation as not made in 1816. *Hunter* v. *Cochrane*, 1826, 4 S. 667.

210. Actings—Apprehension as in meditatione fugæ—Bond of Caution de judicio sisti — Challenge. — A foreigner for whose apprehension as *in meditatione fugæ* a warrant had been granted, granted a bond of caution *de judicio sisti*. In an action subsequently raised against him, his plea of no jurisdiction was repelled on the ground of the bond. *Held*, in a reduction of the proceedings in the petition for apprehension and of the bond of caution, that he was barred from challenging the bond. *Irvine* v. *Hart & Son*, 1869, 7 M. 723 ; 41 J. 881.

211. Actings—Meditatio fugæ Warrant—Detention on Illegal Warrant—Execution of Second Warrant.—A creditor *held* not barred from applying for a *meditatio fugæ* warrant against a party who was detained in Scotland by an irregular warrant previously obtained by him. *Crowder or Turnley* v. *Watson*, 1832, 6 W. & S. 271. Affg. 10 S. 29 ; 7 Fac. 30.

212. Actings — Law Agent — Defective Inhibition—Action of Damages—Plea that Inhibition Null on other Grounds.—*Opinion*, that an agent, who was sued for damages arising from the error in the publication of an inhibition which he was employed by a foreigner to execute, was barred from pleading that the error was immaterial, on the ground of the alleged nullity of the inhibition arising from not having sisted a mandatary. *Cooke* v. *Falconer's Reps.*, 1850, 13 D. 157 ; 23 J. 55, 424.

213. Actings — Prescription — Bankruptcy — Cessio — Ranking — Litigation — Subsequent Sequestration.—The bankrupt in a process of cessio raised in 1850 gave up a state of debts in which A's name appeared as a creditor, and a deposition as to the truth of the state was emitted and signed. A was appointed trustee, and in the course of ingathering the estate raised an action against a creditor for reduction of certain dispositions. In that action the defender denied that A was a creditor, and an issue to that effect was put to the jury, who found in favour of A. In 1867 the bankrupt was sequestrated and the same creditors as in the cessio appeared. The trustee rejected A's claim as prescribed. *Held* that he was barred from pleading the prescription of A's claim. *Thomas* v. *Stiven*, 1868, 6 M. 777 ; 40 J. 399.

214. Actings — Prescription — Bankruptcy — Assignation by Creditors to a Party for Decree of Constitution against Representatives — Decree Obtained after Prescription.—The factor *loco tutoris* to the minor children of a party who died insolvent attended a meeting of creditors, at which it was resolved that the creditors should assign their claims to one party in order that a decree of constitution might be obtained, and this was duly carried out. *Held* that the representatives and the other creditors were barred from pleading the prescription of those claims which had undergone the triennial prescription between the date of the meeting and the date of the decree, but not of those which were prescribed prior to the date of the meeting. *Stuart* v. *Douglas*, 1823, 2 S. 227.

215. Actings — Property — Sale — Condition in Articles of Roup that Purchasers should Satisfy Themselves as to Title.—Lands were exposed to sale under the condition that offerers should before offering satisfy themselves as to the sufficiency and validity of the titles. The purchaser *held* barred from objecting to the titles. *Carruthers* v. *Stott*, 26 May 1825, F. C. ; 4 S. 34.

216. Actings — Process — Cautioner for Bankrupt Pursuer—Withdrawal in Consequence of Representations by Defender—Application for New Caution.—Where the cautioner for a bankrupt pursuer in an action withdrew owing to representations by the defender, *held* that the defender was barred from demanding new caution. *Oliver* v. *Robertson*, 1869, 8 M. 82 ; 42 J. 41.

217. Actings — Process — Caution for Expenses—Right to Demand—Interference with Cautioner Tendered.—A defender, by unduly interfering with a party who had signed as cautioner for a pursuer who had been ordered to find caution for expenses, and inducing the cautioner to withdraw his name, *held* barred by personal exception from insisting in the demand for caution. *Thomson* v. *Wyllie*, 1838, 16 S. 1374.

218. Actings—Teinds—Augmentation—Obligation not to Apply for.—An obligation granted by the minister of a parish to the heritors, that, on withdrawing their opposition to an augmentation of his stipend, he should not bring another during his incumbency, *held*

not to prevent him from again applying for one. *E. of Kellie*, 9 Mar. 1803, F. C.; M. 15710.

219. Actings — Succession — Contract with Succeeding Heirs—Signature by Two—Challenge of Deed Provided for in Contract.—A father settled his estates upon his son James and the heirs of his body (under the fetters of an entail); whom failing, his four daughters were to take as heirs-portioners in fee-simple. James having no family, after his succession, and while *in liege poustie*, had a contract drawn up as between him and his four sisters, whereby on certain conditions the sisters agreed that he should have power to dispone even on death-bed. This deed was signed by only two of the sisters, which prevented the brother from giving full effect to the conditions in the contract. *Held* that the two sisters who signed the contract were not barred from challenging a disposition subsequently executed by their brother on death-bed. *Murray & Others* v. *Kinloch & Others*, 1739, 1 Pat. 245.

220. Actings—Succession—Intromission without Authority—Subsequent Claim for Legacy.—Intromission with the effects of a defunct in a foreign country, *held* not to bar the intromitter's right to a legacy. *Fischer* v. *E. of Seafield*, 24 May 1822, F. C.; 1 S. 435.

221. Actings — Trust — Discretionary Power to Trustees to Restrict to Liferent—Exercise.—A truster declared in his trust deed, that "in case any of our said children shall marry, or otherwise conduct themselves so as not to merit the approbation of my trustees, or a majority of them accepting or surviving at the time, the provision hereby made in favour of said children so marrying shall only belong to them in liferent, for their liferent use allenarly, and to their issue or heirs above-mentioned in fee; but it is hereby declared that a regular minute must be entered in the sederunt-book of the trustees, expressing their disapprobation of the conduct of any of my said children, to restrict them to a liferent as aforesaid." The trust deed provided that an heritable estate should be made over to the truster's eldest son on attaining the age of twenty-five. The eldest son married when twenty-two, and upon that occasion the trustees entered in their minutes an approval of the marriage. The marriage settlements proceeded upon the footing of the son having right to dispose of the fee of the property, and were adjusted between the law agent of the intended wife and a law agent who at the time was agent both for the son and for his father's trustees,—the minute of approval of the marriage being also adjusted by him at the sight of the lady's agent. Just before the son attained twenty-five, a majority of the trustees entered in their sederunt-book a minute disapproving of the son's conduct, and restricting his right in the heritable estate to a liferent. In a multiplepoinding, in which claims were lodged for the marriage-contract trustees of the son and for his creditors, in a competition with a claim by the father's trustees, *held inter alia* that the trustees had not, by approval of the marriage, barred themselves from afterwards disapproving of the son's conduct otherwise. *Weller* v. *Ker*, 1866, 4 M. (H. L.) 8; 38 J. 256.

222. Actings—Trust—Provision of Liferent to A and Children in Fee—Advance of Sum to A—Discharge—Subsequent Plea that Share not Vested. — Trustees were directed to pay the share of an estate to A in liferent and her children in fee. The trustees lent a sum (almost equal to the share) to A; and this was held as payment of the share, and A and her children gave the trustees a discharge of the claim for their respective shares and for all other claims against the trustees. *Held* that this discharge did not bar the children from afterwards maintaining that the fee had not vested in them. *Halbert* v. *Dickson*, 1851, 13 D. 667; 23 J. 287.

223. Actings—Bond by Three Obligants—Signature of Two—Refusal of Third—Knowledge of Signatories.—A bond for money lent, bearing to be granted by A, B, and C as principal obligants, was signed and delivered by B and C, A being present at the execution of the deed, but refusing to sign it. *Held* that B was not afterwards entitled to repudiate the obligation on the ground that A had not signed the deed. *Craig* v. *Paton*, 1865, 4 M. 192; 38 J. 85.

224. Adoption — Forged Signature — Notice as to Forged Bill — Failure to Intimate Forgery.—The silence of a party receiving a notice as to a bill *held* not to bar him from disclaiming liability in respect that his signature to the bill was forged. *M'Arthur* v. *Paterson*, 1825, 3 S. 608.

225. Adoption — Forged Signature — Failure to Intimate Timeously.—A received notice from a bank that a bill on which his name appeared as an obligant was past due, but, although he knew that his brother-in-law was in the habit of forging his name to bills, he did not intimate that the signature was a forgery until three weeks after receiving notice, by which time the forger had absconded. *Held* that he was barred from challenging his signature on the ground of forgery. *Urquhart* v. *Bank of Scotland*, 1872, 9 S. L. R. 508.

226. Adoption—Forged Signature—Bill of Exchange.—Averments *held* irrelevant to support an issue of adoption of forged signature of a bill of exchange. *Boyd* v. *Union Bank of Scotland*, 1854, 17 D. 159; 27 J. 51.

Averments *held* relevant. *Frost* v. *North of Scotland Banking Co.*, 1858, 20 D. 1135; 30 J. 678.

227. Adoption — Forged Signature — Failure to Intimate.—Averments that a party whose name appeared as acceptor of a bill had received notice as to the dishonour of the bill, had been charged thereon, and had an interview with the charger's agent without disclosing that the signature was forged; that he only revealed this after his co-acceptor had fled the country, *held* relevant to support

a plea of adoption of the signature and personal bar. *Findlay* v. *Currie*, 1850, 13 D. 278; 23 J.

228. Adoption — Forged Signature — Failure to Answer Letter Respecting Forged Bill.—A party whose forged signature as acceptor appeared on a bill *held* not to have rendered himself liable thereon by not answering a letter from the discounter as to the bill which made no demand for payment. *Warden* v. *British Linen Co.*, 1863, 1 M. 402; 35 J. 246.

229. Adoption — Forged Signature — Failure to Intimate on Receiving Charge.—One of two brothers *ex facie* co-acceptors of a bill, received a charge for payment and acquiesced in it for a long time, during which his brother left the country. *Held* that he was barred from pleading that his signature was forged. *Maiklem* v. *Walker*, 1833, 12 S. 53.

230. Adoption — Forged Signature — Knowledge of Forged Bill — Payment of Similar Bills.—An issue of adoption of a forged signature as acceptor of a bill *held* to be relevantly supported by averments that the party had paid bills similarly accepted, that he knew that his name to another bill between the parties was forged, and that he did not repudiate his signature on the bill charged on, although informed of its existence before it became due. *Brown* v. *British Linen Co.*, 1863, 1 M. 793; 35 J. 477.

231. Adoption — Forged Signature — Judicial Admission of Genuineness. — A party *held* barred from pleading forgery by an admission of subscription in a previous stage of the cause. *M'Kenzie* v. *M'Kay*, 1825, 3 S. 614; *Miller* v. *Little*, 1831, 9 S. 328.

232. Adoption—Forged Signature—Plea Stated in Reclaiming Petition.—A party who presented a bill of suspension of a charge on a bond of caution, and did not plead forgery specifically till a second reclaiming petition, *held* barred from doing so. *Paterson* v. *Sparrow & Co.*, 1821, 1 S. 223.

233. Adoption—Forged Signature—Bill of Exchange—Plea Stated in Suspension of Decree.—A plea of forgery of a bill *repelled*, where the party alleging it was cited personally, and an agent appeared for him in an inferior court, in which decree was pronounced against him, and the plea was stated for the first time in a bill of suspension. *Provan* v. *Gray*, 1821, 1 S. 92.

234. Homologation — Quality of. — Homologation must rest on circumstances of an unequivocal nature. *Cameron* v. *Cameron*, 18 Dec. 1810, F. C.*

235. Homologation—Reduction of Deeds —Exercise of Right Conferred by.—A party *held* barred from reducing certain deeds by having availed himself of a right which was competent to him only in virtue of the deeds under reduction. *Mill* v. *Mags. of Montrose*, 1825, 1 W. & S. 570. Revg. 2 S. 652.

236. Homologation—Deed Granted during Insanity—Deed Challenged on Ground of Facility.—Where deeds are sought to be reduced as granted during insanity, homologation is no defence, the deeds being null; but it is a defence to a reduction on the head of facility and lesion as in this case the deeds are only voidable not void. *Gall* v. *Bird*, 1855, 17 D. 1027; 27 J. 521.

237. Homologation—Deeds Obtained by Fraud — Mora. — Circumstances *held* not relevant to infer homologation of deeds obtained by fraud, although many years had elapsed from their date. *Leiper* v. *Cochran*, 1822, 1 S. 552.

238. Homologation—Deed not Delivered —Entail—Deed in Contravention.—A reduction brought by a father and his son against the trustee for his creditors, of eight successive trust deeds granted by the father, on the ground that the four first deeds had not been effectually delivered, and that the power of sale contained in all the deeds was in violation of a deed of entail, *held* barred by homologation. *Forbes* v. *Renton*, 1840, 3 D. 149.

239. Homologation—Lease Granted by Minor—Possession and Payment of Rent—Mora.—Possession and payment of rent for thirty years under a lease granted by a minor without consent of his curators *held* to bar reduction of the lease although the granter had died shortly after attaining majority. *Hamilton* v. *Lady Cardross*, 1712, Robert. 37.

240. Homologation — Minority — Ignorance of Legal Rights.—*Held* that alleged acts of homologation of deeds liable to reduction were irrelevant, both because they occurred during minority, and because it was not averred that the party was in the knowledge of his legal rights. *M'Gibbon* v. *M'Gibbon*, 1825, 24 J. 306; 1 Stuart 569.

241. Homologation — Minority. — Circumstances *held* not relevant to infer homologation by children, of a trust constituted by their father during their minority, primarily for liquidating a personal debt in preference to a previous heritable burden in favour of the children. *Telford* v. *Jamieson*, 1835, 13 S 735.*

242. Homologation — Minority — Deed Challenged Recited in Minor's Marriage-Contract.—A plea of homologation against a minor lady, founded on the circumstance of the deed challenged being recited in her marriage-contract, *repelled*. *Rose* v. *Rose*, 1821, 1 S. 154.*

243. Homologation — Death-Bed — Minority — Reduction ex capite lecti — Discharge of Curators Appointed by Deed under Reduction.—*Held* that acts done by a minor heir during minority did not bar him, on attaining majority, from challenging a deed on death-bed; and that an action of count and reckoning raised by him after majority against curators appointed by the deed (in which no proceedings took place),

and a subsequent discharge, were, under the circumstances, no bar to his title. *Brodie* v. *Brodie*, 1827, 5 S. 900.

244. Homologation—Death-Bed—Possession by Minor—Challenge by Heir Representing Trustee under Settlement.—*Held* (1) that possession by a minor under his father's trust deed and settlement, challengeable on death-bed, does not bar a challenge by his heir-at-law; and (2) that although that heir were the representative (which he was not) of a trustee who acted under the deed, this circumstance would not bar the challenge. *Irving* v. *Tait*, 3 June 1808, F. C.; M. "Death-Bed" App. No. 6.

245. Homologation—Death-Bed—Entail—Completion of Title by Heir—Subsequent Challenge ex capite lecti.—Circumstances in which an heir-at-law, who had made up titles under an entail executed by his father on death-bed, was (by a judgment of the Lord Ordinary, acquiesced in) *held* not barred by homologation from setting aside the entail. *Gardner* v. *Gardner*, 1830, 9 S. 138; 6 Fac. 94.

246. Homologation — Settlement — Reduction.—Circumstances in which a plea of homologation was *repelled* in an action as to the reduction of a settlement. *Clark* v. *Thomson's Trs.*, 1823, 2 S. 308.

247. Homologation—Discharge—Settlement of Accounts — Settlement by Unauthorised Agent—Acceptance of Bill for Balance in Settlement—Renewal.—A party took a bill, bearing to be the balance on a settlement of accounts, and subsequently took a renewal from the debtor. *Held* that although the settlement was made by an agent not authorised, yet that the party had homologated the settlement as to all matters in view at making it. *Stein's Assignees* v. *E. of Mar*, 1827, 6 S. 1. See 7 S. 691, footnote.

248. Homologation—Agency—Settlement of Action by Third Party.—Circumstances in which it was *held* that an agreement to compromise an action involving the character of a lady, who was one of two defenders, between the counsel of the other defender and a friend of the lady with the counsel for the pursuer, but unknown to her own counsel, and of which it was a part that the trial should apparently proceed and a verdict be given in her favour (which was done), had been sanctioned and homologated by her. *Jaffray* v. *Simpson*, 1835, 13 S. 1122; 10 Fac. 15.

249. Homologation—Husband and Wife—Loan by Wife.—Actings by a husband which were *held* to be homologation of a loan contracted by his wife. *Grant* v. *Baillie*, 1830, 8 S. 606.

250. Homologation — Insurance — Misrepresentation. — Circumstances in which *held* that the underwriters in a policy of insurance on the cargo of a ship had not barred themselves from objecting to the validity of the policy on the ground of misrepresentation. *Losh, Wilson, & Bell* v. *Martin & Others*, 1856, 19 D. 101; 29 J. 49.

251. Homologation—Compulsory Powers—Agreement by Provisional Committee—Homologation by Company.—Circumstances in which it was *held* that homologation of a proposed agreement by a newly incorporated company, after the passing of their Act, had not been established. *Monklands Rly. Co.* v. *Glasgow & Airdrie Rly. Co.*, 1849, 11 D. 1395; 21 J. 523.

252. Homologation — Entail — Lease — Obligation to Pay for Meliorations — Illegality — Challenge. — Circumstances in which an heir of entail objecting to a demand for alleged meliorations on the entailed estate of his predecessor, was *held* not barred by personal exception from pleading that these ameliorations were not exigible under the stat. 10 Geo. III. c. 51. *Fraser* v. *Fraser*, 1830, 8 S. 806. See 1831, 5 W. & S. 69.

253. Homologation — Entail — Lease — Obligation to Pay for Meliorations.—Circumstances *held* not sufficient to infer homologation so as to render an heir of entail liable for melioration stipulated in a lease granted by a predecessor. *Barclay* v. *E. of Fife*, 1829, 7 S. 708; 4 Fac. 985.*

254. Homologation — Entail — Lease in Contravention — Improvements — Failure to Bring Declarator of Contravention.—An heir of entail granted a lease in contravention of the entail, and the tenant in possession under the lease made improvements. *Held* that a succeeding heir was not barred from challenging the lease though he had brought no declarator of contravention against the heir who had granted it, and had made no objection to the improvements. *D. of Gordon* v. *Innes*, 1822, 1 S. App. 169. Affg. 1 S. 150.

255. Homologation — Entail — Lease in Contravention — Acceptance of Rents — Challenge.—An heir of entail received the rents under a lease of part of the estate. *Held* that this barred both her and her successors from reducing the lease as a contravention of the entail. *Oliphant* v. *Scott*, 1830, 8 S. 985; 5 Fac. 810.

256. Homologation — Entail — Lease in Contravention — Assignation — Reduction.—Circumstances *held* not to bar an heir of entail from challenging a lease in a question with an onerous assignee. *Stirling* v. *Dunn*, 1829, 3 W. & S. 462. Affg. 6 S. 272; 3 Fac. 349.

257. Homologation — Entail — Deeds in Contravention of—Challenge.—A party *held* barred by homologation from reducing deeds granted in violation of an entail. *Cunninghame* v. *Cunninghame*, 1825, 1 W. & S. 103. Affg. 2 S. 232.

258. Homologation—Entail. — Circumstances under which a plea of homologation of an entail was *repelled*. *Colquhoun* v. *Colquhoun*, 1828, 7 S. 200; 4 Fac. 234. *Remitted* on merits, 1831, 5 W. & S. 32. *Adhered to* on merits, 1831, 9 S. 911; 6 Fac. 599.*

259. Homologation—Entail—Granted in Breach of Marriage-Contract. — Circumstances *held* not sufficient to infer homologation of an entail made by a father in breach of a contract of marriage, under which his eldest son had an unrestricted right. *Munro* v. *Munro*, 13 Feb. 1810, F. C.*

260. Homologation—Lease—Acceptance of Rent—Reservation of Right of Challenge. —Homologation not inferred by taking payment of rents payable under a reducible lease, and where the right to challenge was reserved. *Malcolm* v. *Bardner*, 1823, 2 S. 410.*

261. Homologation — Improbative Writ —Vitiation.—*Question*, whether the doctrine of homologation applies to a deed vitiated by erasure *in substantialibus*? *Robertson* v. *Ogilvie's Trs.*, 1844, 7 D. 236; 17 J. 117. *Cumming* v. *Munro*, 1833, 12 S. 61; 9 Fac. 46.

262. Homologation—Improbative Writ —Debt—Inclusion by Executor in Residue Accounts—Payment of Interest.—In an action raised against the executor of a party deceased, to recover an alleged loan to the deceased, vouched only by an improbative acknowledgment written by the defender to the dictation of the deceased, and signed by the deceased and by the defender, it appeared that the loan had been included by the defender in the schedule of debts given up to the Revenue Office with the residue accounts of the deceased's estate, and that the defender had paid interest thereon for fifteen years. *Held* that the pursuer was entitled to recover from the defender as an executor, the court being of opinion that the writing had been homologated by the defender in his executorial character. *M'Calman* v. *M'Arthur*, 1864, 2 M. 678; 36 J. 339.*

263. Homologation — Improbative Writ —Acts Done in Ignorance of Defect.—In a reduction of a missive of feu at the instance of the granter, on the ground of a defect in the statutory solemnities requisite for making it a probative deed, the defender, without alleging that the pursuer was aware of the defect, and cognisant of his legal rights, averred that he had homologated the deed by allowing the defender to exercise various acts of possession. The court *refused* a counter issue of homologation. *Shaw* v. *Shaw*, 1851, 13 D. 877; 23 J. 381.

264. Homologation — Improbative Writ —Objection by Party Taking Benefit.—A testator by an improbative writ addressed to his sons directed that a legacy should be given to his daughter and left the residue of his estate to his two sons. They signed a docquet agreeing to this writ. *Held* that they could not in defence to their sister's action for the legacy plead that the writing was improbative because (1) they had signed the docquet and (2) they had taken the residue under the writing. *Pollock* v. *Pollock*, 1849, 12 D. 143.

265. Homologation — Improbative Writ —Rei interventus.—Circumstances in which the granter of an improbative obligation, on which *rei interventus* had followed, *held* barred from repudiating the obligation. *Gibb* v. *Ogg*, 1835, 13 S. 612.

266. Homologation — Invalid Decree — Valuation of Teinds—Payments in Accordance with Decree.—In a process of valuation of teinds at the instance of a heritor against the minister and B, the High Commission in 1647 pronounced a decree interponing "their decreet and authority" to an agreement therein narrated, whereby B, "as tacksman and titular, and having right to the teinds," and the heritor agreed that the teinds "shall be in all time coming £210 Scots." This valuation was given effect to in subsequent processes of modification and locality, and in a process of disjunction and erection. The teinds were held by B's representatives under successive tacks down to 1848. In 1859 the arrears of surplus teind from 1848 to 1858 were paid to and accepted by the donatories of the titular, on the basis of the decree of valuation. In an action raised in 1863 by the Crown, as titular, and by its donatories, concluding for reduction of the decree in so far as bearing to be a permanent valuation of the teinds, on the ground that the true titular had not been called, and for declarator that the valuation was merely of the tacksman's interest, *held*, by the majority of the whole judges, *inter alia*, that if originally invalid, the decree had been validated by homologation. *Deans of the Chapel Royal* v. *Johnstone*, 1867, 5 M. 414; 39 J. 220.*

267. Homologation — Illegal Contract — Poor — Aliment of Pauper — Relief — Arbitration—Payment of Aliment Following on Contract ultra vires.—The inspector of a parish in which a lunatic pauper became chargeable claimed relief from one or other of two parishes,—that of the lunatic's birth, and that of his alleged residential settlement. It was agreed by the inspectors of the various parishes that the question should be tried in the Small Debt Court in the county in which the parish of residential settlement but not the parish of birth was situated. The parish of the birth was decerned against, paid the sum in the decree, and for two years supported the pauper. The inspector thereafter raised an action against the parish of the pauper's residential settlement. *Held* that the arrangement among the inspectors being *ultra vires*, the action was not barred by the decree, and the maintenance of the pauper subsequent to the decree was not homologation. *Crawford* v. *Beattie*, 1860, 22 D. 1064; 32 J. 489.

268. Homologation — Assignation of Shares in Company—Regulations in Copartnery Contract not Complied with.—Circumstances *held* sufficient to infer homologation of an assignation of a share of a company's stock, though the regulations of the contract of copartnery were not complied with. *Drummond* v. *Hunter*, 1834, 12 S. 620.*

269. Homologation — Contract — Variation — Extras — Stipulation for Authorisa-

tion in Writing—Extras not so Authorised.—Road trustees stipulated, in a contract with a road contractor, that "no additional work should be done, with a view of extra payment, without a written order from the trustees or their surveyor," and the contractor claimed for additional work for which no written order was produced, and offered to prove that the trustees lived near the road, took great interest in its progress, and went frequently along it during the time of these operations, without challenging them as unauthorised,—*held* that the trustees were not liable to pay the sum claimed. *Brown* v. *Lord Rollo*, 1832, 10 S. 667.*

270. Homologation — Trust — Road Trustees—Informal Minute.—Circumstances in which *held* that road trustees had homologated an informal minute of meeting giving effect to an agreement as to their individual liability for debts of the trust. *Duke of Montrose* v. *Sir A. Edmonstone*, 1842, 10 D. 1152.

271. Homologation — Landlord and Tenant—Lease Excluding Assignees—Acceptance of Rent from Assignee.—A lease was granted for a period of years and the lifetime of the tenant and of his heir. On the death of the tenant, his second son, by arrangement with the heir, entered into possession of the subjects and for sixteen years paid the rent to the landlord. *Held* that the landlord was thereafter barred from removing the second son. *Darroch* v. *Rennie*, in footnote to *Cunninghame* v. *Grieve*, 8 Mar. 1803, F. C.; M. 15208.

272. Homologation — Landlord and Tenant — Lease Excluding Assignees — Acceptance of Rent from Assignee—Reservation of Objections.—The tenant in possession of a farm on an entailed estate under a lease which descended to his heir-at-law and excluded assignees died in 1849. His heir-at-law never entered, and by arrangement with him the daughters of the tenant entered into possession and paid the rent. The heir of entail died in 1850 and the receipts for rent from his daughters granted by the succeeding heir reserved all objections to the title. *Held* in action of removing raised in 1856 by the succeeding heir of entail that she was not barred by acquiescence. *Gray* v. *Low*, 1859, 21 D. 293; 31 J. 157.

273. Homologation — Landlord and Tenant — Lease Excluding Sublease — Acceptance of Subrents by Landlord—Challenge of Sublease. — A tenant excluded from subsetting granted a sublease, and thereafter the landlord's factor wrote a letter, which was signed by the tenant, directing the subtenant to pay his rent in future to the factor, who accordingly received payment for two years from the subtenant. *Held* that the landlord could not challenge the sublease. *Maule* v. *Robb*, 1807, Hume 835. *Aglionby* v. *Watson*, 1809, Hume 845. See *E. of Elgin* v. *Walls*, 1833, 11 S. 585.

274. Homologation — Landlord and Tenant — Lease in Contravention of Statute—Reduction by Party Drawing.—Parties entered into a missive of lease, in which the rent was fixed at a half boll of wheat, three firlots of barley, and six pecks of oats for each Scots acre, payable by the fiars prices, but the proportions were not expressed which these several measures bore to the imperial standard measure. The landlord under whose direction the missives of lease had been framed, raised an action, after the tenant had entered into possession, to reduce the lease, libelling upon the Act 5 Geo. IV. c. 74, for uniformity of weights and measures. *Question*, whether the landlord, having drawn the missive himself, was barred *personali exceptione* from pleading the statutory objection. *Henry* v. *M'Ewan*, 1834, 7 W. & S. 411. Affg. 10 S. 572; 7 Fac. 430.

275. Homologation — Landlord and Tenant—Contract for Assignation of Lease on Certain Conditions — Assignation in Violation of Conditions—Acceptance by Landlord of Rent from Assignees.—Magistrates entered into an agreement, that subscribers to a church should get leases of seats at a low rent for a number of years, assignable to relations who might be actual residenters, and that the subscribers, their heirs and assignees, should, on the expiration of the leases, have a preference to the seats at the original rent. The leases expired in 1777, and between that time and 1819 the subscribers assigned their seats to strangers (as well as to relations), who paid to the magistrates the original rent, and the assignations were recorded by them in the rent-book. *Held* that the magistrates were not barred by homologation from demanding an increased rent from those acquiring right to the seats posterior to 1777. *Mags. of Greenock* v. *Greenock Gardeners' Society*, 1822, 2 S. 44.

276. Homologation — Lease — Joint-Tenant — Survivorship Clause — Assignation—Failure to Object.—A farm was let to two tenants and the survivor of them, and the heirs of such survivor. The tenants divided the farm, and each paid the rent and burdens effeiring to his half. One of them assigned his right under the lease to his nephew, and soon after died. The assignee continued in possession for a year, and paid his share of the rent, his name being entered in the landlord's rental book as joint-tenant. *Held* that these circumstances were not sufficient to bar the other tenants from challenging the assignation to the nephew of one-half the lease. *Robertson* v. *Menzies*, 1857, 19 D. 667; 29 J. 308.

277. Homologation — Master and Servant — Indenture — Informality — Service.—*Held* that an apprentice had homologated an informal indenture by serving for a year. *Neil* v. *Vashon*, 1807, Hume 20.

278. Mora — Bankruptcy — Accounting by Trustee—Action Brought after Twenty Years—Acquiescence—Statutory Penalty.—A creditor on a sequestrated estate raised an

action of accounting against the trustee more than twenty years after his appointment. *Held* that he was not entitled to insist on an investigation into the trustee's management, even although he averred neglect to carry out specific instructions, the creditors having acquiesced and approved of the trustee's conduct, but that he was not barred from demanding the infliction of any statutory penalty such as penal interest on sums above £50 retained in the trustee's hands. *M'Lachlan* v. *Likly*, 1830, 9 S. 54, 57.

279. Mora—Delay in Raising Action—Bankruptcy — Trust. — Circumstances in which a claim as executor of a deceased party against the trustee under a trust deed for creditors granted by the deceased more than thirty years previously, *held* barred. *Scott* v. *Mitchell*, 1830, 8 S. 820.

280. Mora — Aliment of Illegitimate Child — Decree — Delay in Enforcing — Charge—Defender's Removal to England.—A mother obtained decree in absence, for aliment of her bastard child, against a working man, then in England, who had acknowledged himself its father. On his return soon after, he was charged on the decree, but immediately went back to England, where he remained, except for a few days at a time, till the child was fourteen. About that time he came again to Scotland, and till his death, five years afterwards, he lodged with the mother of the child. He left property to the value of about £100. *Held* that the woman was not barred from enforcing her decree against the estate. *Melrose* v. *Bruce*, 1855, 17 D. 965 ; 27 J. 490.

281. Mora — Aliment of Illegitimate Child—Delay in Raising Action — Taciturnity.—*Held* that an action, raised in 1856, for inlying charges and aliment of an illegitimate child born in 1817, with interest on each payment as it fell due, was not barred by *mora*, and that there was no room for the plea of taciturnity where the defender alleged that a judicial demand had been made and discharged. *Moncrieff* v. *Waugh*, 1859, 21 D. 216 ; 31 J. 24.

282. Mora — Bond — Assignee — Bankruptcy — Action not Raised till after Defender has Lost Right of Recourse.—An assignee to an English bond in security of a current account having obtained judgment in the English courts, his attorneys imprisoned the debtor, but liberated him on receiving a partial payment, without consulting the original creditor (whereby, according to the law of England, the assignee discharged the bond, and became liable to account for the full amount of it) ; and having been immediately thereafter repeatedly asked for information as to the nature of the settlement (which he withheld), and warned that he would be held responsible, found that although no steps were taken for more than six years, during which time both parties were resident in Scotland, and by the lapse of which period the assignee was said to have lost recourse against his attorneys, an action against the assignee was not barred. *Banner* v. *Gibson*, 1830, 9 S. 61 ; 6 Fac. 49.

283. Mora — Company — Election of Directors—Interdict.—At a meeting of the shareholders of a railway company, two sets of directors were proposed and voted for ; and a scrutiny of the votes having taken place, the chairman decided that one of the sets had been elected, and they thereupon entered upon the discharge of their office as directors. After the lapse of a month from the election, a suspension and interdict against their acting as directors was presented. Interdict *refused* on the ground that the application was not made timeously. *Blackburn* v. *Finlay*, 1848, 10 D. 590 ; 20 J. 194. *Blackburn* v. *Buchanan*, 1848, 20 J. 199.

284. Mora—Contract—Failure to Enforce—Prejudice.—The court assoilzied from a claim founded on a contract, which was dated nearly thirty years before the action was raised, the claim not having been prosecuted *tempestivè*, and a change of circumstances having occurred in the interim. *Black* v. *Hardie*, 1834, 12 S. 643.

285. Mora—Action of Damages—Acquiescence—Abandonment.—A railway servant, who had been injured in a collision in 1846, was employed by the railway company till 1870, when he was dismissed. He made no claim for compensation until after his dismissal. *Held* that the claim was barred by *mora*, and *observed* (*per* Lord Benholme), that in regard to claims requiring constitution, delay for a certain length of time might found the plea of *mora*, though there was no presumption of abandonment or acquiescence. *Cook* v. *N. B. Rly. Co.*, 1892, 10 M. 513 ; 44 J. 342.

286. Mora—Claim of Damages against Law Agent for Negligence.—A party *held* not entitled to insist for reparation for alleged professional negligence on the part of his agent, he having been aware of the alleged neglect and its consequences for eight years, without intimating any intention of making the agent liable. *Hunter* v. *Fleming*, 1829, 8 S. 234 ; 5 Fac. 206.

287. Mora — Joint Obligants — Conditional Discharge of One — Resolutive Condition—Fulfilment—Failure to Notify.—A and B were joint obligants in a bill in favour of C. A paid C a composition, and was discharged by him under the condition that this should not prejudice his (C's) claim against B, and that if B raised the question whether he was liberated the discharge should be null and the composition returned. B did raise the question. *Held* that the composition money not having been then returned C's heir was barred by taciturnity from suing fourteen years later A's heir for the balance of the bill. *Osborne* v. *Brown*, 1832, 10 S. 546.

288. Mora — Debt — Delay in Raising Action till after Bankruptcy of Debtor.—A claim by two sisters on the sequestrated estate of their brother, in 1848, for the value of seed supplied from crop 1826, and spring labour (to which, as executors of their father they had

right, while he succeeded as heir to the lease of the farm), *held* not barred by their silence and delay in prosecuting it. *Mackintosh* v. *Taylor*, 1849, 11 D. 1244 ; 21 J. 500.

289. Mora — Debt — Delay in Raising Action.—*Held* that a creditor was not barred from suing for payment of a debt which was not prescribed by allowing twenty-four years to elapse after the debtor's death before constituting against his representatives. *Gordon* v. *Glendonwyn*, 1838, 16 S. 645.

290. Mora—Entail—Obligation to Reinvest Price of Estate—Failure to Enforce.—A substitute heir is not barred from insisting on the fulfilment of an obligation to reinvest the price of part of the estate sold under a defective entail, by a delay of nearly thirty years from the date of the sale. *Bruce* v. *Bruce*, 1827, 5 S. 822 ; 2 Fac. 568. Rev. on merits, 1830, 4 W. & S. 240.

291. Mora — Fraud — Delay in Action Challenging Fraud.—No time will run to protect and screen fraud ; but the lapse of a considerable period before an action challenging a fraud is brought is an element to be considered in deciding the case. *Kirkpatrick* v. *Irvine*, 1850, 7 Bell 186 ; 22 J. 634. Revg. 10 D. 367.

292. Mora—Husband and Wife—Divorce for Adultery.—An action of divorce cannot be barred by *mora* unless it is such as to infer *remissio injuriæ*. *Hellon* v. *Hellon*, 1873, 11 M. 290 ; 45 J. 192.

293. Mora—Acquiescence—Landlord and Tenant—Withdrawal of Part of Subject—Subsequent Payment of Full Rent.—A tenant who possessed a farm on tacit relocation for four years, *held* to have no claim of damages against his landlord for loss of part of it, from which a neighbouring proprietor, soon after tacit relocation began, excluded him—no complaint having been made till the end of the four years, and he having paid the full rent. *Baird* v. *Graham*, 1852, 14 D. 615 ; 24 J. 314 ; 1 Stuart 578.

294. Mora—Landlord and Tenant—Failure to Enforce Stipulation.—In a lease of coal it was stipulated that the tenant should furnish fortnightly from his books, accounts showing the amount of output and sales, so that the landlord might be enabled to make his election of a fixed rent or of a lordship on the sales. *Held* that although the landlord had not required them fortnightly for two years, he was not precluded from afterwards demanding them for that period. *Adam* v. *Sir W. Napier*, 1843, 5 D. 736 ; 15 J. 333.

295. Mora—Loan—Repayment.—A lady lent her nephew £2000, and took a receipt. The nephew lived for twenty-eight years afterwards, and the aunt survived him by six years. Up to the date of her death no demand was made for capital or interest. In an action upon the receipt at the instance of her executor against the nephew's, *held* the obligation to repay was not extinguished by *mora*, and decree given for the whole sum and interest from the date of the loan. *Cuninghame* v. *Boswell*, 1868, 6 M. 890 ; 40 J. 495.

296. Mora—Poor—Aliment of Pauper—Relief.—A pauper had been supported by a parish, not the parish of her settlement, from 1836 to 1849 ; during all this time no notice had been given to the parish of settlement. The parish which had given the relief having claimed repayment of the sums so expended, *held* that the claim was barred by *mora*. *Hay* v. *Knox*, 1850, 12 D. 1060 ; 22 J. 464.

297. Mora—Poor—Aliment of Pauper—Relief.—A claim against the parish of a pauper's settlement for repayment of sums which had been expended in his support by another parish, *held* to be barred by *mora*, the claim not having been asserted for a period of seven years. *Hay* v. *Jack & Others*, 1853, 15 D. 388 ; 25 J. 234 ; 2 Stuart 221.

298. Mora—Poor—Aliment of Pauper—Relief.—A parish maintained a pauper for twenty-two years (after having made a certain inquiry as to his residence), and at the expiry of that period, for the first time gave notice to an adjoining parish, where the pauper had served an apprenticeship, of a claim for relief. *Held* that the claim was barred. *Scott* v. *Anderson*, 1854, 16 D. 1094 ; 26 J. 594.

299. Mora—Poor—Aliment of Pauper—Relief.—A procurator-fiscal in 1834 procured a warrant to commit a dangerous lunatic to an asylum. He became personally liable for the lunatic's board in the asylum, which he paid till 1857. In an action raised in 1859, to recover his outlay from the parish of the lunatic's alleged settlement, to which no intimation had been given prior to the raising of the action, *held* that the claim not having been insisted in for twenty-four years, the plea of *mora* stated by the defender ought to be sustained, and the parish assoilzied. *Duncan's Trs.* v. *Gow*, 1861, 23 D. 420 ; 33 J. 213.

300. Mora—Poor—Aliment of Pauper—Relief—Notice of Claim.—The parish of A gave a notice to the parish of B in 1850 claiming relief of sums expended in the maintenance of a pauper, on the ground that the parish of B was the parish of birth of the pauper's husband, by whom she was alleged to have been deserted. The parish of B repudiated liability. The claim was repeated in 1853, and liability again repudiated. In the meantime, in 1851, the parish of C as the parish of the pauper's birth admitted liability, and the pauper was thereafter maintained by that parish. In 1860 the parish of C gave notice to the parish of B of a claim of relief. In an action at the instance of the parish, and of A and C against the parish of B, *held* that all claims for sums advanced on behalf of the pauper prior to the notice in 1860 were barred by *mora*. *Question*, whether the parish of C could found on the notice

given by the parish of A. *Lemon* v. *Cameron*, 1864, 2 M. 454; 36 J. 233.

301. Mora—Poor—Aliment of Pauper—Relief—Settlement of Accounts between Same Parties in Regard to other Claims. — On 26th December 1851, notice was sent by Dundee to South Leith that a boy aged eight, who was born in South Leith, had become chargeable to Dundee. The boy continued to receive relief till 1857. In January 1862 the boy again became chargeable to Dundee, and notice was duly sent to South Leith, who admitted liability for relief since January 1862. Various settlements of accounts had taken place between Dundee and South Leith from 1851 to 1862 in reference to other paupers, but no claim had been preferred for the advances made to this boy. *Held* that the claim made for the advances prior to 1862 was barred by *mora*. *Jack* v. *Simpson*, 1864, 2 M. 1221; 36 J. 609.

302. Mora—Poor—Aliment of Pauper—Relief.—Notice of a pauper having become chargeable was given by the relieving parish to the parish of settlement, which denied liability. No claim was made by the relieving parish for six and a half years. *Held* that the mere lapse of this period was not sufficient to sustain a plea of *mora*. *Beattie* v. *Wood*, 1866, 4 M. 427; 38 J. 198.

303. Mora—Poor—Aliment of Pauper—Relief.—In an action raised in 1865 by one parish against another for relief of sums expended in the maintenance of a pauper from 1856 to 1863, statutory notice of claim having been sent in 1856, *held* that the action was not barred by *mora*. *Bremner* v. *Taylor* (O. H.), 1866, 3 S. L. R. 24.

304. Mora—Process—Process in Dependence for Seventeen Years—New Ground of Claim.—An action of multiplepoinding with regard to the division of the funds of a mercantile firm had been in dependence since 1848. In 1865, in a discussion on a report made by an accountant upon a remit, a view of the case was stated which for the first time raised the question as to the liability of the trustees of one of the partners to account for the profits of the firm. *Held* that the right to submit this view had not been lost by delay, but that the delay might affect the question of expenses. *Laird's Trs.* v. *Laird's Legatees*, 1865, 1 S. L. R. 34.

305. Mora — Reduction — Accounting — Settlement of Accounts.—An action at the instance of the representatives of one of two partners against those of the other, raised thirty years after the date of the last docqueted balance, concluding for reduction of the balances and for an accounting, *held* not barred by *mora*. *M'Laren or Law, etc.* v. *Liddell's Trs.*, 1860, 22 D. 373; 32 J. 164.

306. Mora—Reduction of Discharge—Presumption — Acquiescence. — The factor for trustees, in taking payment of a debt, gave an abatement of considerable amount, and discharged the debtor. Twenty-five years afterwards the trustees raised an action to reduce this discharge, and obtain payment of the sum abated. *Held* that the trustees must be presumed to have concurred in their factor's act, and action dismissed. *Murray, etc.* v. *Douglas*, 1797, 4 Pat. 4.

307. Mora—Reduction of Discharge—Minority—Agent and Principal—Acquiescence.—An officer in the army, nearly nineteen years of age, granted a mandate, when abroad, to uplift any sum arising to him out of a certain process. The mandatary did so, and granted a discharge of the process; and the officer made repeated drafts on the sum uplifted, and, after majority, filed an account with the mandatary, and discharged him. *Held* not entitled to insist on reducing that discharge, and the discharge of the process, after the lapse of fifteen years, on the allegation that no curator *ad litem* had been appointed to him during the process, or that the mandatary had exceeded his powers in discharging it. *Roberton* v. *Roberton*, 1831, 9 S. 865.

308. Mora — Reduction — Fraud — Landlord and Tenant—Possession for Ten Years. —*Held* that a tenant who had possessed a grazing farm for ten years on a lease was barred by *mora* from reducing the lease on the ground that he had been induced to enter upon it by false representations made by the landlord as to the number of sheep the farm would keep. *Grieve* v. *Rutherford's Trs.*, 1871, 9 S. L. R. 60.

309. Mora — Reduction — Excambion — Lapse of Thirty Years—Homologation.—An action was brought, thirty years after the excambion of the old glebe belonging to the minister of Lochalsh, for the lands of Ardhill, belonging to Lord Seaforth, to set aside and reduce that contract, on the ground that it was gone into without due authority from Lord Seaforth. *Held* that the transaction having been fairly gone into, and homologated both by the Seaforth family and the minister, could not be disturbed. *Innes* v. *Downie & Others*, 1815, 6 Pat. 75.

310. Mora — Reduction—Decree-Arbitral —Bill Granted in Payment.—A decree-arbitral *held* not to be reducible on production of evidence which had been in possession of the complaining party for six years after the date of the decree, and who had, on a composition with creditors, granted bills for the money specified in the decree. *Sharp* v. *Bury*, 1813, 1 Dow 233.

311. Mora—Rei interventus—Reduction —Decree-Arbitral.—Circumstances in which *held* that a party to a submission was barred from challenging the award which had been acted upon, it being impossible by lapse of time and changes in the situation of matters to ascertain otherwise the claims settled by the award. *Forbes* v. *Edinburgh Water Co.*, 1830, 8 S. 459.

312. Mora—Reduction—Decree-Arbitral —Ultra vires.—Circumstances in which *held*

that a reduction of a decree-arbitral as *ultra vires* was not barred by the pursuer's delay for thirteen years or by his actings. *Birrell* v. *Dundee Gaol Commrs.*, 1859, 21 D. 640; 31 J. 346.

313. Mora—Reduction—Decree-Arbitral—Partnership—Death of Partner—Reference—Reduction—Acquiescence.—The executors of a deceased partner of a firm, with the knowledge of the next-of-kin, entered into a reference with the surviving partners to fix the value of the deceased's share in the business. *Held* that one of the next-of-kin was barred *personali exceptione* and by *mora* from insisting eight years afterwards in a reduction of the award, on the ground that the executors had no power to refer. *M'Kersies* v. *Mitchell, etc.*, 1872, 10 M. 861; 44 J. 487.

314. Mora—Reduction of Decree—Decree by Default—Decree in foro—Reduction Brought Fifteen Years Afterwards.—Decree by default was pronounced against a defender in respect of his failure to lodge answers to the pursuer's revised condescendence. Fifteen years afterwards he raised an action of reduction of the decree, and averred that he had been unable through poverty to continue to defend the former action, or to raise the action of reduction sooner. The court holding that the decree was a decree *in foro*, and that the delay in bringing the reduction was not satisfactorily accounted for, *dismissed* the action as irrelevant. *Mackenzie* v. *Smith*, 1861, 23 D. 201; 33 J. 602.

315. Mora—Reduction of Judicial Proceedings—Reduction by Arrester—Acquiescence of Debtor.—The sheep belonging to an outgoing tenant of a farm were purchased by the incoming tenant, and the price was applied in extinction of the rent due to the landlord who had sequestrated, and of a claim due to a creditor who had poinded the outgoing tenant's effects. The proceedings under which this arrangement was effected were partly judicial and partly extrajudicial. Seventeen years later a creditor of the outgoing tenant arrested in the hands of the incoming tenant and raised a reduction of the proceedings, on the ground that the price of the sheep had never been paid to the outgoing tenant. *Held* that the arrester being in no better position than his debtor, the outgoing tenant, these claims were barred by *mora* and acquiescence. *Adie* v. *M'Martins & Others*, 1837, 15 S. 1045; 12 Fac. 952.

316. Mora—Reduction of Decree—Lapse of Time Short of Prescriptive Period.—*Held*, in a question as to the reduction of a decree, that a term short of the negative prescription might, combined with other circumstances, afford a plea of personal bar and exclude the title to sue. *Sinclair* v. *Campbell's Trs.*, 1837, 15 S. 770; 12 Fac. 743. See 13 S. 594; 10 Fac. 383; 2 S. & M'L. 105; 3 D. 871.

317. Mora—Road—Toll—Level Crossing Unauthorised—Private Railway—Acquiescence.—A company who held, on different leases, the coal-fields in two different estates, through which a turnpike road passed, formed a railway in 1806 through both these estates to a neighbouring harbour—the railway running parallel to the turnpike road on its west side, and being for about a quarter of a mile in immediate contact with it. In 1824 the company, by means of a slip of railway laid across the road, carried their railway into the part of their coal-field on the east of the road. By using this railway they avoided a tollbar erected between their coal-field and the harbour. No objection was made by the road trustees till 1845. *Held* that they were barred from objecting to the use of the railway. *Moir* v. *Alloa Coal Co.*, 1849, 12 D. 77; 21 J. 450.

318. Mora—Sale of Goods—Sale through Agent—Action Delayed till Bankruptcy of Party Bound to Relieve.—A & Co. invoiced to B certain goods for which they had received an order through their agent. Their agent, however, had no authority from B to give the order, and when the goods arrived B refused to receive them. Instead of communicating with A & Co., B was prevailed upon by the agent to indorse to him the shipping documents, and he obtained delivery and misappropriated the goods. On A & Co. rendering their account for the goods supplied, B wrote denying all connection with the transaction, but not giving A & Co. any information which could lead them to understand or suspect the true state of matters. A & Co. made no further claim against B for five months after rendering the above-mentioned account, in the course of which time their agent had become insolvent. *Held* that B had by his conduct incurred the liabilities of a purchaser, and that A & Co.'s claim against him was not, in the peculiar circumstances of the case, barred by *mora*. *Gaskell, Deacon, & Co.* v. *Mackay*, 1870, 8 S. L. R. 253.

319. Mora—Succession—Husband and Wife—Jus relictæ—Action by Representatives of Widow—Acquiescence.—A widow was maintained during the eleven years of her viduity by her eldest son, who was her husband's executor, during which time she made no claim for *jus relictæ*. In an action brought by her representatives fifteen years after her death against the representatives of her son, *held* that the claim was not barred by *mora* and acquiescence. *Mackenzie* v. *Mackenzie's Trs.*, 1873, 11 M. 681; 45 J. 433.

320. Mora—Succession—Husband and Wife—Goods in Communion—Acquiescence.—Circumstances in which a claim made by a widow, as executrix and residuary legatee of her husband, against his father's estate, for the share of goods in communion to which her husband had acquired right on his mother's death, was *held* to be barred by *mora* and taciturnity, or to have been discharged by acquiescence. *Robson* v. *Bywater*, 1870, 8 M. 757; 42 J. 366.

321. Mora—Succession—Landlord and Tenant.—A party resident in America *held* not barred by *mora* from taking up a lease, although fourteen years had elapsed after her father's death. *Crichton* v. *Lady Keith*, 1857, 19 D. 713; 29 J. 329.

322. Mora—Succession—Delay in Making Claim—Presumption of Payment.—A claim (which was not prescribed only in respect of minorities) made by children forty-six years after the death of their father, for their share of his executry, the specific amount of which could not be ascertained, *repelled* on the ground of taciturnity and other circumstances, founding a presumption of payment. *Tod* v. *Beattie*, 1802, Hume 487.

323. Mora—Succession—Claim for Legitim.—Plea of *mora* against an action to recover *legitim* raised twenty years after the date of vesting, *repelled*. *Gourlay* v. *Wright*, 1864, 2 M. 1284; 36 J. 642.

324. Mora — Succession — Delay in Making Claim.—Thirty-six years after a father's death, his daughter's husband brought an action for her share of the executry. *Question*, whether the action was barred by *mora*. *Lindsay* v. *Kinloch*, 1796, 3 Pat. 432.

325. Mora — Succession — Claim for Legacy—Knowledge of Legatee.—Legacies were *granted* by a party who died in 1812, and no demand was made for payment of them till thirty-one years after the time of payment. The legatees averred that the will was unknown to them up to the time when they demanded payment, though the deed was found in a trunk in their own custody. *Held* that the taciturnity was not a bar to the action, and that the question implied discharge or presumed payment ought to be left to a jury. *Seath* v. *Taylour*, 1848, 10 D. 377; 20 J. 128.

326. Mora — Succession — Claim for Legacy.—Circumstances in which a plea of *mora*, in answer to a claim for a legacy brought nearly twenty years after the death of the testator, *repelled*. *Boe* v. *Anderson*, 1857, 20 D. 11; 30 J. 12.

327. Mora — Succession — Trust—Beneficiary—Son of Factor on Estate—Action against Trustees' Representatives.—In 1790 A died leaving a trust-settlement conveying his estate to trustees for payment of the liferent to his daughter and of the fee to her children. The husband of the liferentrix was appointed factor by the trustees, and continued to intromit with the estate till his death in 1802, all the trustees being then dead. The liferentrix died in 1818. *Held*, in an action of count and reckoning raised in 1824 by the fiars under the settlement against the representatives of the trustees, that in the circumstances their claim was barred. *Thomson* v. *Murray & Others*, 1824, 3 S. 297.

328. Mora — Succession — Accounting — Delay in Making Claim — Knowledge of Existence of Claim. — In an action of accounting against an executor for sums received by him twenty-five years before, *held* that the obligation to account was not extinguished by lapse of time. *Observed* that the plea of taciturnity was of no avail if the executor had not accounted, and that it implied knowledge of the existence of the claim on the part of the party against whom the plea is taken. *Allan* v. *Allan's Trs.*, 1851, 13 D. 1220; 23 J. 575, 599.

329. Mora — Succession — Accounting — Succession—Delay in Making Claim.—Circumstances in which the representative of a party was *held* barred by taciturnity from insisting in a claim of accounting against parties alleged to have intromitted with the deceased's estate. *Thomson* v. *Campbell's Exrs.*, 1849, 12 D. 276; 22 J. 72.

330. Mora — Succession — Action of Accounting against Trustee.—An action was brought by a daughter to recover her share of her father's estate forty-four years after his death, and thirty years after her marriage, against a person *in loco parentis*, who had acted as trustee. *Held* that the delay did not free the trustee from liability to account, but as he had acted in good faith he must not suffer prejudice on account of the delay. *Taylor* v. *Mather*, 1873, 10 S. L. R. 461.

331. Mora—Settlement of Accounts—Retention of Account by Debtor without Objection.—Two parties who had been engaged in a joint adventure rendered accounts to each other in 1803. *Held* that one of the parties was barred by *mora* from raising an action of accounting as to the adventure in 1824, he having been silent as to the accounts in the interval. *Rose* v. *M'Leay's Trs.*, 1837, 2 S. & M'L. 958. Affg. 8 S. 1037. See *Carsewell* v. *Steele*, 1848, 10 D. 1528; 20 J. 578. *Pollok, Gilmour, & Co.* v. *Ritchie*, 1851, 13 D. 640; 23 J. 284. *Findlay, Bannatyne, & Co.'s Assignee* v. *Donaldson*, 1865, 2 M. (H. L.) 86.

332. Mora — Account Rendered — Retention by Debtor without Objection to Charges. — An account for work done in surveying operations in a stone-quarry was rendered to the factor for the proprietors, retained for seven years without objection to the items, and employment and attendance at the quarry was proved. *Held* in an action against the proprietors that they were not entitled then to table objections to the accounts, but must be assumed to have acquiesced in the charges. *Smith* v. *Sir W. Maxwell*, 1833, 11 S. 323.

333. Mora—Settlement of Accounts—Partnership.—An executor of a deceased partner, fifteen years after the company accounts had been adjusted and settled, *held* entitled to insist that a certain heritable bond which had not been included in the accounting had belonged to the copartnery, and to claim a share therein. *Lister* v. *Sutor*, 1815, 6 Pat. 78.

334. Mora—Settlement of Accounts—Action of Crown.—Trustees gave up a residue account, and paid legacy-duty in 1827.

In 1859 duty was claimed on a portion of the estate not included in the former account. The trustees, besides denying that additional legacy-duty had ever been due, pleaded that, in respect of the previous settlement and *mora*, the claim was barred. *Held* that this plea did not operate against the Crown. *Lord Advocate* v. *Meiklam*, 1860, 22 D. 1427 ; 32 J. 651.

335. Rei interventus—Improbative Writ—Bond—Error in Testing Clause—Rei interventus quoad one Obligant—Suspension of Charge—Reduction—Absolvitor in Reduction—Plea in Suspension that Summary Diligence Incompetent.—A, B, and C signed a bond of annuity. The signature of A was duly attested, but only one of the witnesses to the signatures of B and C was designed in the testing clause. The price of the annuity was thereafter, on the faith of the bond, paid to A *per* B as A's agent, or at least in B's presence and with his knowledge. B brought a suspension of a charge on the bond and a reduction on the ground of the error in the testing clause. *Held*, in the reduction, that B was barred *rei interventu*, though C was not affected by that plea. *Hamilton* v. *Wright*, 1838, 3 S. & M'L. 127. Affg. 14 S. 323.

Held further that after decree of absolvitor was pronounced in the reduction, B could not plead in the suspension that in respect of the error summary diligence could not proceed on the bond. *Ibid.* v. *Ibid.*, 1839, 2 D. 86 ; 15 Fac. 135.

336. Rei interventus—Improbative Obligation—Abandonment of Action on Faith of Part Payment.—The father of the father of a bastard by an improbative writ agreed to pay the mother certain aliment. Thereupon the mother abandoned an action against the father and received payments under the agreement. *Held* that the father's father was barred from pleading that he was not liable under the agreement owing to its being improbative. *Gibb* v. *Ogg*, 1835, 13 S. 612.

337. Rei interventus—Loan—Cautioner—Improbative Writ—Forged Bond—Advance on Faith of.—A borrowed money, undertaking by improbative writ to grant a bond. B was his cautioner, and it was agreed that he should revise the bond. A bond was granted and payments were made by the creditor. The bond turned out to be forged. The creditor then sued on the original improbative writ, alleging it was validated *rei interventu* by the payments. *Held* that the payments having been made on the faith of the forged bond there was no validation of the writ. *Skelton* v. *M'Laren*, 1816, Hume 106.

338. Rei interventus—Caution—Cash-Credit—Obligation to Relieve Cautioner—Operation on Cash-Credit.—One of two cautioners in a cash-credit died, and A wrote to the other (B) that he would relieve him of half of the obligation under the cautionary bond. B, having paid up under the cautionary obligation, sued A for half. *Held* that money having been drawn out of the bank after A's letter, and B having continued cautioner on the faith of it, there was *rei interventus*, which barred A from challenging his letter under the Act 1696, c. 25. *Martin* v. *Wingate*, 1828, 6 S. 859.

339. Rei interventus—Informal Agreement—Failure of one Part from Ambiguity—Payments in Virtue of other Part—Repetition.—A and B entered into an informal agreement settling certain disputed claims and containing a submission to an arbiter of certain others. Payments were made by A and the possession of an estate ceded to him in virtue of this agreement. The submission was found afterwards to have failed by reason of ambiguity. *Held* that A was not entitled to treat the agreement as not binding on him and to sue for repetition of the sums paid by him. *Stirling* v. *Ker*, 1830, 8 S. 911.

340. Rei interventus—Church—Glebe—Excambion—Agreements as to Roads—Acquiescence.—An excambion of a portion of a glebe with certain rights of servitude, having been made with an adjoining heritor for another piece of land, and arrangements as to roads, etc., thereupon adopted and acted upon, a succeeding incumbent *held* barred from demanding an alteration of those arrangements. *Lockerby* v. *Stirling*, 1835, 13 S. 978.

341. Settlement of Accounts—Memorandum for Temporary Purpose.—A sketch or memorandum of the accounts between two parties, made for a temporary purpose, *held* not to be a settlement of accounts and not to bar an investigation of those accounts. *Forbes* v. *Forbes*, 1821, 1 S. 158.

342. Settlement of Accounts—Arithmetical Error—Rectification.—*Held* competent to rectify an arithmetical error committed in consigning a sum in 1818, under an action for payment raised in 1831, notwithstanding that there had been an intermediate adjustment of accounts, and no reduction brought. *Forbes Trs.* v. *Edinburgh & Glasgow Union Canal Co.*, 1834, 12 S. 365.

343. Settlement of Accounts—Cash-Credit—Annual Balance—Docquet—Error.—A party who had a cash-credit with a bank took receipts for sums paid in by him, but gave them back at the annual settlement which took place on an examination of vouchers and of the bank ledger, after which a balance was struck and signed by the bank and himself, which was carried to a new account. This was repeated for seven successive years, when he paid up the balance due by him, and retired his cash-credit bond. *Held*, in an action by the bank for an accounting, in respect of an alleged error of an entry of £191 to his credit, which it was offered to be proved was an error *calculi*, arising prior to all these settlements, and which sum had never been paid by him, that he was not bound to go into any accounting. *Walker* v. *Drummond*, 1836, 14 S. 780 ; 11 Fac. 622.

344. Settlement of Accounts—Partnership—Error.—Circumstances in which *held* that a transaction settling the rights of partners in the copartnery estate could not be opened up on the ground of errors in accounting. *Johnston* v. *M'Kenzie*, 1824, 3 S. 321.

345. Settlement of Accounts—Interest Added to Principal at End of Year—Objection Subsequent to Settlement—Acquiescence.—A series of accounts between brothers had been rendered yearly, charging interest on cash advances from the date of advance, and adding to it the principal, and charging the whole as a gross sum bearing interest in the accounts of next year; and the accounts had been expressly approved of in many instances by the debtor, and acquiesced in for a long term of years. Objection *repelled* to the mode in which interest was charged. *Sir J. Boswell* v. *Montgomerie*, 1836, 14 S. 554.

346. Settlement of Accounts—Heritable Bond—Interest—Settlement on Payment of Interest at Smaller Rate than Stipulated for.—Although it was stipulated in an heritable bond that the interest for the first five years should not exceed 4 per cent., after which the full legal rate was to be exigible, yet the creditor for several years after the lapse of that period, without objection, received an account, and a balance from the debtor, on the footing that the interest continued at 4 per cent., and the market rate of interest did not exceed that rate. *Held* that the debtor could not be found liable for more than 4 per cent. *Stocks* v. *Whyte*, 1837, 15 S. 1095; 12 Fac. 1035.

347. Settlement of Accounts—Agent and Principal—Account Rendered—Enlarged Account.—An agent who had rendered an account *held* not entitled to claim on an enlarged account. *Gordon* v. *Innes*, 1826, 4 S. 577.

348. Settlement of Accounts—Agent and Principal—Commission—Credit in Quarterly Accounts—Subsequent Claim for Larger Commission.—The agent of an insurance company, who had for nearly fourteen years taken credit in his quarterly accounts for 5 per cent. as commission, not allowed, at the end of his employment, to claim an additional 2½ per cent. as short charged. *Phœnix Assurance Co.* v. *Young*, 1834, 12 S. 680.

349. Settlement of Accounts—Inspector of Poor—Periodical Examination—Docquet.—The accounts of an inspector of poor had been from time to time, during a period of thirteen years, submitted to committees of the parochial board, and from time to time discharged and docqueted. His successor raised an action of count and reckoning against him, and an action for the reduction of the docquets, alleging that no materials had been laid before the committees to enable them to check the accounts, that these had never been duly audited, and that they were grossly inaccurate. *Held* (1) that no relevant ground had been averred for reduction of the docquets; but (2) that the docquets were not *per se* sufficient to exclude an accounting. *Laing* v. *Laing*, 1862, 24 D. 1362; 34 J. 684.

350. Settlement of Accounts—Reopening.—It is not competent, after a settlement of accounts and arrangements founded thereon, to open them up to the effect of reviewing the principles on which the settlement was made. *Fraser* v. *Fraser*, 1827, 5 S. 348.

351. Settlement of Accounts—Attestation by Debtor.—Accounts being regularly rendered to a debtor, who attested and redelivered them to the creditor, cannot be objected to. *Learmonth & Co.* v. *Erskine*, 1823, 2 S. 426.

352. Settlement of Accounts—Heritable Security—Payment of Debt and Expenses—Protest as to Expenses—Action for Repetition.—An heritable creditor having threatened to sell the subjects, the trustee on the debtor's sequestrated estate paid the debt and expenses, taking an assignation to himself; and, after having done so, and on the same day, he intimated by protest that the expenses were exorbitant, and reserved right to repetition of the excess. *Held* that he was not entitled to insist in an ordinary action for repetition, and that even in a reduction fraud or error *in substantialibus* would require to be proved. *Turner* v. *Simson*, 1838, 1 D. 57.

353. Settlement of Accounts—Agent and Client—Deduction—Ranking for Balance on Bankrupt Estate.—A client and his trustee agreed that his law agents should, on abandoning a part of the account (which had been docqueted as correct), be allowed to rank for the balance on his trust estate, which they did. *Held* that the account could not be opened up. *Scott* v. *M'Queen & M'Intosh*, 1822, 1 S. 281.

354. Settlement of Accounts—Agent and Client—Homologation—Mora.—An agent who settled and docqueted accounts with a client in 1821, and afterwards, from the terms of his letters, homologated subsequent annually rendered accounts, in none of which was there any charge for commission on cash transactions, *held* barred in an action raised many years later from making such a charge, or for the share of a newspaper sent to his client. *Tod's Trs.* v. *Melville*, 1836, 14 S. 432; 11 Fac. 361.

355. Settlement of Accounts—Agent and Client—Subscription of Minute Specifying Balance.—Circumstances in which a law agent and factor's account *held* not to be settled, although his clients and constituents had subscribed a minute specifying a balance due to him. *Mackenzie* v. *Mackenzie's Trs.*, 1831, 9 S. 730.

356. Settlement of Accounts—Agent and Client—Rei interventus.—An action between an agent and client having been terminated by an agreement which fixed a balance as due to the agent, and *rei interventus* having followed, *held*, in an action by the representatives of the client against the agent, that the accounts

could not be opened up except as to errors *calculi*. *Colvil* v. *Jameson*, 1839, 1 D. 526; 14 Fac. 592.

357. Settlement of Accounts—Agent and Client—Bills Granted—Mora.—A party was appointed attorney on estates in the West Indies in 1803, and transmitted to his constituent monthly and annual accounts of expenditure, for the balance of which the constituent accepted and paid bills. *Held* that the constituent was not entitled, on the removal of the attorney in 1814, to object to the items of expenditure, but entitled to exhibition of the vouchers where usually taken. *M'Arthur* v. *M'Arthur*, 1821, 1 S. 39, 83.

358. Settlement of Accounts—Agent and Client — Taxation. — Circumstances under which accounts between agent and client were held to be settled, and not liable to be taxed. *Elder* v. *Smith*, 1829, 7 S. 656. *Macdonnell* v. *Mackenzie*, 1829, 7 S. 798.

359. Settlement of Accounts—Agent and Client—Bill Granted to Account—Diligence on Bill—Suspension—Taxation.—In 1830 a law agent rendered an account of £70 to his client, a farmer, who accepted a bill, at four months, for £55, 18s., "to account of an account of business rendered." He failed to retire it, and in 1834 the agent raised a summons, founding on the bill, which the client took out to see, and returned without defences; whereupon the agent obtained decree, on which he charged and thereafter incarcerated his client. *Held*, in a suspension and liberation, that although the accounts had never been taxed, the diligence ought not to be suspended. *Neilson* v. *Morrison*, 1836, 14 S. 974.

360. Settlement of Accounts—Agent and Client—Acceptance of Bill in Payment to Date—Taxation.—Acceptance and payment of a bill by a client, pending a process, in payment of his agent's account to that date, does not preclude the account being opened up and taxed. *Megget* v. *Douglas*, 1826, 4 S. 514.

361. Settlement of Accounts—Agent and Client—Promise to Pay—Part Payment—Taxation.—A cautioner under a composition-contract in a sequestration, after repeated applications to and promises by him to pay the law agent's account, was sued for the amount. After taking the summons to see, decree in absence was pronounced for £90, and he granted his bill for the amount; and, on being charged thereon, paid £50, and got delay as to the balance. *Held*, in a suspension of a charge for the balance, that he was not entitled to plead that the account had never been taxed. *Fraser* v. *Stuart*, 1834, 13 S. 78; 10 Fac. 63.

362. Settlement of Accounts—Agent and Client—Partial Payment—Decree in Absence — Bill Granted — Taxation. — A law agent's account not liable to be objected to, although it had not been taxed, and was alleged to have been made up on an inadmissible scale—partial payments having been made, decree in absence for the balance allowed to be taken, and a bill granted, on a settlement, and retired. *M'Michie* v. *Philips*, 1826, 4 S. 803.

363. Settlement of Accounts—Part Payment — Agent and Client — Taxation. — A party employed a law agent to do certain business for him, and a settlement of accounts took place, in pursuance of which various sums in cash were paid and also bills granted by the debtor. *Held*, in a charge on the last bill granted in payment of the balance remaining due, that the defender was barred from demanding the taxation or general investigation of the accounts, but remit made to the auditor to report on certain errors alleged to appear *ex facie* of the accounts. *M'Ara* v. *Gilfillan*, 1831, 9 S. 684.

364. Settlement of Accounts—Agent and Client—Taxation—Assignation in Security—Bankruptcy of Creditor—Composition—Diligence.—A client assigned to his agent a debt in security of his account, reserving right to object to it; the client thereafter became bankrupt, and was discharged on a composition; and the agent recovered payment of the composition due on his account by diligence. *Held*, in an action for the expense of the diligence, that the client was not entitled to have the original account taxed; and *observed*, that where a law account has been paid, it is requisite, in order to open it up, to specify gross and fraudulent overcharges. *Macdonnel* v. *M'Kenzie & Mann*, 1823, 2 S. 185.

365. Settlement of Accounts—Agent and Client — Taxation — Mora — Acceptance of Bill.—The accounts of a law agent and factor were docqueted in 1779, and thereafter specific factory accounts, and a general abstract of law accounts, were rendered annually till 1809, when a bill was taken by the client for a balance due by the agent on both sets of accounts, but they were never docqueted; *held* that the law accounts were still liable to be taxed and adjusted, but not on such strict principles as if recently contracted. *D. of Queensberry's Exrs.* v. *Tait*, 1822, 1 S. 428; and 5 July 1825, F. C.; 4 S. 145.

366. Settlement of Accounts—Agent and Client—Taxation.—A law agent was employed to recover money due to his client, which he did; and, having paid himself his untaxed business accounts, handed over the surplus to his client. *Held* that the client was still entitled to have the accounts taxed. *Henderson* v. *Jackson*, 1852, 14 D. 1040; 24 J. 630; 1 Stuart 1068.

367. Settlement of Accounts—Agent and Client—Promise of Payment—Taxation.—A client who repeatedly promised payment of accounts rendered, *held* barred from objection that the accounts had not been taxed. *Clyne* v. *Swanson*, 1830, 8 S. 391; 5 Fac. 325.

368. Settlement of Accounts — Bankruptcy Trustees — Accounts — Illegal Charges.—In an action of accounting at the

instance of the granter of a trust deed for behoof of creditors, against the trustees, including one of their number who had been appointed factor and agent for the trust, the pursuer objected to charges for law business and commission in the factor's accounts; but he had himself docqueted the first of these accounts as approved, and authorised the factor to carry the balance to his next account. *Held*, that as it did not appear that the pursuer knew the rule of law against such charges, he was not barred from objecting thereto, even as regarded the docqueted account. *Lauder* v. *Millars*, 1859, 21 D. 1353; 31 J. 740.

369. Settlement of Accounts—Cautioner—Order Granted for Payment—Objection to Charges.—A cautioner who granted an order for payment of a sum as the balance of an account due by the principal, *held* not entitled, in an action founded on the order, to prove that the prices charged in the account were higher than those agreed on, he bringing no reduction of the order. *Somerville* v. *M'Donald*, 1829, 8 S. 136.

370. Settlement of Accounts—Heir and Executor—Entail.—A testator directed that his moveable estate should be applied in purchasing lands to be entailed on a series of heirs. A settlement of accounts took place between the heir called first and the executor. *Held* that this settlement was binding on the subsequent heirs and barred them from going into the earlier accounts. *Macpherson* v. *Macpherson*, 1841, 3 D. 1242; 16 Fac. 1324.

371. Settlement of Accounts — Trust — Business Carried on by Trustees — Accounting for Profits — Receipts for Interest. — Beneficiaries raised an action against trustees, calling on them to account for the profits on trust funds, which, contrary to the directions of the trustee, had been employed in trade. *Held* that the signing a docquet acknowledging the amount in the trustees' hands at the date of the truster's death, and granting receipts for interest at 5 per cent. for several years, did not bar the action, it not being proved that the beneficiaries knew how the funds were employed, or that any claim for profits was competent. *Cochrane* v. *Black*, 1855, 17 D. 321; 27 J. 139.

372. Settlement of Accounts — Building Contract — Measurement — Payment — Extras.—Circumstances in which the contractor for building a dry-house, *held* precluded from making a claim for rebuilding part of a wall which had been injured by an overflow of the employer's mill-dam, in respect that he had allowed the whole work to be measured, and received payment therefor, as well as for two accounts for extra work, without including the rebuilding therein, or in the measurement, or making a demand for it for three months after the settlement. *Adam & Son* v. *Scott*, 1840, 16 J. 316.

373. Settlement of Accounts—Unstamped Bill — Non-Payment—Failure to Notify—Settlement of Subsequent Accounts.—The granter of a promissory-note remitted to the payee, in part payment, an unstamped order upon a third party, for which credit was given in the payee's books; but, when presented, it was not paid. No notice of this was given to the granter, and transactions took place between them, which were settled without any demand being made for the sum contained in the order. The payee having thereafter become bankrupt, his assignee, about a year after the remittance of the order, raised an action against the granters of the promissory-note (which had not been delivered up) for payment of the sum on the unstamped order. *Held* that the claim was barred. *Pennell* v. *Boak*, 1843, 5 D. 1203; 15 J. 495.

374. Settlement of Accounts — Ship—Register—Action against Party Appearing on Register for Disbursements in Connection with Ship—Previous Settlement out of Fund Belonging to Owner.—A ship was consigned, with its cargo, to foreign consignees, who were instructed to sell the cargo, and remit the net proceeds to a third party. They carried out these instructions, remitting the balance of the proceeds after taking credit for certain sums defrayed for the ship. Thereafter the consigner became bankrupt, and the consignees (with a view to benefit the third party, who was a creditor of the consigner, by enlarging the fund) brought an action against a registered owner, who had sold his interest in the ship (but whose name appeared on the register), for payment of the sums defrayed for the ship on the footing that they were liable to account to the third party for the proceeds of the cargo. *Held* barred from making such a claim. *Dempster & Co.* v. *Leyden*, 1838, 1 D. 68.

375. Settlement of Accounts—Ship—Division of Profits—Accounting against Agents.—The part owner of a vessel *held* barred from suing for an accounting of the agent's intromissions as he (the part owner) had taken part in the management and had received dividends without objection. *Ferrier* v. *Handyside & Henderson*, 1869, 6 S. L. R. 290.

376. Settlement of Accounts—Receipt—Relief of Augmentation of Stipend.—*Held*, on consideration of a series of receipts and discharges for payment of money, conceived in general terms, that a claim for relief of sums, paid prior to the receipts and discharges in respect of an augmentation of stipend, was not barred by failure to make the claims till after the receipts and discharges had been granted. *Marshall* v. *E. of Dundonald*, 1836, 9 J. 26.

377. Settlement of Accounts—Succession — Compromise of Competing Claims — Reduction—Ignorance of Legal Rights—Erroneous Advice by Agent Acting for all Parties. — Three parties entered into an agreement, compromising their respective claims to the succession of a relative deceased. *Held*, in a reduction brought by one of the parties, that it was not relevant to allege that she was thereby injured, and led into it in ignorance of her rights, and by erroneous

advice from her professional agent, who was also agent for the other parties; and *observed*, that a transaction or arrangement of doubtful rights was of all agreements the most difficult to set aside. *Stewart* v. *Stewart*, 1839, 1 Rob. 401. Affg. 15 S. 112; 12 Fac. 122.

378. Settlement of Accounts—Terms of Receipt — Acquiescence. — A debtor, at a meeting for settlement of accounts with his creditor, made counter claims, the accounts for which had not been rendered, paid a sum in cash considerably less than the balance claimed, and the creditor docqueted the account as "settled per stamp," but did not specify the amount paid or the mode of settlement; and a few days thereafter he transmitted a stamped receipt, acknowledging the cash paid as a partial payment, and calling for the counter claims. *Held* that although the receipt was retained without objection by the debtor, who never sent the accounts, there had been no such acquiescence as to bar the ascertainment of the justice of the counter claims. *Napier* v. *Lang*, 1834, 12 S. 523.

POINDING

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1. Competency — Amount of Goods Poindable — Claim by Debtor's Landlord for Rent.—*Held* that a creditor was not entitled to poind effects of his debtor to a much greater value than the amount of his debt and expenses, in order to cover a claim for rent by the debtor's landlord, who had threatened to interdict the proceedings so as to preserve his hypothec. *M'Kinnon* v. *Hamilton*, 1866, 4 M. 852; 38 J. 445.

2. Competency — Appropriate Diligence — Poinding or Arrestment — Furniture Placed in Hands of Auctioneer for Sale.—*Observed*, that arrestment and not poinding was the proper diligence to attach furniture which had been placed in an auctioneer's hands for sale. *Mackenzie & Co.* v. *Findlay*, 1868, 7 M. 27; 41 J. 22.

3. Competency — Expenses of Poinding.—It is competent to poind for the expenses of the poinding as well as for the debt. *M'Neill* v. *M'Marchy & Co.*, 1841, 3 D. 554.

4. Competency — Mora — Charge Three Years Old.—Although a charge of horning was given in March 1833, it was *held* competent to poind thereon in April 1836, without giving any new charge. *Kerr* v. *Barbour*, 1837, 15 S. 1041.

5. Competency—Mora—Delay in Carrying out Sale—Delay in Reporting Sale.—Circumstances in which a poinding was found ineffectual against a landlord, and particularly, that although the warrant of sale was granted on 13th September, it was not executed till 14th October, and the sale not reported till thirty-six days thereafter. *M'Ghie* v. *Mather*, 1824, 3 S. 339.

6. Competency—Mora—Delay in Carrying out Sale.—Circumstances where a poinding creditor *held* entitled to claim restitution of poinded goods, although a year had elapsed from the date of obtaining a warrant of sale and no sale had taken place. *Scoullar* v. *Campbell & Co.*, 1824, 3 S. 77.

7. Competency—Mora—Delay in Reporting Execution.—A poinding *held* to be inept seeing that the execution was not reported till two months after its date. *Samson* v. *M'Cubbin*, 1822, 1 S. 407.

8. Competency—Mora—Delay in Reporting Execution.—*Question*, whether a delay of four months in reporting the execution of a poinding renders it null. *Lyle* v. *Greig*, 1827, 5 S. 845.

The execution of a poinding was not reported for four months. The delay was

caused by a claim by the debtor's landlord to the whole of the debtor's effects and by an offer of composition. *Opinions*, that the poinding was not rendered null by the delay in reporting the execution. *Lyle* v. *Greig*, 1827, 5 S. 845.

9. Competency—Mora—Delay in Reporting Execution.—A creditor, after executing a poinding, allowed sixteen days to elapse before reporting it to the sheriff, and no sufficient explanation of the delay was given. *Held* that it was null, though the competing and objecting creditor had not executed his own poinding at the date when the report of poinding was made. *Miller* v. *Stewart*, 1835, 13 S. 483.

10. Competency—On Decree of Furthcoming—Common Debtor.—In a furthcoming decree was pronounced against the arrestee and against the common debtor for his interest. *Question*, whether it was competent for the creditor to poind the common debtor's goods on the decree. *M'Culloch* v. *M'Nildige*, 1827, 5 S. 475.

11. Competency—Personal Bar.—Circumstances in which a debtor was *held* barred from objecting to the regularity of poindings of his effects. *Scott* v. *Dunlop*, 1838, 14 Fac. 303.

12. Competency—Royal Palace.—Poinding within the palace of Holyrood of the effects of a subject for a debt due by him was incompetent, although the King was not in residence. *E. of Strathmore* v. *Laing*, 1826, 2 W. & S. 1. Revg. 18 Feb. 1823, F. C.; 2 S. 223.

13. Competency—Small Debt Act, 1837, s. 13—Lapse of Ten Days.—Under s. 13 of the Small Debt Act, 1837, a decree in the form of Schedule A is a good warrant for poinding and sale after the lapse of ten free days from the date of the interlocutor. A decree was pronounced subject to a condition which was to be purified before extract. The condition was purified sixteen days after the date of the interlocutor. On the same day the interlocutor was extracted, and a poinding proceeded with. *Held* that the poinding was competent, as ten clear days had elapsed from the date of the decree, and that it was not necessary that ten clear days should elapse from the date of the extract. *Munro* v. *Dick*, 1841, 3 D. 1054. See 1 D. 1075.

14. Competency—Sale—Mercantile Law Amendment Act, 1856, s. 1—Poinding by Creditor of Seller.—*Held* that the 1st section of the Mercantile Law Amendment Act did not apply to a transaction or sale under which, as a part of the agreement, the subject sold (namely, a horse) remained undelivered, and the seller had not only the "custody," but continued in the use and possession of it, with a power to sell; and therefore that a poinding at the instance of a creditor of the seller was valid. *Sim* v. *Grant*, 1862, 24 D. 1033; 34 J. 517.

15. Competency—Subject of—Ownership—Father and Minor Son—Caution.—Bill of suspension of a poinding on caution *passed* at the instance of a minor son of the bankrupt, who alleged that the effects poinded were his property. *Spence & Co.* v. *Philip*, 1823, 2 S. 178.

16. Competency—Subject of—Ownership—Father and Son—Collusion.—Where creditors poinded stock on a farm of which their debtor was proprietor, but which stock was claimed by the debtor's son under an alleged lease granted by his father (and which lease was challenged by the creditors as collusive), interdict by the son against a sale of the stock *refused* on juratory caution. *Muirhead* v. *Peebles*, 1852, 1 Stuart 511.

17. Competency—Subject of—Ownership—Furniture—Tenant of House.—In a question between a lady and a poinding creditor of her brother, who lived in the same house with her, *held* to be proved that the household furniture belonged to the lady who was tenant of the house, and not to her brother, although it had some years before been the property of her brother, and no written conveyance of it in her favour was produced, nor any receipt for the price. *Macdougall* v. *Whitelaw*, 1840, 2 D. 500.

18. Competency—Subject of—Ownership—Furniture.—Interdict *granted* of a poinding and sale of furniture which the suspender proved to belong to her, and which had been poinded by the charger for a debt due by her mother, who resided with her. *Smith* v. *Flowerdew*, 1842, 5 D. 335; 15 J. 138.

19. Competency—Subject of—Ownership—Furniture Liferented by Debtor.—A testator bequeathed the liferent of his furniture to his son, and the fee to trustees for purposes set forth in the will. *Held* that the creditors of the son could not poind the furniture. *Scott* v. *Price*, 1837, 15 S. 916; 12 Fac. 854.

20. Competency—Subject of—Ownership—Goods in Communion—Undivided.—Articles of furniture which had been in communion between spouses remained after the husband's death in possession of the widow without division among the family. A creditor of a son who resided in the house poinded part of the furniture, but departed from the poinding in so far as relating to the interest of the widow. The court *refused* a suspension at the instance of the son. *Learmont* v. *Darlington*, 1849, 11 D. 884; 21 J. 308.

21. Competency—Subject of—Ownership—Joint Property.—It is incompetent for the creditor of an individual to poind property belonging to the debtor jointly with another party. *Fleming* v. *Twaddle*, 1828, 7 S. 92.

22. Competency—Subject of—Ownership—Landlord and Tenant—Dung.—A tenant was bound to consume on the farm the straw and fodder of the lands, and to lay the dung yearly on them, and leave all that was not consumed without recompense, except that of the last crop, which was to be paid for by valuation. *Held*, in a question with a poinding

creditor, that the dung belonged to the landlord, and that poinding was not a competent diligence to attach the claim for the value of the dung of the last crop. *Dun* v. *Johnstone*, 1818, Hume 451.

23. Competency—Subject of—Ownership—Landlord and Tenant—Sown Wheat—Decree of Removal.—A tenant in October sowed wheat, and on the 16th of January the landlord got decree of removal on an irritancy; and on the 21st a creditor of the tenant poinded the wheat. *Held* that the wheat belonged to the landlord, subject to a claim by the tenant for the value of the seed and labour; and that poinding was not a habile diligence to attach that claim. *Dun* v. *Johnstone*, 1818, Hume 451.

24. Competency—Subject of—Ownership—Partnership Property—Decree against Partner.—*Question*, whether it is competent on the decree against one partner to poind the effects of the partnership. *Dawson* v. *Cullen*, 1825, 4 S. 39.

25. Competency—Subject of—Ownership—Partnership Property—Collusion.—*Held*, in a question with a poinding creditor of a husband, that a contract of copartnery between his daughter, wife, and her father, to carry on the business of a tavern belonging to and formerly carried on by the husband, and an assignation by the father to the partners of an execution of poinding twenty years previously of the tavern effects, did not divest the husband so as to exclude a poinding of these effects for a debt due by him. *Breichan* v. *Muirhead*, 1810, Hume 215.

26. Competency—Subject of—Ownership—Possession.—A tenant got largely into arrear, and his landlord obtained a decree of declarator of irritancy and removing. On his removal, the landlord obtained possession of a thrashing-mill then on the farm, along with other effects, which had belonged to the tenant, and alleged that he retained these by agreement with the tenant, in satisfaction of the arrears. The landlord sold the mill to the succeeding tenant, who used it for five years without challenge, and repaired it at considerable expense; and thereafter a creditor of the first tenant poinded it. *Held* that the presumption of ownership in favour of the second tenant, not being removed by any proof or presumption adduced on the part of the poinder in favour of the first tenant, the poinder was not entitled to proceed with his diligence. *Sharpe* v. *Smyth*, 1832, 11 S. 38.

27. Competency—Subject of—Ownership—Possession—Furniture Assigned to Trustee but not Delivered.—A party granted a trust deed for behoof of creditors of his whole effects, including household furniture, but of which he retained possession. Having fallen into arrear of rent, his landlord sequestrated the furniture, and on payment by the trustee, assigned to him the sequestration. Thereafter the party contracted a new debt, for which the creditor poinded the furniture. Suspension and interdict by the trustee *refused*, in so far as the furniture was not protected by the right to the sequestration. *Gibson* v. *Wilson*, 1841 3 D. 974.

28. Competency—Subject of—Ownership—Reputed Ownership.—*Question*, whether a creditor, whose debt has been contracted before his debtor has got possession of moveables, can found on that possession a plea of reputed ownership, so as to warrant a poinding of them by him. *Scott* v. *Price*, 1837, 15 S. 916; 12 Fac. 854.

29. Competency—Subject of—Ownership—Sale.—*Question* as to whether poinded cattle were the property of the debtor, or of an alleged purchaser. *Taylor* v. *Jack*, 1821, 1 S. 133.

30. Competency—Subject of—Ownership—Sale—Delivery—Timber.—A proprietor sold growing timber on condition that, after being cut, it should not be removed till measured and the price paid; and part was measured and paid for, but another part, although removed by the buyer's servants to saw-pits in the plantation, was neither measured nor paid for, and the buyer abandoned all claim to it. *Held* that a poinding by a creditor of the buyer could not attach it, as it had not been so delivered as to become his property. *Anderson* v. *Ford*, 1844, 6 D. 1315; 16 J. 577.

31. Competency—Subject of—Ownership—Sale—Evidence.—Where a party craved interdict of a sale under a poinding, and produced written evidence of his having purchased the effects, and the poinder offered to prove that the purchase was fictitious, that the effects had never been out of the possession of his debtor, and remained his property, *held* competent to prove this by parole, without a reduction of the documents. *Cantach* v. *Fowler*, 1832, 10 S. 477.

32. Competency—Subject of—Ownership—Sale Prior to Poinding.—Circumstances in which a poinding of goods in a shop recently belonging to the debtor was held inept by the prior sale of them to a third party. *Walker* v. *Irvin & Co.*, 1841, 3 D. 985.

33. Competency—Subject of—Ownership—Security—Possession.—The owner of a mine granted a missive letter to his overseer, conveying to him the horses, hay, and profits of the works, with power to take possession in security of advances in money to be made by the overseer; but there was no ostensible change in the possession, nor in the relative position of the parties. *Held* that a creditor of the owner was entitled to poind the horses, etc. *Johnstone* v. *Sprott*, 1814, Hume 448.

34. Competency—Subjects Poindable—Bank Notes.—*Question* as to the competency of poinding bank notes. *Alexander* v. *M'Lay*, 1826, 4 S. 439.

35. Competency—Subjects Poindable—Growing Crop.—*Held* that poinding of a

growing crop, only brairded, and of clover grass, was ineffectual. *Elders* v. *Allen*, 1833, 11 S. 902.

36. Competency—Subjects Poindable—Plough Horses.—Plough horses cannot be poinded in the labouring season, when no search has been made for other goods. *Lord Advocate* v. *Forgans*, 1811, 16 F. C. App. No. 1.

37. Competency—Title—Married Woman—Concurrence of Husband.—A poinding at the instance of a married woman for a debt due to herself, *sustained*, her husband having subsequently concurred. *Borthwick* v. *Urquhart*, 1829, 7 S. 420.

38. Competency — Title — Assignee — Horning Raised in Name of A and Assigned to B.—Where horning is raised in name of one party and is assigned to another, the assignee cannot in virtue thereof execute a poinding in his own name. *Kyle* v. *Thomson*, 12 June 1813, F. C.

39. Competency — Warrant — Excise Statutes — Warrant of Justices under English Statutes.—*Held* in a question as to the relevancy of an indictment for deforcing officers of the law (1) that a poinding proceeding upon a warrant of justices of peace, acting under English statutes in excise matters, is illegal, the statutes directing the money to be recovered by distress. *Lord Advocate* v. *Forgan*, 1811, 16 F. C. App. No. 1.

40. Competition — Competition with Arrestment.—An arrestment of goods was preferred to a subsequent poinding of them, where the poinding was accomplished by the voluntary act of the debtor subsequent to the arrestment. *Observed*, that Ersk. III. 6, 21 must be read along with III. 6, 11. *Macdonald* v. *Hancock*, 1841, 3 D. 1128; 16 Fac. 1239.

41. Competition — Competition with Assignation.—An assignation of moveables, conform to inventory with possession, preferred to a poinding executed a few days after possession was taken. *Henry* v. *Robertson & Sym*, 1822, 1 S. 399.

42. Competition — Competition with Assignation — Symbolical Possession. — *Held* that mere symbolical possession of goods conveyed by a trust deed, and allowed to remain with the granter, did not confer a preferable right over a subsequent poinding. *Fraser* v. *Frisby*, 1830, 8 S. 982.

43. Competition — Competition with Landlord's Hypothec—Extent of Hypothec — Compensation. — A lease contained a stipulation that the landlord should take the hay of the last year at a valuation; and the tenant incurred arrears of rent for several years, and in the last year a creditor poinded the hay in stacks and part of the corn crop. *Held* (1) that the hypothec extended over the crop for the rent of the year only of which it was the produce; and (2) that the landlord was not entitled to set off the arrears against the value of the hay; but if claimed by him, he must pay the value to the poinder. *Stewart* v. *Rose*, 1816, Hume 229.

44. Competition — Competition with Poinding the Ground — When Poinding Completed.—A poinding is not completed nor the property transferred until the sale has taken place and a note lodged with the clerk; and poinding of the ground by an heritable creditor is preferable to the poinding of a personal creditor till so completed. *Tullis* v. *Whyte*, 18 June 1817, F. C.

45. Competition—Competition with Purchaser—Delivery—Intimation to Holder.—The owner of hides, which were in the hands of a tanner for the purpose of tanning, sold them to another; and while they were in the hands of the tanner, and before any intimation of the sale to him, a creditor of the seller poinded them. *Held* that he was preferable to the buyer. *Eadie* v. *M'Kinlay*, 7 Feb. 1815, F. C.

46. Execution — Sist of Diligence—Effect.—Although an interlocutor had been pronounced on a bill of suspension, "to see and answer within fourteen days, meantime sists execution, and to be intimated, but on caution only, and not otherwise," it is illegal to execute poinding within the days of the sist, though no caution has then been found. *Keltie* v. *Wilson*, 1830, 8 S. 527; see 7 S. 208.

47. Execution — Validity — Amount of Debt not Stated—Debtors Act, 1838, s. 25. —*Held* that a poinding was ineffectual where the execution did not specify the amount of the debt for which the diligence was used. *Sangster* v. *Burness*, 1857, 20 D. 355; 30 J. 300.

48. Execution—Validity—Conformity to Warrant—Taxes—Trade-Stent—Land Tax. —Under a warrant granted to recover arrears of land and assessed taxes, a sheriff officer poinded, and his execution bore that, having demanded payment of trade-stent or cess, he poinded, etc. *Held* that as trade-stent was part of the land tax, and land tax was known as cess, the execution was conform to the warrant to poind. *Renfrew* v. *Mags. of Glasgow*, 1861, 23 D. 505.

49. Execution — Validity — Omission by Messenger in Execution.—*Held* that it is not a nullity fatal to a poinding, that the messenger did not state in his execution that he had left a note of the appraised values with the debtor or custodiers. *M'Night* v. *Green*, 1835, 13 S. 342; 10 Fac. 179.

50. Execution — Validity — Schedule of Poinding—Pursuer not Named in—Small Debt Act, 1838, s. 20.—In a poinding on a small debt decree under the provisions of s. 20 of the Small Debt Act, 1838, 1 and 2 Vict. c. 41, it is not necessary to insert in the schedule of poinding the name of the party at whose instance the diligence is used. *Crombie* v. *M'Ewan*, 1861, 23 D. 333.

51. Execution — Validity — Valuation—Separate Articles Valued at Slump Sum.—

Held by the Lord Ordinary, and acquiesced in, that a poinding was inept as to certain trunks containing a variety of different articles, where the appraisement was of the trunk and its contents in a slump sum, without a valuation of the several articles. *M'Night* v. *Green*, 1835, 13 S. 342 ; 10 Fac. 179.

52. Form—Summary Form—Railway—Railway Constable's Wages—Act 8 and 9 Vict. c. 3, s. 3.—The Act 8 and 9 Vict. c. 3, s. 3, does not provide a summary form of poinding for the recovery of the wages of constables on railways. *North British Rly. Co.* v. *Horne*, 1847, 9 D. 550 ; 19 J. 230.

53. Failure to Execute — Return — Witnesses.—A return by an officer stating that he is unable to execute a poinding by reason of lockfast places is not an execution within the meaning of the Act, 1686, c. 4, and does not require to be signed by witnesses. *Scott* v. *Letham*, 1846, 5 Bell App. 126 ; 18 J. 421.

54. Interdict — Previous Application Judicially Abandoned — Assignation Unstamped. — A party alleging that certain effects poinded on a farm for the debt of the tenant belonged to him, applied to the sheriff for an interdict, which he afterwards judicially abandoned ; and thereafter, founding on an unstamped deed of assignation, presented a bill of suspension and interdict. The court *refused* the bill. *Kincaid* v. *Love*, 1835, 14 S. 188.

55. Jurisdiction—Magistrates of Burgh of Barony.—Magistrates of a burgh of barony, independent of the barony, are entitled to act under the Bankrupt Statute as "Judges Ordinary" in regard to the execution of poindings proceeding on letters of horning. *Scotts* v. *Oliver*, 1831, 10 S. 16 ; 7 Fac. 13.

56. Landlord and Tenant — Landlord's Hypothec.—Horses, cattle, and farm implements belonging to a tenant, having been poinded by a creditor in the month of April, and a public sale of them advertised, the landlord applied for interdict against the sale, on the ground that he had a hypothec over them for the half-year's rent due at the ensuing Whitsunday, and also for the rent of the current year due at Martinmas and Whitsunday following. The creditor having admitted the claim to the extent of the half-year's rent due at the ensuing Whitsunday, and offered payment of that amount, the court *refused* the note. *Hunter* v. *North of England Bank*, 1849, 12 D. 65.

57. Landlord and Tenant — Landlord's Hypothec — Ownership. — A creditor of a tenant who had succeeded to his mother's lease poinded the stock. The landlord, in a process of interdict of the sale under the poinding, averred that there were rents due by the mother not covered by his hypothec, and that the effects poinded were her property. *Held* that the landlord had no title to interrupt the poinding and was not entitled to a proof of his averments. *Thomson* v. *Christie*, 1858, 20 D. 1256.

58. On Small Debt Decree—Review of Proceedings in Poinding.—A mother and son presented a suspension and interdict of a poinding executed in virtue of a small debt decree against the son, on the grounds that the son was not the party mentioned in the small debt court decree. The court *held* it competent to review the legality of the proceedings in the poinding. *Learmont* v. *Darlington*, 1849, 11 D. 884 ; 21 J. 308.

59. Poinding of the Ground—Compensation.—Circumstances in which a plea of compensation was *repelled*, in a question as to poinding the ground. *Buchan* v. *Scott*, 1830, 8 S. 463.

60. Poinding of the Ground—Competency—Conclusion against Tenant—Rent—Compensation.—A poinding of the ground was brought by an heritable creditor of a sequestrated bankrupt against, *inter alios*, a party who was described as "the tenant or occupant, and in possession of the premises," but concluding against him for "the amount of the rents only which may be due and payable by him for his occupation and possession of the premises." *Held* that the conclusion, as qualified, was directed against him as "tenant"; and the party not being *qua* tenant due "rent"—whether he was due recompense or not—his goods were not attachable under that libel, it being held that "rent" does not comprehend compensation, or any other equivalent for occupancy, and which might be a source of revenue to the proprietor. *Brown* v. *Scott*, 1859, 22 D. 273 ; 32 J. 110.

61. Poinding of the Ground—Defence—Evidence—Recovery of Documents.—Where a party averred that a bond on which a summons of poinding the ground had been raised, had been granted without value, but did not offer to prove this *instanter* by writ or oath, diligence for the recovery of writings to establish this allegation *refused*. *Tweedie* v. *Beattie*, 1836, 14 S. 337 ; 11 Fac. 287.

62. Poinding of the Ground—Decree in Absence against Tenant—Right of Owner to Oppose.—It is not competent for the proprietor of the ground against which a poinding is led, to oppose decree passing in absence against the tenants. *Buchan* v. *Scott*, 1829, 7 S. 296.

63. Poinding of the Ground—Intimation to Tenant — Effect of — Future Rents. — *Held* that the citation of a tenant upon a summons of poinding the ground, at the instance of a creditor of his landlord holding a bond and disposition in security, is not equivalent to intimation of an assignation to the rents contained in the bond, so as to interpel the tenant from paying to the landlord future rents as they fall due. *Royal Bank* v. *Dixon*, 1868, 6 M. 995 ; 40 J. 569.

64. Poinding of the Ground—Intimation to Tenant — Effect of — Proof of Payment of Rent—Reference to Oath of Debtor in Bond.—Execution of a poinding of the ground is a legal intimation to the

tenant of the assignation of rents contained in an heritable security, and renders it incompetent for the tenant to prove, by reference to the oath of the proprietor, that rents due before the poinding had been paid. *Lang* v. *Hislop*, 1854, 16 D. 908; 26 J. 475.

65. Poinding of the Ground — Ground-Annual — Separate Lots — Apportionment of Burden. — The proprietor of building ground sold three lots under reservation of a certain ground-annual for each lot, but declared to be leviable from any part or portion of the ground sold; and the purchaser thereafter sold one of the lots to a third party, the titles to which only burdened that lot with its own ground-annual. *Held*, in a process of poinding the ground at the instance of the trustees of the original proprietor, that it was subject only to the burden of its own ground-annual, and that a poinding of the ground for the whole was invalid. *Thomson* v. *Scott*, 1828, 6 S. 526.

66. Poinding of the Ground—Ownership of Goods Poinded—Transfer—Sale under Levy Warrant for Excise Duties.—A sale under a levy warrant for excise duties does not *per se* divest the owner and transfer goods to the purchaser; and goods, after such a sale, remaining in the possession of the owner are liable to be attached by his heritable creditor in a poinding of the ground. *M'Arthur* v. *Brown*, 1858, 20 D. 1232; 30 J. 729.

67. Poinding of the Ground—Process—Record.—A decree pronounced in a process of poinding the ground, without making up a record. *Tweedie* v. *Beattie*, 1836, 14 S. 337; 11 Fac. 287.

68. Poinding of the Ground — Statute — Construction — Whether "Poinding" Includes Poinding of the Ground. — A poinding of the ground is not a "poinding" in the sense of the Bankrupt Act, 1814, or other enactments regulating poindings. *Bell* v. *Caddell*, 1831, 10 S. 100; 7 Fac. 93.

69. Poinding of the Ground—Title to Sue—Creditor on Real Burden.—A creditor under a real burden, constituted on lands by a resignation *ad remanentiam*, is entitled to pursue a poinding of the ground. *Wilson* v. *Fraser*, 1824, 2 Sh. App. 162. Affg. 1 S. 316; 13 Feb. 1822, F. C.

70. Poinding of the Ground—Title to Sue—Ground-Annual—General Assignation of Heritage — Assignation of Rents. — The creditor in a ground-annual granted a trust deed conveying his whole heritable estate to a trustee with an assignation to the rents. *Question*, whether the trustee had a title to pursue a poinding of the ground as being in right of the ground-annual. *Thomson* v. *Scott*, 1828, 6 S. 526.

71. Poinding of the Ground—Title to Sue—Heritable Bond—Disponee Uninfeft. —Although an assignee and disponee to an heritable bond, on which sasine has been taken, be not infeft, he is entitled to insist in a poinding of the ground. *Tweedie* v. *Beattie*, 1836, 14 S. 337; 11 Fac. 287.

72. Poinding of the Ground—Title to Sue —Prima facie Title.—An objection *repelled* to the execution of a poinding of the ground, that the defender's title, on which the pursuer's debt was a reserved burden, not being regularly made up, the poinding could not be sustained, the title being *prima facie* good. *Lady Anstruther* v. *Anstruther*, 1838, 16 S. 1132.

73. Poinding of the Ground—Title to Sue —Prima facie Title—Objection—Jurisdiction of Sheriff.—A party brought a poinding of the ground in the sheriff court, producing, as a step in his progress, a decree of declaratory adjudication of an heritable right in absence. *Held* that the sheriff, so long as the decree stood, was bound to regard it as free from objection; and therefore rightly repelled defences to the poinding, founded on objections to the decree of adjudication. *M. of Ailsa* v. *Jeffray*, 1859, 21 D. 492; 31 J. 265.

74. Poinding of the Ground—Title to Sue—Real Burden — Liferent and Fee—Service.—A legacy under a trust-disposition and settlement to a mother, "in liferent allenarly, and to her children in fee," was declared to be a real burden on an estate. On the death of the liferenter a poinding of the ground for the purpose of recovering the legacy was raised by her children, who expede a service to her as heirs of provision. It was pleaded in defence that they had no proper title, in respect there was no fee in the mother which could be taken up by service to her. *Held* that, irrespective of the service, they had a valid title to pursue. *Andrews* v. *Lawrie*, 1849, 12 D. 344; 22 J. 85.

75. Poinding of the Ground—Warrant to Poind—Extract of Sheriff's Decree.—An extract of a sheriff's decree of poinding of the ground is a sufficient warrant to poind, without letters under the signet, or a separate precept from the sheriff. *Kennedy* v. *Buick* (*Hannay's Tr.*), 1852, 14 D. 513; 24 J. 257; 1 Stuart 470.

76. Poor Rate — Suspension — Payment of Rate.—Suspension brought of warrant of poinding for failure to pay poors' assessment, on the ground that the assessment was illegally imposed. The court *passed* the note of suspension, but only on evidence of payment of the rate. *Watson* v. *Adams*, 1849, 11 D. 1263; 21 J. 502.

77. Powers of Sheriff—Interdict—Counter Claim. — In a poinding under letters of horning, the sheriff's powers are merely ministerial, and therefore he cannot interdict it on the ground of a counter claim. *Clark* v. *Clark*, 1824, 3 S. 143; 21 F. C. 518.

78. Powers of Sheriff—Interdict—Poinding in Virtue of Magistrates' Precept.—A sheriff may interdict the sale of goods under a poinding, executed in virtue of a precept by magistrates, but not reported to them when

the goods are claimed by a third party. *Steel* v. *Smith*, 1831, 9 S. 371; 6 Fac. 273.

79. Powers of Sheriff — Refusal of Warrant of Sale—Personal Bar.—A sheriff can refuse, on the ground of personal bar, a warrant of sale in a poinding, proceeding under letters from the Signet. *Mitchell* v. *Cuddie*, 14 June 1822, F. C.; 1 S. 496.

80. Reduction—Title to Sue—Ownership of Goods. — Effects were poinded, and a warrant of sale granted. A party against whom the diligence was not directed, but who alleged that the goods belonged to him, brought a reduction of the diligence. The court, in a question as to granting, before answer, a warrant for recovery of writs, *refused* to sustain an objection to his title to insist. *Brand* v. *Barbour*, 1823, 2 S. 566.

81. Sale — Conformity to Warrant — Publication to be Made six Days before Day of Sale — Computation of Days.— Warrant to sell under a poinding was granted, upon publication, for "at least six days before the day of sale." *Question*, whether this warrant was regularly executed, where the publication was completed on 31st July, and the sale took place on 6th August. *Miller* v. *Stewart*, 1835, 13 S. 483; 10 Fac. 287.

82. Sale — Notice — Publication — Computation of Days—Debtors Act, 1838, s. 26.—In computing the number of days during which notice must be given of a sale of poinded goods under the Debtors Act, 1838, s. 26, either the day of publication or the day of sale should be included; and therefore *held* that publication on the 10th November was sufficient compliance with an order to give notice eight days before the day of sale, which was on the 18th. *M'Neill* v. *M'Murchy & Co.*, 1841, 3 D. 554.

83. Sale — Publication — Irregularity — Bankrupt Act, 1814, s. 4.—The Bankrupt Act, 1814, s. 4, required publication of a sale under a poinding to be made not less than eight free days after the warrant to sell was granted. Warrant of sale was granted on 7th December. The sale was advertised on the 12th to take place on the 17th, and it was intimated to the debtor on the 14th. *Held* that the diligence was irregular. *Thom* v. *Stewart*, 1842, 5 D. 369; 15 J. 153.

84. Sale — Publication — Bankrupt Act, 1814, s. 4.—Under the provision of the Bankrupt Act, 1814, s. 4, that on a report of a poinding the sheriff "shall give directions for keeping the goods poinded in safe custody, and selling them by public roup after such publication, not shorter than eight free days, nor longer than twenty from and after the day when the order was given, and at such time and place as circumstances may require," *held* that the specification of time related to the publication, and not to the order of sale. *Carmichael* v. *Johnstone*, 10 Feb. 1821, F. C.

85. Sale—Warrant of Sale—Validity—Failure to Specify Place of Sale—Debtors Act, 1838, s. 26.—A warrant of sale of poinded effects *suspended*, on the ground that the warrant did not specify the place where the goods were to be sold. *M'Vicar* v. *Kerr*, 1857, 19 D. 948; 29 J. 437.

86. Sale—Warrant of Sale—Validity—Failure to Specify Hour of Sale.—*Question* whether, in a warrant of sale following on a poinding, it is necessary to fix the hour of sale. *M'Kinnon* v. *Hamilton*, 1866, 4 M. 852; 38 J. 445.

87. Sale—Warrant of Sale—Validity—Failure to Specify Date of Sale.—A warrant granted by a sheriff to sell poinded effects, without fixing a particular day for the sale, *held* illegal. *Kewly* v. *Andrew*, 1843, 5 D. 860; 15 J. 359.

88. Suspension and Interdict — Competency.—A bill of suspension and interdict presented by a party alleging that he was proprietor of, or at least had a lien over, furniture poinded for the debt of another, *refused*, as it was competent for him to apply to the sheriff. *Scotland* v. *Laurie*, 1828, 6 S. 961.

POLICE

Arrest, Damages for, see title *Arrest*.
Police Commissioners, see title *Burgh*.

1. Constabulary—Dismissal—Local Act.—A local police act (Glasgow) *held* not to exclude the power of the magistrates to dismiss peace officers, though holding the rank of lieutenants of police, and appointed by the statutory commissioners. *M'Kay* v. *Cogan*, 1834, 13 S. 164.

2. Superintendent of Police — Liability of Police Commissioners.—*Held* that the commissioners of police, under the police statutes, are liable to be sued for wrongous acts, alleged to have been done by the superintendent, although it be not alleged that the acts were done or ordered to be done by them. *Lawson* v. *Stewart*, 1839, 14 Fac. 507.

3. Superintendent of Police—Oppression — Damages. — Under the Edinburgh Police Act, 52 Geo. III. c. 172, s. 96, wilful corruption and oppression must be charged, and not merely illegal, unwarrantable, and oppressive procedure, to make an action of damages relevant against a superintendent of police. *Guthrie* v. *Brown*, 18 May 1821, F. C.; 1 S. 19.

4. Superintendent of Police—Oppression —Damages.—A local police act provided that no action should be commenced against any person "for anything done in the execution of this Act, in any case, unless wilful corruption, or oppression, or culpable negligence, out of which real injury has arisen, be charged." In an action of damages against the superintendent of police for apprehending a party and detaining him in custody for thiry-six hours without bringing him before a magistrate, contrary to the injunction of the statute, *held* that the pursuer must put in issue "wilful

oppression or culpable negligence, out of which real injury has arisen." *Barclay* v. *Barclay*, 1854, 16 D. 714; 26 J. 309.

5. Stolen Goods — Warrant to Search — Statutory Power. — *Held* that a warrant granted under the 10th section of the 17th Geo. III. c. 56, to search for manufactured goods suspected to have been purloined or embezzled, and apprehend the person in whose possession they might be found, was not competent—the statute giving this power only in regard to materials for manufacture. *Barnet* v. *Whyte*, 1849, 11 D. 666; 21 J. 190.

POOR

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1. Administration — Heritor's Title to Sue—Burghal and Landward Parish.—In an action at the instance of the landward heritors of a parish containing a royal burgh, to have it declared that the magistrates of the burgh were bound to maintain their own poor; or otherwise, in the event of failing in that conclusion, that the burden of maintaining the poor must be laid equally on the whole inhabitants in burgh and to landward, according to their substance, *held* that any heritor had a title to pursue, that it was sufficient to call as defenders the magistrates and council, and that it was not necessary to call the proprietors within burgh, or certain landward heritors who had disclaimed the action. *Duchess of Roxburgh* v. *Mags. of Dunbar*, 1831, 9 S. 669; 6 Fac. 432.

2. Administration—Kirk-Session—Title to Sue for Aliment.—A kirk-session has no title, without the concurrence of the mother, to pursue an action for aliment against the father of a bastard child, unless a claim for its support has been made against the parish. *Kirk-Session of Garvald* v. *Forrest*, 14 Feb. 1817, F. C.

3. Administration—Votes of Proprietors—Liability for Payment of Poor-Rate.—All proprietors of land and houses liable in payment of poor-rates are entitled to vote at meetings of heritors and kirk-session regarding the administration of the poor laws, though neither entered in the cess-roll nor in the books of the collector of cess as actually paying cess; and heritors may vote by proxy. *Robertson* v. *Murdoch*, 1830, 8 S. 587; 5 Fac. 459.

4. Board of Supervision—Summary Petition and Complaint.—*Held* that it is competent for the Board of Supervision to bring the proceedings of a parochial board under the review of the court by summary petition and complaint. *Board of Supervision of Poor* v. *Parochial Board of Glasgow*, 1850, 12 D. 627; 22 J. 228.

5. Church Collections — Quoad sacra Parish—Claims of the Old Parish.—*Held* that the ordinary collections at divine service at a new church built chiefly by subscription, in connection with the Church of Scotland, and to which a *quoad sacra* parish was annexed by the General Assembly, must be appropriated to the poor of the original civil parish, according to law, although a constitution had been sanctioned by the Assembly, by which those collections were to be applied otherwise; and the managers of the church interdicted at the instance of heritors from otherwise appropriating the collections. *Lord Panmure* v. *Sharpe*, 1839, 1 D. 840; 14 Fac. 913.

6. Church Collections—Special Subscriptions—Liability of Kirk-Session to Account.—A kirk-session, in addition to the usual plate at the church-door for the poor, allowed certain extra plates in the churchyard for contributions towards a litigation with the heritors, the object being always intimated from the pulpit, when the collection for this purpose was made, and the plates being distinguished from that of the poor. *Held* that the members of session who received these collections were not bound to account therefor to the poor's funds. *Speirs* v. *Fleming*, 1831, 9 S. 659; 6 Fac. 421.

7. Collector of Poor-Rates — Tenure — Emoluments.—A parochial board appointed a collector of poor-rates, to be remunerated by a percentage on his collection. At the date of his election, about £630 of the past year's assessment had not been collected. Six weeks after entering on his duties, the board laid on the assessment for the current year, and appointed another collector. *Held* (1) that a collector of poor-rates does not hold office *ad vitam aut culpam*; (2) that the collector first appointed was entitled to the emoluments of the office for collecting the assessment for the current year, and not merely a percentage on the arrears of last year's assessment; and (3) that, so far as necessary to give effect to these rights, reduction and suspension of the second appointment were proper and competent remedies. *Shaw* v. *Barony Parochial Board*, 1862, 24 D. 609; 34 J. 305.

8. Inspector of Poor—Appointment of Colleague.—*Held* that a parochial board having appointed an inspector of the poor, had no right thereafter to appoint a colleague to him as an additional inspector, between whom and the original inspector the outdoor and indoor labour was to be divided. *Observed*, that the proper course was to appoint assistant inspectors under the principal inspector, or to divide the parish into districts, with an inspector for each district. *Board of Supervision of Poor* v. *Parochial Board of Glasgow*, 1850, 12 D. 627; 22 J. 228.

9. Inspector of Poor—Audit of Accounts—Accounting to Parochial Board.—Audits of the accounts of an inspector of poor by committees of a parochial board for a series of years *held* to preclude the parochial board from obtaining from the inspector an accounting of new, but not to bar inquiry with regard to certain items of alleged errors specially condescended upon. *Muirhead* v. *Laing* (O. H.), 1867, 3 S. L. R. 211.

10. Medical Officer—Dismissal by Board of Supervision—Powers of Parochial Board.—The parochial board continued in office a medical officer who had been dismissed by the Board of Supervision until a court of law should decide that the Board of Supervision had a right to dismiss him. *Held* that this continuance of the medical man in office, after being dismissed by the Board of Supervision, was illegal and irregular, and an obstruction of the Act; and interdict *granted* against the parochial board acting on their minute continuing the medical man in office. *Board of Supervision* v. *Parish of Dull*, 1855, 17 D. 827; 27 J. 425.

11. Parochial Board—Banns, Proclamation of—Dues not under Poor Law Act.—*Held* that dues enacted for proclamation of marriage banns do not fall under the operation of the Poor Law Amendment Act, and that the kirk-session are not bound to account for them, or for any portion of them, to the parochial board. *Question*, whether the exaction of such dues is legal. *Kirk-Session of Crieff* v. *Inspector of Poor of Crieff*, 1854, 16 D. 511; 26 J. 235.

12. Parochial Board — Committee of Management—Access to Books of Board.—The parochial board of a large parish (which was composed of several thousand members) appointed a committee of management, by whom the whole affairs of the board were transacted. *Held* that this committee were not entitled to exclude the other members of the board from access to the books. *Wingate* v. *Barony Parish of Glasgow*, 1851, 13 D. 972; 23 J. 448.

13. Parochial Board—Committee—Power to Bind the Board.—In a reduction, at the instance of an inspector of poor, of an agreement entered into between three persons, therein designed as "three and a quorum of the house committee of the parochial board," and a person who had been appointed governor of the poorhouse, the presiding judge refused to direct the jury, at the request of the pursuer, "that unless they were satisfied that the three members of the board who signed the deed under reduction were a quorum of a meeting duly called of the house committee, and signed the agreement as a quorum of such a meeting, they had no authority to sign the agreement so as to bind the board." Exception against the refusal of the direction *disallowed*, upon the ground that the *onus* of satisfying the jury that the agreement had not been duly executed, lay upon the pursuer. *Beattie* v. *Mackay & Paterson*, 1863, 1 M. 279; 35 J. 180.

14. Parochial Board—Funds—Transfer of.—*Held* that funds derived from various sources, in some of which the kirk-session was interested exclusively, and in others jointly with the heritors, and which the kirk-session had in 1735 invested "for behoof of the poor of the parish," and administered for behoof of the general poor, fell to be transferred to the parochial board. *Flockhart* v. *Kirk-Session of Aberdour*, 1869, 8 M. 176; 42 J. 77.

15. Parochial Board—Title to Lands Held for Behoof of the Poor.—In 1726 the kirk-session of a parish bought a farm, taking the disposition in favour of the minister and elders, "for the use and behoof of the poor of said parish." In an action by the inspector of poor, concluding for declarator that at the date of the passing of the Poor Law Amendment Act, 1845, the lands were held by the kirk-session as trustees for the heritors and kirk-session, and that the right was now vested in the parochial board for behoof of the legal poor, *held* (1) that the terms of the disposition of 1726 did not show whether the lands were held for behoof of the general poor or of the legal poor; and (2) that the disposition had been explained by usage, which showed that the land had been possessed by the heritors and kirk-session jointly for behoof of the legal poor. *Inspector of Kinglassie* v. *Kirk-Session of Kinglassie*, 1867, 5 M. 869; 39 J. 484.

16. Parochial Board—Unqualified Person Acting as Member—Interdict.—*Held* that

an application for interdict is competent by a heritor and ratepayer in a parish to have a party who has not the statutory qualification prohibited from acting as a member of the parochial board; and that the party was liable in expenses. *Gilmour* v. *Craig*, 1852, 14 D. 521; 24 J. 261; 1 Stuart 482.

17. Quoad sacra Parish—Effect on Poor Law Liability.—An annexation of parishes *quoad sacra tantum* does not affect or transfer the previous civil rights and obligations of the respective parishes, with regard to the maintenance of the poor. *Thomson* v. *Pollock*, 17 Nov. 1808, F. C.

18. Relief—Admission to Poorhouse.—*Held* that an offer of admission into a combination poorhouse twenty-five miles away was a competent offer of relief to a pauper. *Watson* v. *Welsh*, 1853, 15 D. 448; 25 J. 267; 2 Stuart 260.

19. Relief—Admission to Poorhouse.—*Held* that the offer of admission to the poorhouse was a legal offer of relief. *Opinions*, that in all cases an offer of admission to the poorhouse of the parish is a legal tender of relief, and that the question of its adequacy in the circumstances of each case is one which must be brought in the first instance before the Board of Supervision. *Forsyth* v. *Nicholl*, 1867, 5 M. 293; 39 J. 129.

20. Relief—Admission to Poorhouse—Dependants of Able-Bodied—Onus of Proof.—Where the mother of a legitimate child, whose father is dead, is able to support herself, but not her child, claims relief for her child, an offer by the parochial board to receive both her and her child into the poorhouse is a sufficient tender of parochial relief, and she is not entitled to insist that the board shall take the child alone into the poorhouse. (2) Circumstances in which the onus of proving that a woman applying for parochial relief for her child is an able-bodied person, capable of supporting herself and her child, is laid upon the parochial board. *Held* not proved that a mother was able-bodied. *M'Kie or Mackay* v. *Baillie*, 1853, 15 D. 971; 2 Stuart 595. [See *Laing* v. *Fisher*, No. 28 *infra*.]

21. Relief—Admission to Poorhouse—Stat. 8 and 9 Vict. c. 83.—An aged and infirm woman, though she has a daughter residing with and taking care of her, *held* to be one of the class of persons for whom the 60th section of the Act 8 and 9 Vict. c. 83 authorises poorhouses to be provided. *Watson* v. *Welsh*, 1853, 15 D. 448; 25 J. 267; 2 Stuart 260.

22. Relief—Amount.—*Held* that 3s. 6d. a week awarded to a pauper for herself and seven children by the kirk-session was not sufficient as needful sustentation, and remit made to them to award such addition as might be reasonable. *Duncan* v. *Kirk-Session of Ceres*, 1843, 5 D. 552; 15 J. 287.

23. Relief—Amount—Lunatic.—Circumstances in which the rate of relief of a pauper lunatic was fixed at 8s. per week. *Beattie* v. *Kirkwood*, 1861, 23 D. 915; 33 J. 461.

24. Relief—Amount—Relief in Kind.—*Held* that £6 and ten carts of peats per annum, with a hut to live in, was not needful sustentation for two old pauper women (sisters), and a remit made to the kirk-session to award such further allowance as might be reasonable. *Halliday* v. *Kirk-Session of Balmaclellan*, 1844, 6 D. 1131; 16 J. 494. Thereafter *held* entitled to 3s. 6d. each per week, and not bound to accept an allowance of provisions, clothing, etc., instead of money. 1845, 7 D. 1057; 17 J. 540.

25. Relief — Condition — Separation of Mother and Children.—*Observed*, that where young children were resident in family with their mother in a different parish from that against which they had a claim of relief, the latter was not entitled, as a condition of affording relief, to remove them from her. *Inspector of Lochwinnoch* v. *Inspector of Glasgow*, 1851, 13 D. 1279; 23 J. 603.

26. Relief — Jurisdiction of Sheriff — Pauper Child.—The sheriff has jurisdiction over a kirk-session to ordain it to take a pauper child off the hands of a third party, with whom it had been left destitute by its parents. *Orr* v. *Kirk-Session of Glasford*, 9 July 1831, F. C.; 9 S. 928.

27. Relief—Object of Relief.—*Held* that a person who, though unable to work, was supported by his family without applying for or receiving parochial assistance, was not a "proper object of parochial relief" in terms of the 76th section of the Poor Law Act. *Parish of Coldingham* v. *Parish of Cockburnspath*, 1851, 13 D. 1057; 23 J. 490.

28. Relief—Object of Relief—Onus of Proving Incapacity.—There is no absolute rule that the onus of proving that a woman applying for relief for her child is capable of supporting herself and child, is laid upon the parochial board. *Laing* v. *Fisher*, 1857, 19 D. 749.

29. Relief — Object of Relief. — *Held* that a daughter, seventeen years of age, living in her father's house, and disabled by permanent disease, was a proper object of parochial relief, her father (a farm labourer) not being able-bodied, and being unable to afford his daughter the support which she required. *Knox* v. *Hewat*, 1870, 8 M. 397; 42 J. 184.

30. Relief—Object — Able-Bodied.—*Held* that an able-bodied man has no right to parochial relief for himself, although unable to find employment, and destitute of the means of subsistence. *Adams* v. *M'William*, 1852, 24 J. 391; 1 Stuart 668. Affg. 11 D. 719; 21 J. 253.

31. Relief — Object — Able-Bodied — Settlement—Interruption.—An able-bodied man out of employment received from the inspector of poor 8s. of funds of the parochial board, under a minute by the board, "for the sake of his family." *Held* that an able-

bodied man had no right to claim relief from the parochial board, and that the parochial board could not legally, under the Poor Law Amendment Act, grant such relief out of their proper funds: therefore that its receipt could not interrupt the continuity of an industrial residence. *Observed*, that in the sense of the Poor Law Act, able-bodied meant, under no disability, physical or mental, to work. *Petrie* v. *Meek, etc.*, 1859, 21 D. 614; 31 J. 334.

32. Relief — Object — Able-Bodied. — *Held* that as the Poor Law Act only authorises a parochial board to raise by assessment "the funds requisite for the relief of the poor persons entitled to relief," it is *ultra vires* of the board to expend any part thereof in relieving able-bodied poor, these not being entitled to demand relief. *Jack* v. *Isdale*, 1866, 4 M. (H. L.) 1; 38 J. 221; L. R. 1 Sc. Apps. 1.

33. Relief — Object — Able-Bodied Lunatic Wife.—An able-bodied man is not entitled to parochial relief either for himself or for his family, and the confinement of his wife as a pauper lunatic under the provisions of the Lunacy Act does not render him a pauper. *Palmer* v. *Russell*, 1871, 10 M. 185; 44 J. 110.

34. Relief — Object — Bastard. — A kirk-session is liable to the mother of a pauper bastard in aliment from its birth, where the father has absconded, but not for any fixed period. *Robert* v. *Fife*, 5 Feb. 1825, F. C.; 3 S. 500.

35. Relief — Object — Bastard. — The mother of a bastard child having failed to recover anything from the father, and being herself unable to support it, *held* that the parish was liable to her father, with whom she and her child resided, for the past aliment, and in future, so long as he should continue to support the child, and the parents should be unable to do so, and it should be entitled to parochial relief; and this though the father of the child had offered to take it, the mother having the absolute right of custody. *Weepers* v. *Kirk-Session of Kennoway*, 1844, 6 D. 1166; 16 J. 507.

36. Relief — Object — Bastard. — The grandmother of an illegitimate child, who, on the refusal of the kirk-session to support it, maintained it for some years, *held* entitled to relief from the kirk-session. *Lumsden* v. *Kirk-Session of Leslie*, 1846, 8 D. 1251; 18 J. 588.

37. Relief—Object—Dependants of Able-Bodied.—An able-bodied man has no right to relief for his pupil children. *Thomson* v. *Lindsay*, 1852, 24 J. 391; 1 Stuart 668. Affg. 11 D. 719; 21 J. 253.

38. Relief—Object—Dependants of Able-Bodied — Lunatic Dependants. — *Question*, whether an able-bodied man is entitled to demand parochial relief for a lunatic child. *Thomson* v. *Morris*, 1850, 12 D. 1266; 22 J. 598.

39. Relief—Object—Dependants of Able-Bodied—Deserted by Husband.—*Held* that an able-bodied woman deserted by her husband, an able-bodied man, and left destitute with three children under thirteen years of age, was entitled to parochial relief for herself and them. *Hay* v. *Doonan*, 1851, 13 D. 1223; 23 J. 577.

40. Relief—Object—Criminal—Liability for Maintenance in Jail.—Pauper criminals, under sentence of imprisonment, must be alimented by the burgh in which they are imprisoned. *Ramsay* v. *Officers of State*, 1 Mar. 1825, F. C.; 3 S. 597.

41. Relief — Object — Destitute Child.— Circumstances in which the heritors and kirk-session were held bound to have instantly taken charge of a child left destitute. *Orr* v. *Kirk-Session of Glassford*, 1831, 9 S. 928; 6 Fac. 623.

42. Relief — Object — "Industrious Poor."—The kirk-session of a parish having ordered a rate to be levied in a time of great scarcity, not merely for the support of the ordinary poor, but also of a class of persons termed the "industrious poor," and a tenant having refused payment of the rate so far as regarded the latter, a charge by the collector against him *found* orderly proceeded. *Pollock* v. *Darling*, 17 Jan. 1804, F. C.; M. 10591.

43. Relief—Object—Lunatic—Criminal—Liability for Maintenance. — A lunatic pauper brought for trial before the Court of Justiciary, having been found not to be fit for trial, and ordained to be kept in custody till further orders, *held*, in a question between the collector of rogue money for the county and the parish where he was apprehended, that the parish was primarily liable for the aliment, subsequent to the sentence, until the parish of settlement should be discovered. *Kirk-Session of Kilmorich* v. *Beith*, 1839, 1 D. 1231; 14 Fac. 1222.

44. Relief—Object—Lunatic—Criminal—Liability for Maintenance in Jail. — A pauper was tried for theft before the Court of Justiciary, and a verdict returned finding him guilty, but that he was insane at the time of committing the theft; and the court ordained him to be confined in the jail of the head burgh of the county where the crime was committed. *Held* (but *reversed*) that the burden of maintaining him in jail, and afterwards in a lunatic asylum, till liberated on a remission, falls on the Crown, and not on the county where the acts were perpetrated, nor the burgh of imprisonment, nor the parish of his settlement. *Commrs. of Supply of Wigtonshire* v. *Parishes of St. Quivox, etc.*, 21 Feb. 1823, F. C.; 2 S. 236. 1827, 5 S. 767; 2 Fac. 531. H. L. 1830, 4 W. & S. 43.

45. Relief — Lunatic — Jurisdiction of Sheriff.—The sheriff, in a petition for the commitment to safe custody of a dangerous lunatic, under the Act 20 and 21 Vict. c. 71, has no power (1) to find that the parish in which the lunatic was apprehended is liable *ad*

interim for his maintenance; or (2) to decern against the inspector of the poor of the parish for the expense of the apprehension and maintenance of the lunatic. *Beattie* v. *Gemmel*, 1861, 23 D. 386; 33 J. 191.

46. Relief — Lunatic — Liability — Father's Estate—Of Brother.—*Held* (1) that a father's natural obligation to support his lunatic son ceases at his death, and that his executor is not bound to set apart executry funds for that purpose beyond the legal share falling to the son at his father's death; and (2) that the eldest son was not bound to support the lunatic, although he had succeeded to heritage of the yearly value of £9, the lunatic having succeeded to his share of the moveables, amounting to upwards of £45. *Mackintosh* v. *Taylor*, 1868, 7 M. 67; 41 J. 41.

47. Relief — Lunatic — Liability—Parish of Settlement.—A lunatic possessed of a residential settlement in a parish, and erroneously supposed to be a pauper, was sent, under warrant of the sheriff, to a district asylum within the parish, where some years afterwards she became a pauper. *Held* that under the Lunatics Act, 1857, the parish of her settlement at the date of the order for her reception into the asylum, and not the parish of her birth, was liable for her maintenance. *Kirkwood* v. *Lennox*, 1869, 7 M. 1027; 41 J. 572.

48. Relief—Lunatic—Liability—Parish of Settlement—District Asylum.—*Held* (1) that the Lunatics Act, 1857, fixes the permanent burden of a pauper lunatic's maintenance on the parish of the lunatic's settlement at the date of seclusion in the district asylum, even in cases where the settlement is derivative, and is lost during the period of confinement; and (2) that this liability is not avoided when another asylum is by legal authority substituted for the district asylum. *Palmer* v. *Russell*, 1871, 10 M. 185; 44 J. 110.

49. Relief — Recovery from another Parish.—*Held* (1) that the parish of a pauper's residence, even where another parish is admittedly that of settlement, is bound to take entire charge of the pauper, and perform all the duties of inspection; (2) that the parish of residence, when distributing aliment furnished by the parish of settlement, is not entitled to make against that parish any separate charge for the expense of inspection. *Hay* v. *Melville*, 1858, 20 D. 480; 30 J. 259.

50. Relief — Recovery from another Parish—Inducing Pauper to Leave Parish —Stat. 8 and 9 Vict. c. 83, s. 70.—In an action for reimbursement of advances made to a pauper at the instance of the relieving parish, against two parishes where the pauper had previously received temporary relief, on the ground that these inspectors had induced the pauper to leave these parishes, and that they therefore continued liable under the 70th section of the Poor Law Amendment Act,—averments *held* not proved, and defenders assoilzied. *Taylor* v. *Strachan & Brown*, 1864, 3 M. 34; 37 J. 16.

51. Relief — Recovery from another Parish.—Where the parish of birth is the parish legally liable, it is not sufficient to relieve the parish affording temporary relief of the permanent burden that it bring into court two adjoining parishes, and prove that the pauper was born in either the one or the other parish; it must prove a case against one, otherwise both fall to be assoilzied. *Anderson* v. *Mackenzie & Jack*, 1864, 3 M. 253; 37 J. 125.

52. Relief — Recovery from another Parish—Decision of Inspector—Appeal.—A widow applied to the inspector of a parish (not that of settlement) for interim relief, as being destitute, which the inspector refused; and she, without appealing to the sheriff, applied to and obtained relief from the inspector of an adjoining parish. *Held* that the refusal of the inspector, not having been challenged, was final; and therefore that the adjoining parish had no claim of relief against the other parish. *Parish of Dalkeith* v. *Parish of Crichton*, 1850, 13 D. 335; 23 J. 151.

53. Relief — Recovery from another Parish—Error.—*Held* that a parish which had by mistake disbursed expenses incurred for a lunatic pauper by another parish was entitled to be relieved by the real parish of settlement. *Methven* v. *Arthur*, 1869, 7 M. 477; 41 J. 256.

54. Relief — Recovery from another Parish — Error — Lunatic. — A lunatic was sent to an asylum and maintained there by the parish of A. The parish of B, which was then supposed to be that of the lunatic's settlement, admitted liability and reimbursed A. It was afterwards ascertained that C was the parish of settlement, to which B then gave the statutory notice. *Held* that B, as the disbursing parish, was entitled to be relieved by C from the expenses incurred during the year preceding the statutory intimation. *Methven* v. *Arthur*, 1869, 7 M. 477; 41 J. 256.

55. Relief — Recovery from another Parish—Error.—*Held* that an admission of liability made by a parish on the faith of a statement which was erroneous in fact was not binding. *Innes* v. *Ironside*, 1868, 5 S. L. R. 582.

56. Relief — Recovery from another Parish—Error.—*Held* that a parish which had repaid advances on behalf of a pauper, believing that it was in law the parish of settlement, could not afterwards claim repetition, the error being error of law, not of fact, and not grounding a claim of repetition by the law of Scotland. *Bremner* v. *Taylor* (O. H.), 1866, 3 S. L. R. 24.

57. Relief — Recovery from another Parish—Expenses.—In an action raised by a parish, for relief of a pauper's aliment, against two other parishes, the only question in dispute was as to the liability of the defenders *inter se*. *Held* that the pursuer was not entitled to any expenses subsequent to the decision in the Outer House. *Allan* v. *Burton & Higgins*, 1868, 6 M. 358; 40 J. 188.

58. Relief — Recovery from another Parish—Expenses of Action.—An action was brought by a parish for relief of the expenses incurred in supporting a pauper, against three other parishes, one of which was found to be liable. Circumstances in which *held* that this last parish was not liable to relieve the parish pursuing the action of the expenses in which it had been found liable to the two other parishes, which had been called as defenders, and had been assoilzied. *Hay* v. *Jack & Others*, 1853, 15 D. 388; 25 J. 234; 2 Stuart 221.

59. Relief — Recovery from another Parish—Expenses of Investigating Claim.—*Held* that expense incurred after the date of notice, in investigating the pauper's claim, fell under s. 71 of the Poor Law Act, and might be recovered from the parish to which the pauper belonged, subject to taxation. *Hay* v. *Murdoch*, 1854, 16 D. 424; 26 J. 201.

60. Relief — Recovery from another Parish — Lunatic — Primary Liability of Parish of Settlement.—A person found insane in a parish, without means, in Scotland, was lodged by the inspector of poor in a lunatic asylum. In an action of relief brought by the inspector against the parish of the lunatic's settlement, the defence was that the lunatic had means in England. *Held* that, whether the lunatic had means in England or not, the pursuer was entitled to treat the lunatic as a pauper lunatic, and was entitled to relief from the parish of his settlement. *Dinwoodie* v. *Graham*, 1870, 8 M. 436; 42 J. 209.

61. Relief — Recovery from another Parish—Mora—Notice.—A claim against the parish of a pauper's settlement for repayment of sums expended in his support by another parish, *held* to be barred by *mora*, after seven years. *Opinion* that, to entitle a parish affording relief to recover from the parish of settlement, notice is requisite even where the relief afforded had commenced before the passing of the statute. *Hay* v. *Jack & Others*, 1853, 15 D. 388; 25 J. 234; 2 Stuart 221.

62. Relief — Recovery from another Parish—Mora.—A pauper had been supported by a parish for thirteen years, and no notice had been given to the parish of settlement. *Held* that the claim for repayment of her aliment was barred by *mora*. *Hay* v. *Knox*, 1850, 12 D. 1060; 22 J. 464.

63. Relief — Recovery from another Parish—Mora — Statutory Notice. — On 26th December 1851, notice was sent by Dundee to South Leith that a boy aged eight had become chargeable to Dundee. The particulars accompanying the notice stated that the boy's father, an Irishman, was in a weak state of health, unable to maintain his family, and unfit for removal, and that the boy was born in South Leith. The boy continued to receive relief till 1857. His father died in February 1852, but notice of this event was not made to South Leith. In January 1862 the boy again became chargeable to Dundee, and notice was duly sent to South Leith, who admitted liability for relief since January 1862. Various settlements of accounts had taken place between Dundee and South Leith from 1851 to 1862 in reference to other paupers, but no claim had been preferred for the advances made to this boy. *Held* (1) that the notice of 26th December 1851 was not notice of a claim against South Leith in terms of the statute, but mere notice of an impending claim, which that parish was entitled to disregard; (2) that the claim made for the advances prior to 1862 was barred by *mora*. *Jack* v. *Simpson*, 1864, 2 M. 1221; 36 J. 609.

64. Relief — Recovery from another Parish—Mora.—A parish having maintained a pauper for twenty-two years after having made a certain inquiry as to his residence, and having, at the expiry of that period, for the first time given notice to an adjoining parish, where the pauper had served an apprenticeship, of a claim for relief, *held* that acquiescence for so long a period barred such claim. *Scott* v. *Anderson*, 1854, 16 D. 1094; 26 J. 594.

65. Relief — Recovery from another Parish — Mora — Agreement Barring Recovery.—In an action for repayment of aliment to a pauper at the instance of the disbursing parish against the parish of the pauper's settlement, *held* (1) that the inspector of the parish of settlement having, in reply to inquiries respecting the pauper, written a letter to the pursuer, wherein he said—"You should either send her to the House of Refuge, or offer to take her into your workhouse, of course at our expense"—this amounted to a contract or agreement, which, being acted on by the pursuer, attached liability to the parish of settlement, apart from the statute, and which superseded the necessity of statutory notice; (2) that the claim was not affected by delay in making it, and that it was as much the duty of the parish of settlement to inquire whether the authority had been acted on, as of the other parish to intimate that it had been acted on. *Hay* v. *Simpson*, 1856, 19 D. 200; 29 J. 97.

66. Relief — Recovery from another Parish—Mora—Statutory Notice.—A parish which gave parochial relief to a deserted wife, gave in 1850 a statutory notice claiming relief from the parish of the husband's birth. Liability was denied, and thereafter the maintenance of the woman was undertaken by the parish of her birth, which in 1860 gave a statutory notice to the parish of the husband's birth. The parish which originally gave relief had repeated the notice in 1853. In 1862 the two relieving parishes raised an action claiming repayment of their advances from the parish of the husband's birth. The latter, besides defences on the merits, pleaded that the claims prior to the notice in 1860 were excluded by *mora*. Plea *sustained*. *Question*, whether a statutory notice given by one parish enures to another which takes up the claim, so as to bar a plea of want of notice from the second parish. *Lemon* v. *Cameron*, 1864, 2 M. 454; 36 J. 233.

67. Relief — Recovery from another Parish—Mora—Notice.—In an action raised in 1865 by one parish against another for relief of sums expended in the maintenance of a pauper from 1856 to 1863, statutory notice of claim having been sent in 1856, *held* that the action was not barred by *mora*. *Bremner* v. *Taylor* (O. H.), 1866, 3 S. L. R. 24.

68. Relief — Recovery from another Parish—Notice—Stat. 8 and 9 Vict. c. 83, s. 71.—The 71st section of the Poor Law Act allows a parish which has given relief to a pauper belonging to another parish, to claim repayment of sums so expended only after written notice to that parish. *Question*, whether this section applies to the case of relief given partly before and partly after the passing of this Act. *Hay* v. *Knox*, 1850, 12 D. 1060; 22 J. 464.

69. Relief — Recovery from another Parish—Notice—Stat. 8 and 9 Vict. c. 83, s. 71.—Notice of a pauper having become chargeable was given by the relieving parish to the parish of settlement, which denied liability. Afterwards the pauper ceased for about twenty months to require relief, but she was then again placed on the roll of the parish which had formerly relieved her. *Held* that at this second time she "became chargeable" in the sense of the 71st section of the Poor Law Act, and that consequently new notice to the parish of settlement was requisite to preserve recourse against it. *Beattie* v. *Wood*, 1866, 4 M. 427; 38 J. 198.

70. Relief — Recovery from another Parish—Suing two Parishes—Relevancy.—A relieving parish sued the parish of a pauper's birth, and a parish in which the birth parish alleged that a residential settlement had been acquired. The pursuer did not aver that there was a settlement in the alleged parish of residence, but only that it was so alleged by the birth parish. Objection to the relevancy of the summons on that ground *repelled*. *Adamson* v. *Knox & Beattie* (O. H.), 1867, 3 S. L. R. 288.

71. Relief — Recovery from Parochial Board—Mora.—A claim against a parochial board for repayment of relief afforded to a pauper lunatic, not having been intimated or insisted in for twenty-four years, *held* barred by *mora*. *Duncan's Trs.* v. *Gow*, 1861, 23 D. 420; 33 J. 213.

72. Relief—Recovery from Pauper—Adjudication by Kirk-Session.—Circumstances under which a kirk-session was found not entitled to adjudge a property for aliment alleged to have been given to the proprietor. *M'Lachlan* v. *Kirk-Session of Stevenston*, 1828, 6 S. 443; 3 Fac. 469.

73. Relief — Recovery from Pauper — Poor Relief a Charity — Pauper Acquiring Wealth.—Advances made to a pauper by the heritors and kirk-session, under the former Poor Law, and continued by the parochial board under the Poor Law Amendment Act, are of the nature of charitable donations; and an action for repetition thereof from a pauper who has succeeded to considerable means will not be sustained. *Henderson* v. *Alexander*, 1857, 29 J. 559.

74. Relief—Recovery from Relatives—Father of Illegitimate Daughter.—*Held* that the father of an infirm, adult, illegitimate daughter was bound to relieve the parish of the burden of her support. *Anderson* v. *Kirk-Session of Lauder*, 1848, 10 D. 960; 20 J. 332.

75. Relief—Recovery from Relatives—Children—Question of their Ability.—In an action of relief by a parish for aliment to parents, an inquiry into the ability of the sons to support their parents was ordered. *Kirk-Session of Ettrick* v. *Sword*, 14 Feb. 1824, F. C.; 2 S. 715.

76. Relief—Recovery from Relatives—Grandchildren—Offer of Home to Grandparent.—Only needful sustenance actually supplied by the parish can be recovered from relatives; and a grandson who offers his indigent grandmother a home and maintenance therein has discharged his obligation, and the inspector has no claim for relief of outlays after such offer. *Buie* v. *Steven*, 1863, 2 M. 208; 36 J. 103.

77. Relief—Recovery from Relatives—Grandfather—Physical Incapacity.—In a question with a kirk-session, *held* that a grandfather, aged, maimed in one hand, and making only about £5 a year, was not bound to aliment his grandchildren. *Wilson* v. *Kirk-Session of Cockpen*, 1825, 3 S. 546.

78. Relief—Recovery from Relatives—Maternal Grandfather.—A maternal grandfather of a pauper *held*, in a question with the kirk-session, not liable to aliment him. *Nicoll* v. *Kirk-Session of Dundee*, 1832, 10 S. 670; 7 Fac. 514.

79. Relief—Refusal to Receive Petition.—Circumstances in which a complaint against a session-clerk, for refusing to receive a petition for relief addressed to the "heritors and kirk-session" of a parish, was *dismissed*. *Anderson* v. *Muir*, 1834, 13 S. 108; 10 Fac. 78.

80. Relief — Refusal of — Petition. — An Irish widow applied to the inspector of a parochial board in Glasgow for relief for her two infant children, who had been born there. Relief was granted on two consecutive weeks, but an intimation was given on both occasions, that if the application was renewed she would be sent to Ireland. No relief was given on the third week, and on the fourth she presented a petition to the sheriff, on the ground that relief had been refused. *Held* that there was a constructive refusal of relief, and that the petition was competent. *Willock* v. *Rice*, 1848, 10 D. 1259; 20 J. 462.

81. Relief—Temporary Relief—Appeal—Board of Supervision — Jurisdiction of Sheriff.—*Held* that a pauper in receipt of casual relief, whether entered on the roll of paupers or not, is not entitled to apply to the

sheriff, under s. 73 of the Poor Law Act, on the footing of having been refused relief, but that the remedy is by way of appeal to the Board of Supervision, on the ground of the inadequacy of the relief. *Keith* v. *Inspector of Lanark*, 1866, 4 M. 1025 ; 38 J. 520.

82. Relief — Temporary — Computation of Time.—A pauper received at midday on 4th January parochial relief for the following fortnight. *Held*, in a question of computation of time between two parishes, that the fortnight included the day on which the relief was given, and ended at midnight of 17th January. *Cochrane* v. *Kyd*, 1871, 9 M. 836 ; 43 J. 457.

83. Relief — Temporary — Desertion by Husband — Ability of Relatives to Support. — The circumstance of a woman being deserted by her husband, having two infant children to support, and being assisted by private charity, does not make such a *prima facie* case as to entitle her to be placed on the permanent roll of paupers,—the heritors and kirk-session averring that she was able to maintain herself, and that her husband's father (who had taken two of her children) was in such circumstances as to support her and her other children. But she may be entitled to temporary aid, pending an action by her against her father-in-law to have him ordained to maintain the children. *Watson* v. *Kirk-Session of Ancrum*, 1828, 6 S. 736 ; 3 Fac. 792. 1829, 7 S. 495 ; 4 Fac. 647.

84. Relief—Temporary—Inducing Pauper to Leave Parish.—A pauper having applied for and obtained interim relief from a parish where she was residing at the time of her destitution, but which was not that of her settlement, the inspector induced her to remove to another, where also she had no settlement, by guaranteeing the rent of her lodging in it for a certain time. *Held* that he was not thereby freed from liability to afford her interim maintenance until the parish ultimately liable should be ascertained. *Parish of Galston* v. *Parish of Loudon*, 1851, 13 D. 1009 ; 23 J. 464.

85. Relief — Temporary — Removal of Pauper.—A pauper is not entitled to interim aliment after declining an offer of removal, free of expense, to a parish which has admitted liability. *MacIntosh* v. *Welch*, 1860, 22 D. 1423 ; 32 J. 649.

86. Removing Pauper to Parish of Settlement.—*Question*, whether the inspector of a parish, where a pauper has become chargeable, is entitled to remove the pauper by force to his parish of settlement. *Small or M'Intosh* v. *Welch*, 1860, 22 D. 1423 ; 32 J. 649.

87. Removing to England and Ireland.—The provisions for the removal of paupers to England and Ireland apply to such as have no settlement, although one acquired in Scotland may have been lost. *Beattie* v. *Wilson*, 1861, 23 D. 412 ; 33 J. 204.

88. Removing to Parish of Settlement.—*Held* that the parish of a pauper's settlement is not bound to remove him from the parish where he may be resident, but that the parish of residence is entitled to send the pauper to the parish of settlement at the expense of that parish, unless it enters into an arrangement for the pauper's maintenance satisfactory to the parish of residence. *Hay* v. *Melville*, 1858, 20 D. 480 ; 30 J. 259.

89. Settlement. — *Question*: What is the proper meaning of "settlement" according to the law of Scotland? *Hay* v. *Carse*, 1860, 22 D. 872 ; 32 J. 366.

90. Settlement — Alteration of Parish Boundary.—A stream which formed the boundary between two parishes was diverted from its course in 1800. Several years after the piece of ground situated between the old and new channel came to be regarded as forming part of the parish to which it did not originally belong, and to be assessed for poor-rates and other taxes accordingly. *Held*, in a question of settlement between the parishes, that the piece of ground still belonged to the original parish. *Knox* v. *Hewat*, 1870, 8 M. 397 ; 42 J. 184.

91. Settlement—Bastard—Residence of Mother.—A bastard child is to be maintained by the parish where the mother has been domiciled for three years previous to its birth, although she has resided there without any industrial occupation. *Kirk-Session of Rescobie* v. *Kirk-Session of Aberlemno*, 28 Nov. 1801, F. C. ; M. 10589.

92. Settlement—Bastard—Residence of Mother.—*Held* that the circumstance of a decree for aliment of a bastard child against the putative father was not sufficient to render the parish of his residence liable for the aliment of the child on his insolvency, and that the parish of the mother's residence was liable. *Kirk-Session of Edinburgh* v. *Brown*, 11 June 1806, F. C. ; M. "Poor" App. No. 5.

93. Settlement—Bastard—Residence of Mother.—A bastard child, whose father was not known, was born an idiot in Salton. The mother with the child resided more than three years in Preston, and on her death the idiot resided more than that period with her grandmother in Gladsmuir. *Held* that the parish of the mother's residence (Preston), and not that of the idiot's birth or residence, was liable for aliment. *Kirk-Session of Gladsmuir* v. *Preston & Salton*, 11 June 1806, F. C. ; M. "Poor" App. No. 6.

94. Settlement—Bastard—Settlement of Mother. — *Held* that the settlement of an illegitimate child was that of its mother ; that she never having acquired a settlement in her own right, her settlement was that of her father while she was in pupillarity, although not then residing with him. *Kirk-Session of Lasswade* v. *Kirk-Session of Newlands*, 1844, 6 D. 956 ; 16 J. 425.

95. Settlement — Bastard — Mother's Derivative Settlement—Birth.—The parish in which a woman has acquired a derivative

settlement through marriage, is not liable for the support of her bastard child born subsequent to her husband's death; but the liability for the child falls upon the parish in which it is born. *Hay* v. *Scott*, 1852, 15 D. 62; 25 J. 33; 2 Stuart 36.

96. Settlement — Bastard — Father's Parish. — Illegitimate children born to a married woman after her husband's transportation are not burdens upon his parish of birth. *Hay* v. *Oliphant*, 1856, 18 D. 508.

97. Settlement — Bastard — Mother's Derivative Settlement.—A woman who had an illegitimate pupil child, having acquired a new settlement in another parish through her marriage, *held* that that settlement enured to the child, although he continued to reside in the parish of his birth with his maternal grandfather, and did not reside with his mother. *Bremner* v. *Taylor* (O. H.), 1866, 3 S. L. R. 24.

98. Settlement—Birth.—Circumstances in which birth not *held* sufficient to impose the burden of maintaining a pauper on the parish. *Kirk-Session of Dalmellington* v. *Kirk-Sessions of Troqueer & Ruthwell*, 1822, 1 S. 259.

99. Settlement—Birth—Proof of.—*Held*, in a question as to the birth settlement of a pauper, that an entry in a parochial register, made in the handwriting of a session-clerk not appointed till twenty-one years after the date the entry bore, was sufficient evidence, in the special circumstances of the case, to establish the parish of his birth, being confirmed by the belief of the pauper himself, and by an independent statement by him that an entry had been made in the parish register when he was about thirty years old. *Hay* v. *Murdoch*, 1854, 16 D. 364; 26 J. 172.

100. Settlement — Birth — Residence during Pupillarity.—A daughter after her father's death resided with her mother in the parish of A during four years of pupillarity and the three following years. She then left her mother's house and removed to another parish, where she lived two years and became a pauper. *Held* that she had not a settlement in the parish of A, and that her own birth parish was liable. *M'Lennan* v. *Waite*, 1872, 10 M. 908; 44 J. 496.

101. Settlement—Birth—Loss of Derivative Settlement.—A pauper, born in 1841 in the parish of A, removed with his father's family in 1846 to the parish of B, where he lived in family with his father till the death of the latter in 1860. A few weeks after his father's death he enlisted, and remained abroad on military service till February 1872, when he returned to Scotland and became a proper object of parochial relief. *Held* that the parish of his birth was liable for his support, and not the parish of B, in which he had ceased to have a derivative settlement by emancipation at his father's death. *Ferrier* v. *Kennedy*, 1873, 11 M. 402; 45 J. 274.

102. Settlement—Birth.—A man who had no residential settlement died leaving a pupil son, who became a pauper when seventeen years of age, at which time he had not acquired a residential settlement. The parish in which he became chargeable convened in an action of relief the parish of the pauper's birth and the parish of his father's birth. *Held* that the parish of the pauper's birth was liable. *Craig* v. *Greig & Macdonald*, 1863, 1 M. 1172; 35 J. 670.

103. Settlement—Birth.—A pauper was born in the parish of A on the occasion of an accidental visit paid to the parish by his mother for the purpose of attending a market. At the date of the birth his parents had a settlement in the parish of B. In a question between these two parishes, *held* that the pauper's birth settlement was in A. *Craig* v. *Ross*, 1867, 39 J. 390; (O. H.) 4 S. L. R. 10.

104. Settlement—Birth—Loss of Settlement by Non-Residence.—A pauper was born in the parish of Bolton. When four years old he removed with his parents to the parish of Salton, where he remained till 1807, when, at the age of fifteen, he enlisted in the army, from which he was discharged in 1818. He had no permanent place of residence till June 1842, when he took up his abode in the parish of Greenlaw, where he resided, maintaining himself till April 1847, when he obtained parochial relief. *Held*, in an action by Greenlaw against Bolton and Salton (1) that as at the date of the passing of the Poor Law Amendment Act (August 1845) the pauper was not an object of parochial relief, his residence for three years in Greenlaw was insufficient to acquire a settlement there; and as he had become an object of parochial relief before he had acquired a settlement by five years' residence there, that parish was entitled to be relieved; (2) that the settlement acquired by the residence of his parents in the parish of Salton had been lost, by his not having for more than five years resided, at least one year continuously, in that parish; and (3) that Bolton, being the parish of birth, was liable for his support. *Hume* v. *Pringle*, 1849, 12 D. 411; 22 J. 121.

105. Settlement — Birth — Children Deserted by Father.—Where a father, who had no settlement by residence, and his settlement was that of the parish of his birth, had deserted his children, *held* that the liability to support the children attached to the parishes of their birth, and not to that of their father. *Parish of St. Cuthberts* v. *Parish of Jedburgh*, 1851, 13 D. 783; 23 J. 356.

106. Settlement—Child—Forisfamiliated —Parish of Father's Birth.—The fact that a forisfamiliated child has no settlement (either birth or residential) in Scotland does not preserve or revive the Scottish derivative settlement as a member of her father's family. *Walker* v. *Russell*, 1870, 8 M. 893; 42 J. 531.

107. Settlement — Parentage — Child — Pupil—Residence of Father—Relief Prevents Loss of Settlement.—The unemancipated pupil child of an able-bodied man, in

1856, became, in respect of the state of her health, a proper object of parochial relief in her own right, and was admitted into the poor-house of the parish of A., where she and her father resided. At the date of her admission her father had a residential settlement in the parish of B., which he lost in 1858 by non-residence. The relieving parish did not give the statutory notice to the parish of B. until 1860. *Held* (1) that the daughter, when first she obtained relief, had a settlement in her own right in the parish of B., in respect of her father's residential settlement; (2) that the relief given to her prevented her losing that settlement by the absence either of herself or her father from that parish; (3) that the neglect of the relieving parish to give the statutory notice did not affect the pauper's settlement. *Beattie* v. *Adamson*, 1866, 5 M. 47; 39 J. 36.

108. Settlement — Child — Parentage — Residence of Father—Loss of Settlement. —A father who died in April 1854, having a residential settlement in a parish which he had left in 1852, left a daughter, a minor, unforisfamiliated. The daughter, in 1857, became a pauper. *Held* that the residential settlement acquired for her by her father had not been retained, because neither he nor she had resided in that parish for a year continuously during the last five years, and that having lost that settlement, the parish liable was that of her own birth. *Allan* v. *Higgins*, 1864, 3 M. 309; 37 J. 149.

109. Settlement—Child—Parentage—Residence of Mother—Three Years' Limit.—A child was born, after the death of its father, in the parish of A., and was removed by its mother to that of B., where she had an industrial residence with the child for more than three years, and thereafter the latter had an industrial residence in that of C. for two years, eleven months, and fourteen days. *Held*, in a question as to liability to support it, that C. was not liable, in respect that there had not been a completed residence of three years; that B. was liable in respect of the residence of the mother; and that thereby A. was relieved. *Kirk-Session of Crieff* v. *Kirk-Session of Foulis-Wester, etc.*, 1842, 4 D. 1538.

110. Settlement — Child — Parentage — Foreign Father—Parish of Mother's Birth. —An Englishman married in Scotland and lived there for some time, but before he had acquired a settlement, he deserted his wife and child. After the lapse of nearly three years, the wife, for a few days before her death, was in receipt of parochial relief. *Held* that the child, a pupil, fell to be supported by the parish of its mother's birth. *Carmichael* v. *Adamson*, 1863, 1 M. 452; 35 J. 286.

111. Settlement — Child — Parentage — Foreign Father. — An Englishman married and died in Scotland without having acquired a settlement there. He left an able-bodied widow and children. *Held* that the parish of the widow's birth was liable in support of the children, and not the parish in which they themselves were born. *Gibson* v. *Murray*, 1854, 16 D. 926; 26 J. 489.

112. Settlement — Child — Parentage — Convict's Children. — A man who had no settlement but that of birth was transported. He left a wife and children. *Held* that the parish of the father's birth settlement was liable to maintain his children. *Adamson* v. *Barbour* (H. L.), 1853, 1 Macq. 376; 15 D. (H. L.) 46; 25 J. 419; 2 Stuart 86. See contra *Inspector of Lochwinnoch* v. *Inspector of Glasgow*, 1851, 13 D. 1279; 23 J. 603.

113. Settlement — Child — Parentage — Advances by Relatives — Recovery from Parish. — The father of a child was born, resided in, and was married in the parish of A., but the child was born in B., and, on the death of the mother and desertion of the father, was supported for several years by her relatives in C. *Held* that A. was liable to maintain the child; and that the relatives were entitled to be relieved of their advances from the time of applying to A., but not of those previously, as the latter was to be considered as made *ex pietate*. *Howie* v. *Kirk-Session of Arbroath, etc.*, 25 Jan. 1800, F. C.; M. "Poor" App. No. 1.

114. Settlement — Foundling — Parish where Found.—A child was exposed within a part of the parish of Govan, annexed *quoad sacra* to Gorbals. *Held* that the burden of supporting it fell on Govan. *Thomson* v. *Pollock*, 17 Nov. 1808, F. C.

115. Settlement — Hawker — Father's Birth Parish.—A woman of weak intellect, born in England, the daughter of a Scotsman, travelled about England and Scotland as a hawker without acquiring a residential settlement. She became insane and chargeable as a pauper in Scotland at the age of thirty-eight. *Held* that as she had not been precluded by mental weakness from self-support, she was not incapable of forisfamiliation and of acquiring a settlement for herself, and consequently that the parish where she became chargeable had no claim of relief against that of her father's birth, although she had no other settlement in Scotland. *Walker* v. *Russell*, 1870, 8 M. 893; 42 J. 531.

116. Settlement — Hawker — Loss of Settlement.—A man in 1845 had a residential settlement in Edinburgh. From that year until 1866 he resided during winter with his wife and children in lodging-houses in Edinburgh, making baskets, and during the summer and autumn months he and his whole family travelled about the country selling the baskets. He had never been absent from Edinburgh for more than six months at one time. *Held* that he had lost his residential settlement in Edinburgh. *Crosby* v. *Taylor & Greig*, 1869, 8 M. 39; 42 J. 9.

117. Settlement—Lunatic—Birth.—*Held* that the burden of supporting a pauper lunatic, whose father was alive, but had no settlement, except in the parish of his birth, fell upon the parish of the lunatic's birth, and not upon that

of his father's birth. *Thomson* v. *Morris*, 1850, 12 D. 1266; 22 J. 598.

118. Settlement — Lunatic — Parish where Found.—The parish in which a lunatic had been apprehended, *held* liable, in the first instance, in his maintenance in the bedlam of Edinburgh, where he had been sent by the sheriff on an application from the procurator-fiscal, although the pauper had not chiefly haunted that parish — power being reserved to the parish to maintain the lunatic at a cheaper rate, if kept in safe custody to the satisfaction of the sheriff. *Scott* v. *Thomson*, 13 Nov. 1818, F. C.

119. Settlement — Lunatic Wife. — A Scotswoman, the wife of an able-bodied Irish labourer who had long resided in Scotland, but without acquiring a settlement, became insane, and was, by the public authorities, put in confinement. *Held* that the parish where she was apprehended, and from which she was taken and sent, had no claim of relief against the parish of her birth settlement. *M'Crorie* v. *Cowan*, 1862, 24 D. 723; 34 J. 365.

120. Settlement — Lunatic — Parish of Father's Birth. — *Held* that the burden of supporting a pauper minor lunatic, whose lunacy had commenced during pupillarity, and whose father was alive, but had no settlement except in the parish of his birth, fell, not upon the parish of the lunatic's birth, but upon the parish of the father's birth. *Hay* v. *Paterson*, 1857, 19 D. 332; 29 J. 152.

121. Settlement — Lunatic cannot Acquire or Lose Settlement. — A native of Aberdour acquired an industrial settlement in the City parish of Glasgow. He then (1844) became insane, and was removed to the house of a brother in the parish of Burntisland, whence, after two years, he was removed to the lunatic asylum at Montrose, where his own funds supported him till June 1853. *Held* that, having acquired a settlement in the City parish of Glasgow, he had, ever since acquiring it, been equally incapable of losing that settlement and of acquiring a new one; therefore that that parish, and not the parish of birth, was liable in his future maintenance. *Melville* v. *Flockhart, etc.*, 1857, 20 D. 341; 30 J. 183. See also *Kirkwood* v. *Lennox*, 1869, 7 M. 1027; 41 J. 572.

122. Settlement — Lunatic — Residence. —A lunatic incapable of working or taking care of himself, but sent away and boarded by his friends in a distant parish, does not acquire a settlement in such parish. *Question*, whether, if by reason of infirmity of mind of one member of a family, the whole family went and lived for five years with him in a different parish, such residence would enable the lunatic to acquire a settlement in that parish. *Watt* v. *Hannah*, 1857, 20 D. 347; 30 J. 185.

123. Settlement — Lunatic — Unforisfamiliated Daughter — Residential Settlement of Father. — A young woman aged twenty-three, residing in her father's house, and entirely supported by him, became insane in 1853, and was removed to an asylum. Her father died in 1858, having a residential settlement in the parish of A., where he had resided for upwards of twenty years. In 1860 the daughter became a pauper. *Held* (1) that in 1853 she was, though above majority, unforisfamiliated; (2) that by her absence from the parish of A. from 1853 to 1858 in a lunatic asylum, she did not lose her settlement in A., derived through her father; (3) that therefore her settlement at his death, in 1858, was his residential settlement, which she had not lost when she became a pauper in 1860. *Fraser* v. *Robertson*, 1867, 5 M. 819; 39 J. 455.

124. Settlement—Lunatic—Residence of Mother—Absence from Parish.—A widow may acquire a residential settlement for an imbecile child living in family with her. (2) An absence of some weeks from a parish, spent in procuring furniture and making other arrangements for continuous residence in the parish, does not interrupt the continuity of residence. *Grant* v. *Reid & Miller*, 1860, 22 D. 1110; 32 J. 499.

125. Settlement—Lunatic—Parentage.—A parish affording relief to a congenital idiot, whose father, a Scotsman, was still alive, brought an action against the alleged birth parish of the father, and against the pauper's birth parish. The proof of the father's birth failed. *Held* that the parish of the pauper's own birth was not liable. *Hopkins* v. *Ironside & Wallace*, 1865, 3 M. 424; 37 J. 203.

126. Settlement — Lunatic — Married Woman—Loss of Settlement by Husband. —*Held* that the parish of settlement at the time of a pauper's confinement in an asylum is liable for her maintenance while she remains there, even though the settlement is derived from her husband and he loses his settlement during her detention there. *Palmer* v. *Russell*, 1871, 10 M. 185; 44 J. 110.

127. Settlement — Married Woman — Foreign Lunatic.—In 1861 a foreigner who had no settlement in Scotland became chargeable as a pauper lunatic in the parish of S., and was maintained in an asylum in that parish down to his death in 1866. In 1863 his wife became chargeable in the parish of G. *Held* that the former parish, not being the parish of the husband's settlement, was not bound to relieve the latter parish of the advances made to the wife. *Kirkwood* v. *Knox*, 1868, 40 J. 503.

128. Settlement — Married Woman — Proof of Marriage.—The inspector of B. sued the inspector of S. for advances made to a female pauper born in S. The parish of S. alleged that the pauper was married, and that her husband's settlement was in B. *Held* that as the marriage was not proved the parish of S. was liable. *Beattie* v. *Baird*, 1863, 1 M. 273; 35 J. 183.

129. Settlement — Married Woman — Parish of Husband's Birth.—A pauper died

leaving a widow. At the date of his death he had no settlement but that of birth. *Held* that the parish of the husband's, and not of the widow's, birth was liable in her support. *Hay* v. *Thomson*, 1854, 16 D. 994; 26 J. 541.

130. Settlement—Married Woman—No Separate Settlement.—*Opinion*, that *stante matrimonio* a married woman cannot have a settlement apart from her husband, whether he have one in Scotland or not. *M'Crorie* v. *Cowan*, 1862, 24 D. 723; 34 J. 365.

131. Settlement — Married Woman — Residence during Husband's Lifetime.—*Held* (1) that a wife's residence in a parish during the lifetime of her husband cannot be available in acquiring for her a residential settlement therein after his death; (2) that a husband's residence in a parish in which he never acquired a settlement is not available to his widow in acquiring a settlement by residence in that parish, either for herself or for pupil children of the marriage. *Kirkwood* v. *Wylie*, 1865, 3 M. 398; 37 J. 196.

132. Settlement — Married Woman — Widow—Loss of Derivative Settlement.—A widow who lost, by non-residence subsequent to the death of her husband, the residential settlement of her husband, before she acquired a new settlement, became a proper object of parochial relief. *Held* that the liability for her maintenance did not fall on the parish of her husband's birth, but on that of her own birth. *Hay* v. *Carse*, 1860, 22 D. 872; 32 J. 366.

133. Settlement — Married Woman — Desertion.—A married woman living apart from her husband cannot acquire a settlement in a parish by industrial residence, unless the separation has been caused by her husband's desertion. *Palmer* v. *Russell*, 1871, 10 M. 185; 44 J. 110.

134. Settlement — Married Woman — Desertion — Husband's Settlement Unknown.—A Scotswoman had been deserted by her husband, an Englishman, who had never acquired a settlement in Scotland, and whose residence in England was not known. *Held* that the parish of her maiden settlement was bound to support her. *Hay* v. *Skene*, 1850, 12 D. 1019; 22 J. 420.

135. Settlement — Married Woman — Desertion.—Although a husband desert his wife and go abroad, *held* that she cannot (until the dissolution of the marriage) acquire a settlement in any parish different from that where his settlement was at the time he left the country. *Gray* v. *Fowlie*, 1847, 9 D. 811; 19 J. 363.

136. Settlement — Married Woman — Desertion.—A Scotswoman, the wife of an Englishman, but deserted by her husband, cannot, during his life, obtain for herself and her children a settlement in a parish in Scotland, so as to entitle them to permanent aliment from the poor's funds. *Pennycuick* v. *Heritors of Duddingston*, 3 Mar. 1813, F. C.

137. Settlement — Married Woman — Desertion—Birth.—An Irishman residing in Scotland, where he had no settlement, deserted his wife, who was a Scotswoman, and went to reside in another part of Scotland, concealing his place of residence and contributing nothing to the support of his wife and family. The wife became insane, and she and the family were supported by the parish in which they were found. *Held* that the wife's birth parish was bound to relieve that parish of the sums expended, although the husband was able-bodied and resident in Scotland. *Johnston* v. *Wallace*, 1873, 11 M. 699; 45 J. 422.

138. Settlement—Married Woman—Remarriage—Settlement of Children by First Husband.—*Held* that, by her second marriage, a woman had lost the settlement of her first husband, and acquired that of her second husband, not only for herself, but also for the pupil children of her previous marriage, and that the parish of the second husband's settlement was the parish liable to support them. *Greig* v. *Adamson & Craig*, 1865, 3 M. 575; 37 J. 286.

139. Settlement — Married Woman — Remarriage.—*Held* that a woman by her second marriage entirely loses the settlement derived from her first husband, although the second husband has no settlement in this country, and that the derivative settlement being lost, and not merely suspended, does not revive on the dissolution of the second marriage. *Kirkwood* v. *Manson*, 1871, 9 M. 693; 43 J. 333.

140. Settlement—Married Woman—Remarriage — Children. — *Held* that a mother cannot acquire a settlement for her child by a former husband, by a joint industrial settlement with a second husband. *Dinwidie* v. *Knox*, 1849, J. Shaw 215.

141. Settlement—Disputed Settlement—Competence in Small Debt Court.—It is *ultra vires* of inspectors of the poor of various parishes, disputing as to a pauper's settlement, to agree to try the question in the small debt court of the county where one of the parishes is situated. *Crawford* v. *Beattie*, 1860, 22 D. 1064; 32 J. 488.

142. Settlement — Residence — Apprentice.—*Question*: Can a pupil apprentice acquire an industrial settlement? *Hay* v. *Scott*, 1852, 25 J. 33; 2 Stuart 36.

143. Settlement — Residence — Apprentice.—Three years' residence as an apprentice fixes a settlement. *Heritors of Cockburnspath*, 9 June 1809, F. C.

144. Settlement—Residence.—*Held*, in a question between a parish in which the father of a pauper had resided for more than three years, and a parish in which the pauper had taught dancing and lived in lodgings for four months yearly during about fourteen years, that the latter was liable to aliment the pauper, although he carried on his profession in other places during the above period.

Dalmellington v. *Irvine*, 3 Dec. 1800, F. C.; M. "Poor" App. No. 2.

145. Settlement — Residence — Continuity.—A man and his wife, who for nearly three years had rented a house in the City parish of Edinburgh, sold their furniture and went to Berwick, where they remained for about two months. They next lodged in the parish of St. Cuthberts, Edinburgh, for about six weeks, after which they returned to the City parish, where they lodged for about five months. They again left Edinburgh, and rented a house in Leith for two months. They then went to Linlithgow for about six weeks, and thereafter returned and rented a house in the City parish of Edinburgh for three years. *Held* that these absences broke the continuity of residence. *Hay* v. *Beattie & Hardie*, 1857, 20 D. 146; 30 J. 83.

146. Settlement — Residence — Continuity.—*Held* that two periods of absence—of some weeks at a time—during the currency, but neither at the commencement nor close of a period of five years, did not interrupt the continuity of residence, so as to prevent acquisition of a settlement. *Opinion*, that annual absences (from the parish where he had habitually resided and earned his subsistence) of several weeks spent in visits to a father in another parish would not have that effect. *Mackenzie* v. *Cameron*, 1858, 21 D. 93; 31 J. 66.

147. Settlement — Residence — Continuity.—*Held* that a tailor, who had worked in Edinburgh for upwards of five years, had acquired a settlement there, although during that time he was occasionally absent for short periods, and during part of the time had lodged beyond the boundary of the parish. *Inspector of Edinburgh* v. *Inspector of Torthorwald*, 1851, 13 D. 1313; 23 J. 608.

148. Settlement — Residence — Continuity.—A pauper resided in the parish of F. for above two years. He was then absent for a period variously stated at from three to eight months. He then returned to the parish for above three years, working as a collier; and during the whole period, including the period of absence, he had a collier's house in the parish. In an action by the parish in which he was relieved, against the parish of his birth, it was stated, in defence for both, that the pauper had acquired a settlement by residence in F. *Held* that it was not proved that the pauper had acquired a settlement in that parish, the nature of his occupation during his absence being left uncertain, and there being thus no proof of continuous residence. *Beattie* v. *Leighton & Mitchell*, 1863, 1 M. 434; 35 J. 260.

149. Settlement — Residence — Continuity—Casual Employment.—Circumstances in which *held* that it was not proved that a man of weak intellect had acquired a residential settlement in a parish where he had lived (with intervals elsewhere) partly by casual earnings and partly by charity. *Allan* v. *Burton & Higgins*, 1868, 6 M. 358; 40 J. 188.

150. Settlement — Residence — Continuity.—In 1863 a man went to reside in the parish of A. with his wife and family. In 1864 he worked for six months in another parish, frequently returning at night to his wife and family in the parish of A. In 1866 he was absent for ten weeks on an engagement in a parish eighteen miles distant, and only returned twice during that time. In 1868 he worked in a parish eight miles distant for six months, and only returned for the night once a week or once a fortnight. In 1869 he became a proper object of parochial relief. *Held* that he had acquired a residential settlement in the parish of A. *Milne* v. *Ramsay*, 1872, 10 M. 731; 44 J. 435.

151. Settlement — Residence — Continuity—Animus revertendi.—Absence from a parish for eleven months in the middle of a period of five years, *held* to prevent the acquisition of a residential settlement, although during the whole absence there had been a wish or hope to return. (2) Is an allegation of absence *animo revertendi* relevant in a question of disputed residential settlement? *Hutchison* v. *Fraser*, 1858, 20 D. 545; 30 J. 294.

152. Settlement — Residence — Continuity — Loss of Settlement. — *Held* that a person who had been for four years and four months absent from a parish in which he had acquired a settlement by residence, had lost his settlement in that parish. *Hay* v. *Morrine*, 1851, 13 D. 628; 23 J. 430.

153. Settlement — Residence — Continuity.—A man who had resided for nearly five years in Govan, left his family there, and went to England to seek work. He failed in getting work, and returned in six weeks to Govan. Meanwhile his family had received small sums of occasional relief. After his return he completed his five years' residence. *Held* that the residence had not been interrupted by the absence of six weeks. *Hamilton* v. *Kirkwood & Smith*, 1863, 2 M. 117; 36 J. 49.

154. Settlement — Residence — Continuity.—A lad earning his own livelihood resided in his father's house in Govan, the parish of his birth, till Whitsunday 1847. He thereafter continued to be employed and took his meals in Govan, but he slept in his father's house in the City parish of Glasgow till July 1852, with the exception of a period of between six weeks and three months in 1849, when, his father having left Glasgow in search of employment, he left his father's house and took lodgings in Govan, where he resided till his father's return to the City parish, after failing to obtain work elsewhere. *Held* that the residence in Govan in 1849 was of such a character as to interrupt his industrial residence in the City parish, and prevent the acquisition of a residential settlement; and that, on his becoming a proper object of parochial relief in 1852, the parish of his birth

was liable for his support. *Beattie* v. *Kirkwood*, 1861, 23 D. 915; 33 J. 461.

155. Settlement — Residence — Continuity — Absence on Military Service. — A soldier's absence on service for more than five years does not terminate a residential settlement previously acquired. *Question*: Is a settlement acquired before the passing of the Poor Law Amendment Act lost by absence from the parish, when it was acquired for five years before the passing of the Act? *Hay* v. *Croll & Beattie*, 1858, 20 D. 507; 30 J. 272.

156. Settlement—Residence—Continuity —Absence on Military Service—Deserted Wife.—A man who had a settlement in Edinburgh, enlisted in 1855, and immediately his regiment went on foreign service. His wife and family remained in Edinburgh. The wife continued to reside with the family in Edinburgh down to 1863, maintaining herself and them by her own industry. At that date the wife having become chargeable, the inspector of Edinburgh applied to the sheriff for warrant to remove her and a pupil child to Ireland, her native country. *Held* (1) that if the husband had enlisted with no intention of deserting his wife, his residential settlement in Edinburgh was still retained by him, and enured to her; (2) that if the husband had deserted his wife, she had acquired a residential settlement for herself and her pupil child, and therefore that neither she nor her pupil child was removable. *Masons* v. *Greig*, 1865, 3 M. 707; 37 J. 348.

157. Settlement—Residence—Continuity —Absence at Sea—Residence of Wife.—A sailor took a house in the parish of North Leith at Whitsunday 1858, and continued tenant thereof until Whitsunday 1863. During that period he was absent on voyages for more than half the whole time, one voyage lasting nearly two years, and in no instance did he live continuously in the house for more than ten months. His wife lived in the house during the whole period. *Held* that he had "resided for five years continuously" in that house, and had therefore acquired a settlement in North Leith. *Greig* v. *Miles & Simpson*, 1867, 5 M. 1132; 39 J. 617.

158. Settlement—Residence—Continuity — Absence in England. — Residence of a pauper for three years in a parish in England, which does not, by the English law, entitle to a settlement, *held* not to liberate a parish in Scotland from alimenting him. *Brown* v. *Kirk-Session of Mordington*, 4 Mar. 1806, F. C.; M. "Poor" App. No. 4.

159. Settlement — Residence — Continuity—Continued Residence of Wife and Children.—*Held* (1) that personal residence is necessary for the acquisition of a settlement by residence, and that a householder cannot maintain the continuity of his residence by the residence of his wife and children; and (2) that absences under contracts of service which render residence in other parishes for several months at a time imperative, interrupt the continuity of residence. *Inspector of Kelton* v. *Inspector of Tongland*, 1866, 4 M. 1033; 38 J. 525.

160. Settlement — Residence — Continuity—Continued Residence by Widow.— A party resided with his wife and children for four years in the parish of A. He then went into service in the parish of B., where he resided for ten months, and then died. His wife and family resided throughout that period in the parish of A., and he frequently visited them. *Held* that his residence for these ten months was in the parish of B. After his death, his wife and family continued to reside in the parish of A. *Question* whether, supposing his residence to have been in A. at the date of his death (in which case he would have resided four years and ten months in that parish), the subsequent residence of his wife and family could be added to his residence, so as to confer on her a residential settlement within five years after her husband's residence in the parish of A. had commenced. *M'Gregor* v. *Watson*, 1860, 22 D. 965; 32 J. 410.

161. Settlement — Residence — Continuity — Imprisonment. — *Held* that an industrial residence might be acquired, although during six months of the period of five years the party was absent from the parish, having been imprisoned for breach of the peace, and then handed over to his regiment as a deserter. *Roger* v. *Maconochie*, 1854, 16 D. 1005; 26 J. 549.

162. Settlement — Residence — Continuity—Lunatic.—After having resided in a parish with his wife and family for five years, less four months, a party was removed to a lunatic asylum. He was incurable. His friends paid the first three months' board. In a question as to the subsequent board, between the parishes of alleged residence and of birth, *held* that the parish of birth was liable. *Observed*, that where the question is, whether a residential settlement has been acquired, the first requisite is to have a complete period of five years, without deficiency either at the beginning or the end; that constructive residence is not enough; that where absences during the currency of such a period are not held to interrupt continuity of residence, they must be merely incidental to the residence; and that absence during the concluding four months in a lunatic asylum, where not followed by recovery, cannot be so regarded. *Aberdeen Infirmary* v. *Watt*, *etc.*, 1858, 21 D. 117; 31 J. 91.

163. Settlement — Residence — Continuity—Lunatic—Loss of Settlement. — A party who had acquired a settlement in a parish by industrial residence, thereafter was absent from that parish for four years, during one year and ten months of which he had been maintained in a lunatic asylum at the expense of his friends. *Held* that he had not retained his residential settlement. *Crawford & Petrie* v. *Beattie*, 1862, 24 D. 357; 34 J. 180.

164. Settlement—Residence—Continuity —Lunacy.—A party of full age resided with

his father in a parish for five years, with the exception of two periods, one about six months, the other about three months, during which he was boarded by his father in lunatic asylums not in the parish. *Held* that these interruptions of the continuity of residence did not prevent the acquisition of a settlement. *Greig* v. *Chisholm*, 1857, 20 D. 339; 30 J. 189.

165. Settlement—Residence—Continuity — Lunacy.—*Held* that the continuity of a person's industrial residence in a parish had not been interrupted by his having been confined in prison for a few days as a dangerous lunatic, under warrant of the sheriff, and treated under the Lunacy Act as a pauper lunatic. *Inspector of Row* v. *Inspectors of Strath and Kiltearn*, 1866, 4 M. 1037; 38 J. 530.

166. Settlement — Residence — Continuity—Lunacy.—A party subject to mental derangement, but not such as to prevent her from working, although not continually, *held* to have acquired a settlement by residence. *Heritors & Kirk-Session of Haddington* v. *Dunbar*, 1837, 16 S. 268.

167. Settlement — Residence — Continuity—Onus of Proof.—*Held* that the onus lay upon the parish of a pauper's birth, in proving his residence for five years in another parish, of showing that an absence of six weeks from the parish was of such a nature as not to destroy the continuity of his residence. *Allan* v. *Burton & Higgins*, 1868, 6 M. 358; 40 J. 188.

168. Settlement — Residence — Continuity—Onus.—*Held* (1) that where a man has for many years previous to becoming a pauper earned his entire subsistence in a parish other than the parish of birth, though occasionally absent for weeks or even months at a time, in a question between the two parishes, the presumption was that he was continuously resident; and (2) that the onus of showing where he was during occasional absences did not lie on the parish of birth. *Mackenzie* v. *Cameron*, 1858, 21 D. 93; 31 J. 66.

169. Settlement—Residence—Dependent on Father.—Where a party left his father's house to go into service, and, after being so engaged for eight months, returned to his father, permanently disabled by paralysis, and resided for more than five years in the parish, *held* that it was not an objection to his settlement in that parish, that he had not maintained himself during that period, but had been supported by his father. *Parish of St. Cuthberts* v. *Parishes of Peebles and Stobo*, 1851, 13 D. 683; 23 J. 304.

170. Settlement — Residence — Deserted Wife—Foreign Husband.—A woman, after having resided for three years in a parish, married a foreigner, and continued to reside with him in the same parish for two years more. Her husband, who had not acquired any settlement in Scotland, having deserted her, *held* that she was entitled to add to the three years' residence in the parish before her marriage, her subsequent two years' residence during the marriage, so as to make the five years requisite for a settlement, and that the marriage did not prevent her doing so. *Thomson* v. *Knox*, 1850, 12 D. 1112; 22 J. 513.

171. Settlement—Residence—Fisherman —Periodical Absences.—A fisherman resided for five years with his family in the parish of A., except during the fishing seasons, when he went, for the purpose of fishing to reside in the parish of B. for some months in each year. His family resided continuously for the five years in a house rented by him in the parish of A. *Held* that he had acquired a residential settlement in A. by five years' "continuous residence." *Moncrieff* v. *Ross*, 1869, 7 M. 331; 41 J. 196.

172. Settlement—Residence—Foreigner. —A foreigner may acquire a settlement by residence, so as to entitle him to parochial relief. *Higgins* v. *Kirk-Session of the Barony Parish, Glasgow*, 9 July 1824, F. C.; 3 S. 239.

173. Settlement — Residence — Lunatic —Deserted Family.—A man who had acquired a residential settlement deserted his wife and family. They still remained in the parish, but not in the same house as the husband had occupied; and after he had been more than four years absent, parochial aid was applied for and furnished to his lunatic daughter. *Held* (1) that the man's residential settlement was not continued by the residence in the parish of his wife and family; (2) that the parish of his birth settlement was liable. *Keay* v. *Stewart*, 1858, 21 D. 89; 31 J. 68.

174. Settlement — Residence — Receipt of Charity.—*Held* that a blind pauper, who had not applied for parochial relief nor had recourse to common begging, was not incapacitated from acquiring a new residential settlement, and losing her original one, having been supported mainly by charitable contributions of benevolent persons, and by aid from a charitable society. *Hay* v. *Ferguson*, 1852, 14 D. 352; 24 J. 155; 1 Stuart 255.

175. Settlement—Residence—Receipt of Charity.—In a question, whether a pauper had acquired a settlement in a parish by residence there for three years, *held* (1) that the residence had not been interrupted by the applicant having entered into an engagement of service for six months in another parish, but which was broken off within six weeks, when she returned to the former parish; and (2) that although during her residence she had been supported partly by charity and partly by her earnings, yet as she made no application to the parish, she was not a pauper during that period, and was therefore not barred from acquiring a settlement by residence. *Parish of Edinburgh* v. *Parish of Dingwall*, 1851, 13 D. 1057; 23 J. 490.

176. Settlement—Residence—Receipt of Relief—Voluntary Separation of Spouses.—An able-bodied man may acquire a settlement by five years' residence in a parish, though his

wife has, during the whole period of his residence, been in receipt of relief from another parish, in which she has been living in voluntary separation from her husband. *Innes* v. *Ironside*, 1868, 40 J. 631 ; 5 S. L. R. 582.

177. Settlement—Residence—Receipt of Relief. — *Held* that the receipt of 4s. 6d. of relief did not prevent the acquisition of a settlement by five years' residence. *Hay* v. *Scott*, 1852, 25 J. 33 ; 2 Stuart 36.

178. Settlement—Residence—Receipt of Relief.—*Held* that parochial relief given to a party not a proper object of relief had not the effect of preventing his acquiring a residential settlement. *Question*, whether relief given by an inspector within a few days of the completion of a five years' residence, without any inquiry, and without complying with the forms issued by the Board of Supervision, could amount to statutory relief. *Porteous* v. *Blair*, 1856, 19 D. 181 ; 29 J. 83.

179. Settlement—Residence—Receipt of Relief.—Receipt of relief administered *bona fide* for two months during a residence of five years, prevents the acquisition of a residential settlement. *Johnston* v. *Black*, 1859, 21 D. 1293 ; 31 J. 675.

180. Settlement—Residence—Receipt of Relief—Temporary Relief.—*Held* that certain sums amounting to 11s. given by an inspector of poor as "temporary aid" to a party in sickness, without any application on his part for relief, and while he was in receipt of 3s. a week from a destitute sick society of which the inspector was visitor, had not been given unnecessarily or unwarrantably, and were sufficient to interrupt the acquisition of a settlement. *Simpson* v. *Allan*, 1859, 21 D. 1363 ; 31 J. 744.

181. Settlement—Residence—Receipt of Relief—"Proper Object of Relief."—A parochial board, on an application on behalf of a man labouring under the disease of which he died in February 1849, afforded him pecuniary relief during February and March 1848. *Held* that at the time relief was afforded, the pauper, though in bad health, was able to earn wages, and was not therefore such a "proper object of parochial relief" as to render the relief afforded sufficient to bar the acquisition of a residential settlement. *Jack* v. *Thom*, 1860, 23 D. 173 ; 33 J. 79.

182. Settlement—Residence—Receipt of Relief — Admission to Roll — Temporary Relief.—Admission to the roll is the test of pauperism in a question of retention of residential settlement, and the court will not go into allegations by the parish of birth that the pauper ought to have been admitted to the roll as a proper object of parochial relief at an earlier period, and before a residential settlement had been lost by absence. Nor will the receipt of a few shillings of temporary aid prevent the loss of a residential settlement by absence. *Turnbull* v. *Kemp*, *etc.*, 1858, 20 D. 703 ; 30 J. 370.

183. Settlement — Residence — Relief to Deserted Wife.—*Held* (1) that a husband had acquired a settlement in a parish by five years' industrial residence therein, although during part of that time his wife, who had been deserted by him, had been receiving parochial relief from another parish ; and (2) that the parish in which the husband had acquired a residential settlement was liable to reimburse the parish for advances subsequently made to his wife. *Wallace* v. *Turnbull*, 1872, 10 M. 675 ; 44 J. 373.

184. Settlement—Residence — Sailor in Port.—A sailor does not acquire a residential settlement in the parish of the port from which his vessel sails, by lodging there for short periods while he happens to be in port. *Aberdeen Infirmary* v. *Watt*, *etc.*, 1858, 21 D. 117 ; 31 J. 91.

185. Settlement — Residence Prior to Poor Law Act—Birth Settlement.—A husband died in 1844, having a residential settlement in the Burgh parish of Paisley. His widow soon after removed to England, and did not return to Scotland till 1848, when she became chargeable to the Abbey parish. She never had acquired any other settlement than what had accrued to her by her marriage, and her husband never had been an object of parochial relief. *Held* that the residential settlement in the Burgh parish, which her husband had acquired under the old law, and possessed at his death in December 1844, had been lost to the widow by s. 76 of the Poor Law Amendment Act, as it would have been to her husband had he survived the passing of that statute ; but that, in discharging residential settlements, under five years, the statute replaced them by birth settlements, and therefore claim by the Abbey parish *sustained* against the parish of the husband's birth for maintenance of his widow. *Robertson* v. *Stewart*, 1854, 17 D. 169 ; 27 J. 58.

186. Settlement — Residence Prior to Poor Law Act.—*Held* that residence for three years in a parish anterior to the passing of the Poor Law Act is not sufficient to give a pauper a settlement there, unless he had also become a proper object of parochial relief before that date. *Thomson* v. *Knox*, 1850, 12 D. 1112 ; 22 J. 513.

187. Settlement — Residence Prior to Poor Law Act—Act 8 and 9 Vict. c. 83, s. 76.—The 76th section of the Poor Law Act contains a proviso that nothing therein contained "shall be held to affect those persons who, previous to the passing of this Act, shall have acquired a settlement by virtue of a residence of three years, and shall have become proper objects of parochial relief." At the passing of the Act, in 1845, a pauper had a three years' residential settlement in, and was in receipt of parochial relief from, South Leith. She continued to receive relief till August 1860. Between August 1860 and October 1863 she resided in the City parish of Edinburgh, supporting herself, but in October 1863 again became chargeable. *Held* that the proviso had not the effect of making her three years' residence in Edinburgh sufficient to give her a

settlement there, and that South Leith was still her parish of settlement. *Simpson* v. *Greig*, 1865, 3 M. 1075; 37 J. 566.

188. Settlement — Residence Prior to Poor Law Act — Act 8 and 9 Vict. c. 83, s. 76.—*Held* that the proviso in the 76th section of the Poor Law Amendment Act, as to the statute not affecting settlements acquired by three years' residence, applies only to the case where the pauper has been a proper object of parochial relief at the date of the passing of the Act, and that it is not sufficient that he had been so some time previous to that date, if he ceased to be a pauper at the date of passing. *Thomson* v. *Walker & Blacklock*, 1853, 16 D. 66; 26 J. 41.

189. Settlement — Residence Prior to Poor Law Act—Effect—Bastard—Mother's Residence.—A person acquired a settlement in the parish of St. Cuthberts by his residence within it for five years prior to Whitsunday 1841. He died a pauper in December 1845. During the intervening period he did not reside within the parish of St. Cuthberts; but from February until September 1844, relief was afforded him by the City parish of Edinburgh. It was then suspended, because of some doubt as to his residence, but his name was retained in the register; and at the time of his death, he, as well as his wife and family, were again in receipt of parochial relief. During the interval, in August 1845, the Poor Law Amendment Act was passed. *Held* (1) that the pauper must be held to have been a proper object of relief at the passing of the Act; (2) that the provision in the 76th section of the Act, excluding its application to the case of persons who had acquired a three years' residential settlement, and were proper objects of parochial relief at the passing of the Act, applied; therefore (3) that under the old law the pauper still retained his residential settlement in the parish of St. Cuthberts; and (4) that it also accrued to his widow and children. *Held* also that the settlement of an illegitimate child is the settlement of the mother, in whatever way she shall have acquired it; and therefore that the widow of the pauper in the above case having had an illegitimate child, that child was chargeable on St. Cuthberts, the widow's settlement, through her husband's residential settlement there. *Hay* v. *Thomson, etc.*, 1856, 18 D. 510; 28 J. 191.

190. Settlement — Residence Prior to Poor Law Act — Three Years.—A person who had acquired a settlement by industrial residence, removed to a neighbouring parish, where he supported himself and his family for three years. He became an object of parochial relief before the passing of the Poor Law Amendment Act. *Held* that he had acquired a settlement in the parish of his last residence, and that that parish had no claim of relief against the parish of his former settlement. *Webster* v. *Mackenzie*, 1853, 15 D. 399; 25 J. 239; 2 Stuart 232.

191. Settlement — Residence Prior to Poor Law Act — Three Years — Loss of Settlement. — *Held* (1) that a person who came to reside in a parish at Whitsunday 1837, having for a period of upwards of three years after February 1840 received parochial relief, did not, under the old law, acquire an industrial settlement in the parish, although the periods of industrial residence before and after he had received relief (prior to the date of the Poor Law Amendment Act), taken together, amounted to more than three years; (2) and that a parish in which, previous to 1837, he had acquired a residential settlement was liable in the expense of supporting him during a subsequent period from February 1840 to July 1843, when he required parochial relief; but *held* (3) that the latter parish was not liable for the relief given to the pauper in 1846, he having by that time lost his settlement in that parish by absence for five years. *Hay* v. *Scott*, 1852, 15 D. 62; 25 J. 31; 2 Stuart 36.

192. Stat. 8 and 9 Vict. c. 83 — Limitation of Actions—Not Applicable to Cases on Contract.—The limitation of actions on account of things done in the execution of the Poor Law Act does not apply to cases on contract. *Mackay* v. *Beattie*, 1860, 22 D. 1486; 32 J. 667.

193. Stat. 8 and Vict. c. 83, s. 76—Interpretation.—*Held*, with reference to the 76th section of the Poor Law Act, which provides "that nothing herein contained shall be held to affect those persons who, previous to the passing of this Act, shall have acquired a settlement by virtue of a residence of three years, and shall have become proper objects of parochial relief,"—that the concurrence of both these requisites before the passing of the statute is necessary to the operation of the proviso. *Skene* v. *Beaton*, 1849, 11 D. 660; 21 J. 184.

194. Stat. 8 and 9 Vict. c. 83, s. 86 —Limitation of Actions. — *Held* that an action of reduction of the election of an inspector of poor did not fall under s. 86 of the Poor Law Act, 1845 (8 and 9 Vict. c. 83), limiting actions under that Act to the sheriff court. *Thompson* v. *Parochial Board of Inveresk*, 1871, 10 M. 178; 44 J. 107.

POOR'S ROLL

EXPENSES, see that title.

1. Admission — Certificate — Absence of —Remit.—In an application for the benefit of the poor's roll, the kirk-session had omitted the usual certificate. After a favourable report on the *probabilis causa*, the court *remitted* to supply the omission. *Halket*, 1857, 19 D. 877; 29 J. 412.

2. Admission—Certificate by Justice of Peace.—A certificate of poverty by a justice of peace and two elders, *sustained*, the minister of the parish being under suspension by the ecclesiastical courts. *Bryden*, 1864, 36 J. 404.

3. Admission — Certificate — Dissenters. —A certificate by the minister and elders of a Dissenting congregation is not sufficient to support an application for the poor's roll. It must be attested by the minister and elders of the parish. *Elphinstone*, 1836, 14 S. 463; 11 Fac. 382.

4. Admission — Certificate — Elders not Ordained.—Where parties have acted for a tract of years as elders, and in that character have signed a certificate of an applicant for the poor's roll, the court will not refuse to remit the case to the counsel for the poor, on an allegation that the elders have not been ordained. *MacIntyre*, 1830, 8 S. 549.

The fact that the minister has signed implies his attestation that the other subscribers are elders, and the court will not listen to an averment that these are not ordained. *A. B.* v. *C. D.*, 1833, 12 S. 127.

5. Admission—Certificate—Good Character.—An applicant for the poor's roll is obliged to produce a certificate of good character from the minister and elders of his parish, only when his statement of his circumstances rests entirely on his own authority. *Macindoe* v. *Douglas*, 1849, 11 D. 516; 21 J. 148.

6. Admission—Certificate—Kirk-Session —Disjoined Papers.—*Held* that the certificate of poverty granted by the minister and elders need not be given in kirk-session, and that, in the circumstances, a certificate subscribed on one paper by the minister, and on another by the elders, was sufficient. *Morren* v. *Murray*, 1842, 4 D. 396.

7. Admission — Certificate — Merits of Case.—*Observed*, that it is entirely out of the sphere of the kirk-session to take into consideration the merits of the action, in reference to which the applicant requires the benefit of the poor's roll. *Smith*, 1834, 12 S. 890.

8. Admission—Certificate—No Elders—Remit to Sheriff. — Where there were no elders in a parish, and the necessary certificate could not be procured by an applicant for the poor's roll, the court *remitted* to the sheriff to take the applicant's declaration. *A. B.*, 1836, 14 S. 1040.

9. Admission—Certificate—No Minister —Remit to Justice of Peace.—A petitioner for the benefit of the poor's roll presented a note, stating that the minister of the parish in which he resided had died some time ago, and no successor had been as yet appointed, and prayed for a remit to the sheriff to take his declaration. The court, on the ground that the sheriff or his substitutes were not likely to know anything of the petitioner's circumstances, *refused* to do so, but *remitted* to a justice of the peace. *Stewart*, 1853, 16 D. 164; 26 J. 64.

10. Admission—Certificate—Objections to—Lapse of Time.—After a remit to the lawyers for the poor, and a report that there was *probabilis causa*, *held* too late to object that the certificate of poverty was informal, as the minister and elders omitted to state whether any of the applicant's allegations were within their own knowledge; and such objection not allowed to be stated. *Oal* v. *A. B.*, 1836, 14 S. 1120.

11. Admission—Certificate—One Elder. —In an application for the poor's roll, the court *sustained* a declaration signed by the minister and one elder of the parish, being the whole number of the kirk-session. *Mitchell*, 1851, 14 D. 248; 1 Stuart 187.

12. Admission — Certificate — Proper Parish.—A party belonging to a parish in the country came to Edinburgh with the view of getting the benefit of the poor's roll, in an action about to be instituted by him. He emitted the usual declaration before the kirk-session of one of the parishes of Edinburgh. The court *refused* to entertain his application till he should make the necessary declaration before the kirk-session of his own parish. *Paterson* v. *M'Kenzie*, 1830, 8 S. 920.

13. Admission — Certificate — Quoad sacra Minister.—A certificate, in an application for the benefit of the poor's roll, from the minister and elders of a *quoad sacra* parish, erected under the Act of Assembly, 1834, *refused*. *Bell*, 1840, 3 D. 204.

But *held* to be sufficient compliance with the Act of Sederunt. *Murrie* v. *M'Donald*, 1853, 16 D. 325; 26 J. 154.

14. Admission—Certificate—Refusal of —Citing to Bar.—Where a minister refuses to give a certificate to a party applying for the benefit of the poor's roll, the court will cite him to give evidence at the bar as to the applicant's condition. *Glass*, 1833, 11 S. 543. *Smith*, 1834, 12 S. 890.

Elders cited in such circumstances. *Craigie* v. *Croall*, 1832, 10 S. 315.

15. Admission—Certificate—Refusal of —Expenses.—Where a kirk-session obstinately refuses to take the declaration of an applicant for the poor's roll, and thereby occasions delay and expense to the pauper, the court will subject them in expenses to him. *Morris* v. *Greig*, 1835, 13 S. 1092.

16. Admission—Certificate—Refusal of —Proof of Poverty.—The court *remitted* a petition for the benefit of the poor's roll to the reporters on *probabilis causa*, in respect the petitioner's poverty was sufficiently proved by his being on the poor's roll of his parish, although the minister and elders refused a certificate of good character, and stated that he was notoriously of a litigious disposition. *Muir*, 1849, 11 D. 517; 21 J. 149.

17. Admission—Certificate—Refusal of —Remit.—A clergyman having refused to grant the usual certificates, the court *remitted* to the sheriff to inquire and report. *Rattray*, 1824, 3 S. 232. *Thomson*, 1829, 7 S. 301.

18. Admission—Certificate—Refusal of — Separate Certificates — Suspended Minister.—Where, on the application of a

party to the minister and kirk-session for the usual joint certificate of poverty, the session refused to meet with the minister, because he had been deposed by the church courts (this sentence being under suspension in the civil court)—the court *authorised* the party to obtain separate certificates from the minister and session. *Wylie*, 1843, 5 D. 578; 15 J. 297.

19. Admission—Certificate—Remit to Sheriff—No Minister.—Where there was no minister of a parish, the court *remitted* to the sheriff to take the pauper's declaration. *Gellatly*, 1852, 1 Stuart 804.

20. Admission—Certificate—Remit to Sheriff.—In an application for the benefit of the poor's roll, in an action against the kirk-session of the applicant's parish, a remit made to the sheriff-substitute of the county to receive the declaration, and report. *A. B.*, 1831, 9 S. 308.

21. Admission—Certificate—Remit to Sheriff.—A minister who was deposed by the General Assembly of the Church of Scotland, applied for the benefit of the poor's roll, in order to bring an action of reduction of the decree of the Assembly, and stated that the moderator was minister of the parish where the applicant was now residing. The court *remitted* to the sheriff of the county instead of the minister and elders. *Mackellar*, 1863, 1 M. 1114; 35 J. 636.

22. Admission—Certificate—Sufficiency—Statement as to Credibility.—An application for the benefit of the poor's roll *remitted* to the lawyers and agents for the poor, though the certificate of the kirk-session bore merely that the truth of the applicant's statement rested on his declaration alone, and that they knew no reason to doubt his credibility, but did not state that they knew him to be worthy of credit. *Cumming*, 1831, 9 S. 342.

23. Admission—Certificate—Sufficiency.—The court *remitted* a cause to the counsel for the poor, although the certificate of the minister was rested solely on the applicant's statement, and he was not personally known to the minister. *A. B.*, 1832, 10 S. 673.

24. Admission—Certificate—Sufficiency.—Where a certificate by the kirk-session that the applicant had maintained a good character, but that her story depended on her own credit, the court *remitted* again to the session. *Paton*, 1832, 11 S. 146.

But such a certificate *held* sufficient. *Dickson*, 1852, 14 D. 330; 24 J. 154; 1 Stuart 254.

25. Admission—Condition—Expenses of Divorce.—In an action of divorce by a husband against his wife, the Lord Ordinary had ordered him to pay £8, to enable her to conduct her defence. Being unable to pay this sum, he presented an application for admission to the poor's roll. The court *granted* the application, on condition of his undertaking to have his wife put on the roll also at his own expense. *Gibson*, 1845, 7 D. 581; 17 J. 286.

26. Admission—Counter Action—Consent of Parties.—A party who, in a reduction at his instance, was put on the poor's roll, also put on it of consent in a counter action of declarator raised against him. *M'Dowall*, 1837, 16 S. 103.

27. Admission — Declaration before Sheriff.—Intimation of ten days of the diet fixed for the declaration before the sheriff seems to be necessary, as in the case of that before the minister and elders. *M'Coll* v. *Downie*, 1827.

28. Admission — Married Woman — Curator.—*Held* that a wife could not apply for the benefit of the poor's roll without a curator *ad litem*, and her husband refused, in respect he also was applying to be put on the roll. *Rennie*, 1851, 13 D. 1257; 23 J. 593.

29. Admission — Married Woman — Objection Omitted.—An objection that an applicant for the poor's roll was a married woman, and had not her husband's concurrence, stated after the lawyers had reported a *probabilis causa*, *held* to be competent, and omitted *quoad hoc*, but that it would be open to the objector to plead it *in causa*. *A. B.* v. *C. D.*, 1833, 12 S. 197.

30. Admission — Objection — Bar. — A defender, by entering on the merits, *held* barred from objecting that a pursuer suing *in forma pauperis* had never obtained the benefit of the poor's roll. *Plowman* v. *Keith*, 1823, 2 S. 543.

31. Admission—Objection—Payment of Prior Expenses.—It is no objection to a party getting on the poor's roll, that she may be unable to pay previous expenses before she can be reponed against an interlocutor. That is a subsequent question. *Sassen* v. *Campbell*, 1831, 9 S. 533.

32. Admission—Objection as to Poverty—Time for Stating.—It is premature, in an application for the benefit of the poor's roll, to object, when it is moved to be remitted, that the pecuniary circumstances of the applicant are such as not to entitle him to be put on the roll. *A. B.*, 1837, 16 S. 306.

33. Admission—Objection as to Poverty — Time for Stating. — Objections to the admission of an applicant to the benefit of the poor's roll, on the ground that the applicant's circumstances are not such as to entitle him to that benefit, should be stated when the application is moved in the Single Bills, and before a remit is made to the reporters on *probabilis causa*. *Allan*, 1872, 10 M 510.

34. Admission—Petition—Intimation.—Where a party petitioned for the benefit of the poor's roll, in order to lodge a claim in a multiplepoinding, where there were above 100 claimants, the court, without requiring special notice to each of the claimants, *ordained* intimation of the petition on the walls and in the minute-book, and notice to the raiser

of the multiplepoinding. *Grassie*, 1836, 15 S. 116; 12 Fac. 127.

35. Admission — Petition — Form of.—*Observed* that, in a petition for the benefit of the poor's roll, the nature of the action ought always to be stated. *Duncan*, 1846, 8 D. 411.

36. Admission—Poverty.—A clerk with an income of about £30 yearly, *refused* the benefit of the poor's roll. *Wallace*, 1823, 2 S. 391 (note).

But this decision was not intended to fix a general rule. Each case must be decided on its own circumstances. *Mackintosh* v. *M'Kenzie*, 1829, 8 S. 123.

37. Admission — Poverty. — A married man with an income of £40, 8s. per annum, and having only one child twelve years old, *refused* the benefit of the poor's roll. *Drysdale* v. *A. B.*, 1829, 8 S. 276.

A bachelor having an annual income of £54, 12s., *held* not entitled to the benefit of the poor's roll. *Hunter* v. *A. B.*, 1829, 8 S. 223.

A man with one child, having a house rent-free, with the use of coals and candles, and an income of £46, 16s. per annum, *refused* the benefit of the poor's roll. *Christie* v. *A. B.*, 1830, 9 S. 169.

An unmarried labouring man, with an annuity of £52 in addition to the profits of his labour, *refused* the benefit of the poor's roll. *Leslie* v. *A. B.*, 1832, 10 S. 315.

A gentleman's servant, whose income was stated to be £24 per annum of wages, out of which he had to support a child, admitted to the poor's roll, because of the precarious nature of his income. *A. B.* v. *C. D.*, 1832, 10 S. 425.

An application by a man aged seventy, who had a wife and children to support, and had been lately disabled from work for a time, *remitted* to the lawyers for the poor, although he had a bond of annuity for £30. *A. B.* v. *Patton*, 1833, 11 S. 360.

A lieutenant aged forty-three, who had half-pay of £82, and a wife and five children, *refused* the benefit of the poor's roll. *A. B.* v. *Scott*, 1834, 12 S. 489.

A defender in an action of damages, who was between fifty and sixty years of age, had a family, and possessed an annuity of £24, besides 8s. per week of wages as a shoemaker. *Held* entitled to the benefit of the poor's roll. *Gunn* v. *Goodall*, 1834, 12 S. 336.

A man of middle age and fit for work, who had £50 in the bank, and had, a few years before, paid £200 for heritage, yielding £6 per annum, *held* not entitled to be put on the poor's roll. *A. B.* v. *C. D.*, 1836, 14 S. 965.

38. Admission — Poverty.—A party in his sixtieth year, who had a wife, but no children, was earning weekly wages of 5s., but was affected by bodily infirmity, so as to make his wages precarious, and he enjoyed a pension of £18, 15s. 5d. as a discharged soldier. *Held* entitled to the benefit of the poor's roll. *Meikleham* v. *M'Gruthar*, 1840, 2 D. 1372.

A widow having an alimentary income of £41 for her lifetime, *held* entitled to the benefit of the poor's roll, she being above sixty years of age, in infirm health, and called as a defender in an action raised by a body of creditors to reduce her title to a small property, the rents of which were in the meantime arrested, and the action being such as to involve the expense of a jury trial. *Bett*, 1840, 2 D. 1466.

An application by a husband to be admitted on the poor's roll, in order to raise and carry on an action of divorce against his wife, *refused in hoc statu*, as he was in receipt of wages at the rate of £1 per week. *King* v. *King*, 1845, 7 D. 499; 17 J. 244.

39. Admission — Poverty — Married Woman.—A married woman *admitted* to the roll for a limited time, in order that she might raise an action of divorce, although evidence had not been adduced of her husband's inability to pay the expenses. *Alison*, 1849, 12 D. 415

40. Admission — Poverty — Deductions from Income.—An applicant for the benefit of the poor's roll was in receipt of 17s. per week. He alleged that he had for some years been supporting an indigent mother-in-law, and that, after deducting the sum he so paid, house rent, and taxes, he had only 14s. a week to support himself, his wife, and children. The court, as such deductions had never been given effect to, *refused* the application. *Webster*, 1858, 20 D. 1058; 30 J. 646.

41. Admission—Poverty.—An application for the benefit of the roll, with the view of raising an action of divorce, by a man who was twenty-eight years of age, and earning £12 per annum and his board, and whose wife and only child were not maintained by him, *refused*. *Observed*, that he might renew the application after having raised the summons. *Muir*, 1850, 12 D. 632; 22 J. 208.

Application for admission on the poor's roll by a party who was mate of a trading vessel, earning wages at the rate of £3 per month, *refused*. *Kelt* v. *Graham & Sons*, 1850, 12 D. 1112; 22 J. 512.

A parish schoolmaster, with a wife, and five children under eleven years of age, in receipt of £35 per annum, and with a free house, *refused* the benefit of the poor's roll. *Clark* v. *Steele*, 1856, 18 D. 980.

The pursuer of an action of damages for adultery, averred in his condescendence that he was in good circumstances. In order to carry on the action, he afterwards applied for the benefit of the poor's roll, and stated that he was a barber, sixty-five years of age, and had four children, the eldest of whom was thirteen years old; that his earnings amounted to £28 per annum, and he had no other source of income. Application *refused*. *Innes*, 1857, 19 D. 1096; 29 J. 559.

A labourer aged forty-seven, earning 15s. per week, *refused* the benefit of the poor's roll. *Walker* v. *Brown*, 1860, 22 D. 678; 32 J. 262.

A miner, who had formerly earned 15s. a week, but who at the date of his application had been out of employment for eleven months, *refused* the benefit of the poor's roll. *Graham* v. *Wilson & Co.*, 1860, 22 D. 1470 ; 32 J. 669.

An application for the benefit of the poor's roll, with a view to an advocation of an inferior court judgment, *refused*. The applicant was a widow earning 10s. 6d. per week by letting lodgings. *Duncan* v. *Morrison*, 1863, 1 M. 257 ; 35 J. 182.

A wife (whose husband was sequestrated and in prison) and four daughters, whose whole income was £30, derived from heritable subjects, applied for the benefit of the poor's roll, to enable them to defend an action of reduction of their title, and of count and reckoning as to the rents. *Held* that as the applicants had not been prevented drawing the rents, they were not entitled to be admitted. *Inglis*, 1863, 1 M. 391 ; 35 J. 240.

Application for the benefit of the poor's roll, by a woman who alleged herself to be one of three heirs-portioners of a deceased lady, and as such desirous of suing a reduction of her settlement, *granted*, although her husband had 2s. 6d. a day, and stated that his average wages were 10s. or 11s. a week. A similar application by her husband also *granted*. *Hallidays*, 1864, 2 M. 1288.

Application for the benefit of the poor's roll, in order to sue an action of divorce by a man who had 10s. a week of wages and board, *refused*. *Sutherland*, 1864, 2 M. 509.

Application for admission to the poor's roll by a workman earning 14s. a week with four children, two of whom were dependent on him, *refused*. *Cunningham*, 1867, 4 S. L. R. 155.

A man, earning 20s. a week as a clerk, without incumbrances, *refused* admission to the poor's roll. *Ingram* v. *Hastie*, 1872, 9 S. L. R. 375.

42. Admission—Poverty.—Circumstances in which a party who had a *probabilis causa*, and who had continued to defend himself without the aid of the poor's roll until he was on the eve of a jury trial, was *found entitled* to the benefit of the poor's roll, although he received wages of £96 per annum. *Miller* v. *Gordon*, 1838, 16 S. 812 ; 13 Fac. 528.

43. Admission — Poverty — Appeal.—An application for the benefit of the poor's roll by a party in an advocation *refused*, as his income was 25s. a week, although he was on the poor's roll in the sheriff court and had succeeded there. *Collins* v. *King & Co.*, 1867, 39 J. 257.

44. Admission — Poverty — Appeal.—An applicant for the poor's roll had £26 per annum, was sixty-four years of age, and had a wife and two children dependent on him. He had lost his action in the sheriff court, and made this application with a view to advocation. Application *refused*. *Williamson* v. *Irving*, 1863, 2 M. 126.

45. Admission — Poverty — Heritable Estate.—The benefit of the poor's roll *refused* to a person possessed of a small heritable subject, which was burdened with debt to about one-fourth of its value, and the reversion of which (if sold) would (if applied to the expenses of an action) leave no means to maintain his family. *Paul*, 3 Mar. 1803, F. C. ; M. 14983.

But if a man is unable to support himself, the fact that he possesses heritage is no bar to his admission. *A. B.*, 24 May 1814, F. C.

46. Admission — Poverty — Proof of.—*Held* that an applicant for the benefit of the poor's roll, who adduced no evidence as to his circumstances but his own statement, to the effect that he earned 16s. a week for five and a half months in the year, and about 12s. a week during the remainder, and who was alleged by the kirk-session to be a person unworthy of credit, could not be admitted to the benefit of the poor's roll. *Observed*, that even if his statements were substantiated, his circumstances would not warrant his admission. *M'Alley*, 1872, 44 J. 415 ; 9 S. L. R. 463.

47. Admission — Poverty — Remit to Reporters.—A remit made to the reporters on the *probabilis causa*, to inquire into circumstances of an applicant certified by the kirk-session to have been stated to them by him. *Sutherland* v. *Sprott*, 1858, 20 D. 499 ; 30 J. 374.

48. Admission—Poverty—Report as to —Delay.—Circumstances in which it was *held* unnecessary to have a new report as to the poverty of an applicant for the poor's roll, though the report founded on had been made about three years previously. *M'Coll* v. *Downie*, 1830, 8 S. 466.

49. Admission—Relevant Averments.—It is not sufficient to exclude a party from the poor's roll, that no evidence is adduced in support of his averments if these are relevant. *Wilkie* v. *Flowerdew*, 1836, 14 S. 668.

50. Admission—Pupil.—Pupils, in applying for admission to the poor's roll, must have a tutor *ad litem*. *Davidsons*, 1865, 4 M. 276 ; 38 J. 145.

51. Advocation — Sist of Agent. — An advocation by a party on the poor's roll, in the sheriff court, against an interlocutor as to expenses, *dismissed*, because his agent did not sist himself as a party. *M'Dougall* v. *Clark*, 1852, 1 Stuart 796.

52. Agent—Account.—Circumstances in which one of the agents for the poor *held* entitled to charge only for the business performed by him ; and that another agent, who was not authorised to act for the poor, but was the actual agent, was entitled to all the other charges. *Barr* v. *Clyne*, 1832, 10 S. 408 ; 7 Fac. 294.

53. Agent—Carrying on Process Despite Compromise.—The agent for a person on the poor's roll is entitled to carry on a process so far as regards expenses found due to the party, though the party has compromised his principal claim and claim for expenses. *Rox* v. *Stewart*, 3 July 1818, F. C.

54. Agent—Liability.—*Observed*, that if an agent receives explicit instructions and accepts a duty, the fact that he is acting gratuitously as an agent for the poor will not free him from responsibility. *Hay* v. *Baillie*, 1868, 7 M. 32; 41 J. 25.

55. Agent — Liability — Repetition of Expenses.—In a judicial reference, a party on the poor's roll was found entitled to certain expenses, in consequence of his opponent having failed timeously to lead his proof, and these were paid to his agent. Thereafter, judgment was pronounced against him with expenses, including those formerly awarded. The opponent then sued the agent for repetition of the sum paid. *Held* that the agent must repay these. *Christie* v. *A. B.*, 1833, 5 J. 371.

56. Agent — Nomination by Sheriff — Petition to Court.—The procurators before a sheriff court appointed as agent for the poor one who resided twenty miles from the seat of court, and without the county. The sheriff called upon them to make a new appointment, which they refused to do. *Held* (1) that it was competent for the sheriff to bring the question before the court, by a petition and complaint against the procurators; and (2) that they were bound to act on his order to make a new nomination. *Colquhoun* v. *Paterson*, 1850, 12 D. 851; 22 J. 370.

57. Agent—Rights against Client.—The agent of a person on the poor's roll has a right to payment of expenses out of any fund belonging to that person, but he cannot operate payment by personal diligence. *Taylor* v. *Barr*, 1841, 3 D. 892; 16 Fac. 936.

58. Counsel.—Senior counsel are entitled to act (with the counsel for the poor) in a poor's cause without the special authority of the court. *Bell* v. *Murray*, 1833, 12 S. 187.

59. Counsel.—The Dean of Faculty, at the request of a counsel for a party on the poor's roll, gave his assistance to the party. Before pleading, he called the attention of the court to A. S. 16 June 1819, which prohibits any other than a counsel for the poor to appear for a poor party. *Held* that it did not apply to this case. *Garvie* v. *Hammermen of Perth*, 1832, 10 S. 758 (note).

60. Counsel — Fees. — Where a senior counsel, at the request of the counsel for the poor, acts in a poor's cause, his services are *held* to be gratuitous. *Robertson* v. *Finlay*, 1849, 12 D. 148, 393; 22 J. 112. *Wark* v. *Russell & Wardrop*, 1850, 12 D. 1074; 22 J. 470.

61. Fee-Fund Dues.—Petition by a party who had been admitted to the poor's roll, but without obtaining a renewal, *refused* to be written on, not being fee-funded. *Cargill*, 1830, 8 S. 595.

62. Fee-Fund Dues—Extract.—*Question*, whether a party on the poor's roll obtaining decree against the opposite party, and being found entitled to expenses, is not bound to pay (or his agent to advance) the usual fee-fund dues chargeable for extract of a decree; but the extract having been issued without exacting the fee, the court *found* it unnecessary to pronounce any order, but *granted* warrant for payment of the party's expenses from the fee-fund. *Calder* v. *Parker*, 1841, 3 D. 477.

63. Fee - Fund Dues — Reclaiming. — A reclaiming note against a decree in absence was received, without payment of the fee-fund, in consequence of the word "poor" being written before the party's name, and the party was reponed in virtue thereof; but, in point of fact, he was not on the poor's roll, nor his agent one of the agents for the poor. *Held* that the proceeding was unwarrantable, and could not stop the finality of the interlocutor. *Panario* v. *Turner*, 1828, 6 S. 695.

64. Fee - Fund Dues — Summons. — A party on the poor's roll having been successful in a suspension of diligence, raised an action of damages upon the same facts, and against the same defender, but without being admitted to the roll as to this action. *Held* that the summons not being fee-funded, had been irregularly called, but that it might still be called on payment of the dues. *Smith* v. *Flowerdew*, 1843, 6 D. 250; 16 J. 151.

65. House of Lords.—The Court of Session cannot grant leave to an appellant to sue *in forma pauperis* in the House of Lords. *Urquhart*, 1865, 3 M. 882; 37 J. 459.

66. Mandatary.—A pursuer on the poor's roll, residing beyond the jurisdiction of the court, is not bound to sist a mandatary who shall be liable in expenses if awarded. *Carling* v. *Campbell*, 1826, 4 S. 548; 1 Fac. 488.

A mandatary for a foreigner on the poor's roll is not liable for the expenses of process. *Middlemas* v. *Brown*, 1828, 6 S. 511.

67. Probabilis causa—Admission—Remit.—A motion for a remit to the reporters on *probabilis causa* of a case which had previously been remitted to them and dismissed as having fallen asleep, *refused*. *Rule* v. *Baxter*, 1870, 7 S. L. R. 535.

68. Probabilis causa—Appeal.—A girl applied for the benefit of the poor's roll to enable her to advocate an action of filiation and aliment which had been decided in her favour by the sheriff-substitute and against her by the sheriff. The court *refused* the application. *Fairgrieve*, 1865, 1 S. L. R. 51.

69. Probabilis causa—Compromise Declined.—A obtained a report that he had a *probabilis causa*. He was then offered £30 for a settlement, which he declined. The counsel and agents for the poor reported that as the offer was declined he no longer had a *probabilis causa*, and the court *refused* to admit him to the roll. *Forbes* v. *Wilson, Stow, & Co.*, 1835, 7 J. 302. [See also No. 79.]

70. Probabilis causa—No Remit.—The court, on a petition from a pauper cited to appear for her interest in an action between two parishes, in which the question was, which

parish was liable in the burden of her support, *admitted* the petitioner to the poor's roll of the court, without making any remit to the reporters on the *probabilis causa*. *Howie*, 1848, 10 D. 1471.

71. Probabilis causa—Report.—It is no objection to effect being given to a report by the lawyers and agents for the poor (as to a party in a pending process having a *probabilis causa litigandi*), that the Lord Ordinary, before whom the cause depended, has decided against him. *Gibb*, 1833, 11 S. 732.

72. Probabilis causa—Report—Difference of Opinion.—*Held* that it is the exclusive privilege of counsel for the poor to judge whether there is *probabilis causa*, although the agents may differ from them. *Clark* v. *Campbell*, 1833, 11 S. 908.

Where the counsel for the poor differed in opinion, a remit made to other counsel. *M'Callum*, 1841, 3 D. 1102.

But where the reporters were equally divided the court *admitted* the applicant. *Bonar*, 1866, 2 S. L. R. 31.

73. Probabilis causa—Report—Difference of Opinion.—Where the two counsel were of opinion that a party had *probabilis causa*, and the two agents that he had not, the court being satisfied that there was *probabilis causa*, *admitted* the party to the roll. *Smith* v. *Crichton*, 1852, 14 D. 484 ; 24 J. 233 ; 1 Stuart 410.

74. Probabilis causa—Report—Review.—The court *refused* to review the judgment of the lawyers and agents for the poor on the matter of *probabilis causa* ; but the applicant not having been fully heard, they *remitted* to hear him further. *Currie*, 1829, 7 S. 302.

Held incompetent to review the judgment of the counsel for the poor as to *probabilis causa*. *A. B.* v. *C. D.*, 1833, 12 S. 58.

75. Probabilis causa—Report—Review.—A petition by a party applying for the poor's roll, setting forth that his case had not been duly investigated by the lawyers, *refused*, as there had been a report that there was no *probabilis causa*, and as the petition therefore resolved into an allegation that the lawyers had formed an erroneous judgment, which was no ground of complaint unless corruption were also alleged. *Irvine*, 1842, 5 D. 372.

76. Probabilis causa—Report—Two Reporters.—Two of the reporters on the *probabilis causa* being unable to give an opinion,—the one an agent, by reason of absence, the other a counsel, in respect he was retained for the defence,—*held* that the remaining two might call in the assistance of a counsel who had been a reporter for the previous year. *Rutherford*, 1855, 17 D. 1140 ; 27 J. 597.

77. Procedure—Transmission of Process.—Warrant *granted* to transmit processes from an inferior court, to enable the lawyers to judge of *probabilis causa*. *Stewart*, 1829, 8 S. 252.

78. Reclaiming—Reponing—Expenses.—A reclaiming petition by a party on the poor's roll having been dismissed as incompetent, as not being marked by a clerk, the court *refused* to repone him without payment of previous expenses. *Pratt* v. *Lord Dundas*, 1824, 3 S. 120.

79. Striking Off—Compromise.—A pursuer of an action of damages struck off the poor's roll because he refused to accept a sum reported to be adequate. *M'Intosh* v. *M'Indoe*, 1821, 14 S. 18.

80. Striking Off — Probabilis causa Ceasing—Tender.—Owing to a tender to a pursuer on the poor's roll, his counsel reported that there was no longer a *probabilis causa*, and, on the motion of the defender, he was *ordered* to be removed from the poor's roll. *A. B.* v. *Fraser*, 1836, 14 S. 1114.

POSSESSION

ASSIGNATIONS, AS TO, see title *Assignation*.
BONA FIDES, see that title.
FISHINGS, AS TO, see title *Fishing*.
INTERDICT, see that title.
PRESCRIPTIVE, see title *Prescription*.

1. Access for Drawing Water.—In a declarator at the instance of a house proprietor in a burgh of a right of access to a mill-run in the vicinity of his tenement, for the purpose of drawing water, in which the possession of the pursuer and his authors, and also of the other inhabitants of the neighbourhood, was libelled on, *held* that the proper issue was one in which the possession of the inhabitants of the neighbourhood was put in question, as well as that of the pursuer and his authors, the pursuer being entitled to found upon and prove their possession in support of his own right. *Thorburn* v. *Charters*, 1841, 4 D. 169.

2. Common Passage—Encroachments—Interdict.—A passage between two streets of a burgh had existed for above a century, and though of irregular width, was defined by buildings on either side. A party having right of free ish and entry at that passage, and alleging himself to have a common property in its *solum*, had been in the use of the passage for a long term of years. *Held* that he was entitled to an interdict against encroachments on the passage by a conterminous proprietor, who alleged that he held the exclusive property of the *solum* of the passage, and that he had left ample space for the ish and entry of the first party. *Ferrier* v. *Walker*, 1832, 10 S. 317.

3. Commonty—Action of Division.—In an action of division of commonty between several adjoining proprietors, part was claimed by one of them as his exclusive property. *Held* that another was not entitled, in order to show that it was commonty, to found on acts of possession by other proprietors, who had admitted that it was the exclusive property of the party by whom it was claimed as such. *Gordon* v. *Sir James Grant*, 1850, 13 D. 1 ; 22 J. 171.

4. Decree—Possession on Decree—Reduction of Decree.—In an action of reduction of a decree of the Judge-Admiral, pronounced in 1792, relative to the boundaries of conterminous oyster fishings in the Firth of Forth, combined with a declarator of the extent of the pursuer's right, *held* that a proof of possession since 1792, offered by the defenders, was irrelevant, in respect it must have followed on the decree, which they admitted must be reduced. *D. of Buccleuch* v. *Mags. of Edinburgh*, 1843, 5 D. 846.

5. Effect of—Acquiescence—Signboard.—A person *held* not entitled, under a mere possession for thirteen years without title, to keep up a signboard on the house of another. *Buchanan* v. *Carmichael*, 1823, 2 S. 526.

6. Effect of—Feu without Title.—Although a party got into possession of a feu without any title but the sufferance of the superior, and paid the feu-duties, and ameliorated the subject, *held* not to afford any defence against an action of property by the true owner. *Sinclair* v. *Sinclair*, 1829, 7 S. 342.

7. Effect of—Interdict.—Interdict *granted* against the appropriation of a piece of ground reclaimed from the sea, in respect that while neither party had any proper title to the same, the respondent was seeking to invert the existing state of possession. *Irvine* v. *Robertson*, 1873, 11 M. 298; 45 J. 209.

8. Effect on Written Title.—Proof of possession, besides being an element of prescription, serves as an interpreter of a written title. *Lord Advocate* v. *Sinclair*, 1867, 5 M. (H. L.) 97; 39 J. 459.

9. Entailed Estate—Challenge of Feu—Lease.—A feu of entailed lands which were possessed under a lease, was, subsequently to the date, but during the currency of the lease, granted to the tenant. *Held*, in a challenge by a substitute heir, on the ground that the feu was *ultra vires* of the granter, that the possession must be attributed to the tack so long as it subsisted, and that prescription of the right to challenge the feu ran only from the expiry of the lease. *D. of Roxburgh* v. *Don*, 1734, 1 Pat. 126.

10. Immemorial Possession.—In a question between conterminous heritors, whether the pursuer had enjoyed immemorial possession of certain lands, the jury found for the pursuer. *Johnston* v. *Fergusson*, 1834, 12 S. 572.

11. Immemorial Usage—Right of Burial.—A suspension and interdict by a party claiming right to the office of constabulary of an ancient priory, to prohibit its being used in future as a place of burial, *refused*, as not being the proper form of trying the question—the respondents alleging that there had been an immemorial usage of burial there, and denying the title of the suspender. *Lord Lovat* v. *Fraser*, 1845, 8 D. 316; 18 J. 140.

12. Moveables—Symbolical Possession—Poinding.—The mere symbolical taking possession of moveables under a trust-disposition cannot prevent a poinding by a creditor of the granter, in whose custody they were allowed to remain. *Fraser* v. *Frisby*, 1830, 8 S. 982.

13. Minor—Possession by Curator.—The possession of a subject by a minor's curator or legal administrator is equivalent to possession by the minor. *Jamieson* v. *Spottiswood's Trs.*, 6 Dec. 1808, F. C.

14. Pledge—Possession by Pledgee.—*Held* that the deposition by contractors to a railway company of all plant brought on to the works gave such possession to the company as, taken along with the terms of the contract, vested them with a real right of pledge effectual against the contractor's creditors. *Moore* v. *Gledden*, 1869, 7 M. 1016; 41 J. 567.

15. "Possessed as his Property"—Meaning of.—The words "possessed as his property" occurring in an issue, *held* to mean "possessed exclusively." *Mushet* v. *D. of Buccleuch*, 1856, 18 D. 322; 28 J. 147.

16. Possessory Judgment.—A party refused a possessory judgment. *Cunninghame* v. *Learmonth*. 1831, 9 S. 902. If a title of possession is fraudulent, the Sheriff can refuse effect to it. *Brown's Trs.* v. *Fraser*, 1870, 8 M. 820; 42; J. 479.

17. Possessory Judgment.—A personal title, with seven years' possession, *held* to warrant a possessory judgment. *Knox* v. *Brand*, 1827, 5 S. 714.

18. Possessory Judgment.—An uninterrupted possession for seven years by one of two adjacent proprietors, each claiming right to a piece of ground, *sustained*, as conferring a possessory right. *Watt* v. *Makgill*, 1823, 2 S. 289.

19. Possessory Judgment.—The sheriff having pronounced an interlocutor on a complaint between conterminous proprietors, which *inter alia* defined their boundaries, and the nature of certain rights of servitude affecting them, the court *repelled* an objection subsequently taken to the title of the respondents, and (of consent of parties) *sustained* the interlocutor to the effect of being a possessory judgment. *Thomson* v. *Donald*, 1830, 8 S. 630.

20. Possessory Judgment—Bounding-Charter—Servitude.—A party who had enjoyed possession for seven years of ish and entry to a plot of ground, *held* entitled to the benefit of a possessory judgment, though he had a bounding-charter which made no reference to such servitude, and contained no clause of parts and pertinents. *Liston* v. *Galloway*, 1835, 14 S. 97; 11 Fac. 75.

21. Possessory Judgment—Commonty—Interdict by Joint Proprietor.—An application for an interdict by a joint proprietor of a commonty against a party from pasturing cattle on the commonty, *refused*, as the party had been in possession for seven years upon a title which did not exclude his right; but note of suspension *passed*. *Porterfield* v. *M'Millan*, 1847, 9 D. 1424; 19 J. 627.

22. Possessory Judgment—Ditch.—Circumstances in which *held* that a party had proved possession of a ditch for seven years under a sufficient title, and was entitled to a possessory judgment. *Ritchie* v. *Anderson*, 1867, 5 S. L. R. 82.

23. Possessory Judgment — Fencing in Land.—Circumstances in which *held* that the respondent in an advocation had proved possession upon a sufficient title (while the advocator's title did not expressly include the ground), and that he was entitled to a possessory judgment. *Ross* v. *Meikle*, 1869, 6 S. L. R. 331.

24. Possessory Judgment — Possession without Title.—Possession for fifteen years without a title is not a sufficient ground for a possessory judgment. *Neilson* v. *Vallance*, 1828, 7 S. 182.

25. Possessory Judgment—Reservation of Servitude.—A party who possessed a piece of ground from 1821 to 1828 under a disposition, reserving a servitude of road in favour of a third party, got a new disposition from his author (whom he guaranteed against the consequences), omitting the clause of servitude, and burnt the prior disposition. *Held* that he was not entitled in 1831 to possessory judgment, in a question with the party in whose favour the servitude was reserved. *Ross* v. *Fisher*, 1833, 11 S. 467.

26. Possessory Judgment—No Sasine—Interdict. — *Question*, whether possession without a sasine or lease is a sufficient or competent foundation for a possessory judgment in the form of an interdict. *Dickson* v. *Dickie*, 1863, 1 M. 1157; 35 J. 669.

27. Possessory Judgment—Salmon-Fishing.—Two opposite heritors on the banks of a river had each right to one-half of the salmon-fishing, and exercised it for more than seven years by one and the same tenant. *Held* that a tenant who had so enjoyed that possession, by virtue of a joint lease, was entitled to the benefit of a possessory judgment after the one heritor had let his one-half share to another tenant. *Sutherland* v. *Mackenzie*, 1826, 2 W. & S. 158. Affg. 4 S. 230.

28. Possessory Judgment—Salmon-Fishing.—Circumstances under which a party was *held* not entitled to a possessory judgment as to a right of salmon-fishing. *Hunter* v. *Maule*, 1827, 5 S. 238; 2 Fac. 148.

29. Possessory Judgment — Stream. — Circumstances in which the court *held* a party entitled to the benefit of a possessory judgment, and therefore granted interdict against certain operations which changed the existing channel of a stream, and ordained that channel to be restored. *Campbell* v. *M. of Bute*, 1831, 9 S. 848.

30. Possessory Judgment—Servitude of Road.—The proprietor of a feu with a strictly bounding-charter containing no clause of parts and pertinents, but merely alleging forty years' possession of a servitude of road, has no title on which to found a possessory judgment to the use of the road. *Saunders* v. *Hunter*, 1830, 8 S. 605.

31. Possessory Judgment — Servitude Right of Passage.—Possession for seven years without a title is not sufficient to entitle a party claiming a servitude right of passage to a possessory judgment. *Carson & Co.* v. *Miller*, 1863, 1 M. 604; 35 J. 357.

32. Possessory Judgment — Thirlage. — A party obtained a missive of lease (as preparatory to a regular deed) of lands which had been from time immemorial thirled to a mill, but nothing was said in the missive as to the thirlage. *Held* that although the tenant of the mill had been in possession for only five years, and the tenant of the lands for two years, the miller had a possessory right to the thirlage. *Cowieson* v. *Burn*, 1808, Hume 740.

33. Possessory Right—Ground Used as Public Street.—Parties who had the management of the streets in a town, *held* to have a title to acquire a possessory right to ground which had been used as a public street. *Richmond* v. *Inglis*, 1842, 4 D. 769.

34. Possessory Right—Interdict—Effect of.—In an advocation of a petition to the sheriff, praying for findings that the petitioner was proprietor of a water-closet, or had a possessory right thereto, and for an interdict against his neighbour interfering with it, under which the sheriff had ordered the subject to be restored to the condition in which it was before the date of the petition, and afterwards granted interdict as craved, *held* that it was unlawful and unwarrantable for the respondent (the advocator, who had taken possession of and put a lock upon it, excluding the petitioner) to resort to or use the water-closet; but *observed*, that the proper remedy, in the circumstances, was an action of intrusion, either in the shape of a summons, or of a summary application to the sheriff containing a prayer to turn out the intruder and restore the petitioner. *Dickson* v. *Dickie*, 1863, 1 M. 1157; 35 J. 669.

35. Possessory Right—Road—Right to Remove Obstruction.—A party who had a possessory right to the use of a road, entitled *de recenti* to remove *via facti* a wall built across it. *Macdonald* v. *Watson*, 1830, 8 S. 584.

36. Possessory Right—Shutting up Gate. —A party *held* not entitled, under special circumstances, to an interdict, on the footing that he had a possessory right, against another shutting up a gate. *Ferrier* v. *Mags. of Edinburgh*, 1842, 4 D. 1484.

37. Precarious Possession — Solum of Canal—Annual Payment without Title.—The tenant of a coal-work was allowed to form a canal through the lands of a neighbouring proprietor, without any written title. The canal was possessed by him and his landlord and their successors for many years, the tenants paying yearly to the proprietor a sum, fixed originally by valuation, as damages. *Held*

that the owner of the coal-work had no right of servitude over the solum for the purpose of a canal, but was a precarious possessor whom the proprietor might at any time remove. *Campbell* v. *D. of Argyll*, 1836, 14 S. 798; 11 Fac. 652.

38. Presumption of Ownership—Sale—Poinding.—A tenant got largely into arrear of rent, and his landlord obtained decree of declarator of irritancy and removing. On his removal, the landlord retained possession of a thrashing-mill, then on the farm, along with other effects, which had belonged to the tenant, and alleged that he had retained these by agreement with the tenant, in satisfaction of the arrears. He sold the mill to the succeeding tenant, who used it for five years without challenge, and repaired it at considerable expense. Thereafter a creditor of the first tenant poinded it. *Held* that the presumption of ownership in favour of the second tenant not being removed by any proof or presumption adduced on the part of the poinder in favour of the first tenant, the poinder was not entitled to proceed with his diligence. *Sharpe* v. *Smyth*, 1832, 11 S. 38.

39. Reputed Ownership.—A party purchased a vessel, and got a certificate of registry in his favour, and thereafter appointed the seller and his sons, as a company, to be his agents. A creditor of the seller arrested the vessel on the allegation that he was truly the owner, at least ostensibly possessed as such, and was the reputed owner. The purchaser, after a reference to oath as to the proprietorship, which he deponed belonged to him, *found* entitled to demurrage from the arrester. *Gray & Co.* v. *Farquhar*, 1823, 2 S. 160.

40. Reputed Ownership—Collusion to Defraud Creditors—Liability for Debts.—The elder of two brothers, on their father's death, allowed the younger to enter into possession of a feu belonging to the father, with houses thereon, and for twenty years to act as proprietor. He lived in the same village with him, talked of him as the owner, and suffered him to be so talked of in his presence. The younger became bankrupt, whereon the elder claimed the property. *Held*, in an action by creditors of the younger brother, that the elder had fraudulently colluded with the younger, so as to induce the creditors to trust him as proprietor of the houses, and that he was liable for the debts. *Dougall* v. *Marshall*, 1833, 11 S. 1028.

41. Reputed Ownership — Bathing Machines Left for Twenty Years in Possession of Seller who Died Bankrupt.—A sold certain bathing machines, etc., the plant of a sea-bathing establishment, in 1847, to B, who sold them in 1849 to C. A, however, remained in the uncontrolled possession of them. In 1848 A was sequestrated, but was discharged in 1855. During this time he remained in uncontrolled possession, and continued so until his death in 1867. *Held*, in a question between a party alleging right derived from C and the trustee on the estates of A, again sequestrated after his death, that the property was at the date of his death liable to be attached by the diligence of his creditors, and was carried by the sequestration to the trustee for behoof of creditors. *Edmond* v. *Mowat*, 1868, 7 M. 59; 41 J. 32.

42. Reputed Ownership — Furniture — Liferent of.—The liferenter of furniture does not, by possession of it in virtue of his liferent, subject it to the diligence of his creditors, on the ground of reputed ownership. *Question*, whether a creditor whose debt was contracted before the debtor's possession of the moveables began, can found on the reputed ownership of these moveables, as a ground for attaching them, although he had not contracted on the faith of such ownership. *M'Millan* v. *Price*, 1837, 15 S. 916; 12 Fac. 854.

43. Reputed Ownership—Furniture—Poinding.—Interdict *granted* of a poinding and sale of furniture which the suspender proved to belong to her, and which had been poinded by the charger for a debt due by her mother, who resided with her. *Smith* v. *Flowerdew*, 1842, 5 D. 335; 15 J. 138.

44. Reputed Ownership — Furniture — Onus.—In a question between a lady and the creditor of her brother, who lived in the same house with her, *held* to be proved that the household furniture belonged to the lady who was tenant of the house, and not to the brother, although it had some years before been the property of her brother, and no written conveyance of it in her favour was produced, nor any receipt for the price. *Macdougall* v. *Whitelaw*, 1840, 2 D. 500.

45. Reputed Ownership — Furniture —Poinding.—A party granted a trust deed for behoof of creditors of his whole effects, including household furniture, but of which he retained possession. Having fallen into arrear of rent, his landlord sequestrated the furniture, and, on payment by the trustee, assigned to him the sequestration. Thereafter the party contracted a new debt, for which the creditor poinded the furniture. Suspension and interdict by the trustee *refused*, in so far as the furniture was not protected by the right to the sequestration. *Gibson* v. *Wilson*, 1841, 3 D. 974.

46. Reputed Ownership — Furniture — Conveyance of, by Husband to Wife.—In an antenuptial contract the husband disponed to his wife his household furniture, conform to inventory indorsed upon the contract, declaring that it should not be attachable for her debts, nor liable to the diligence of her creditors, and should not be assignable by her, it being constituted an alimentary provision in her favour; and the furniture remained in the house occupied by the spouses. *Held*, in a question between the wife and the trustee on the husband's sequestrated estate, that there was no effectual transference of the furniture to the wife, and that the trustee was entitled to dispose of it for behoof of

the creditors. *Ross or Brown* v. *Fleming*, 1850, 13 D. 373; 23 J. 176.

47. Reputed Ownership—Goods in Retail Shop.—*Held*, in a question as to passing a bill of suspension without caution, that *prima facie* goods in a retail shop carried on by and in name of the wife, belonged to and were poindable for the debts of the husband; and that an allegation that they *bona fide* belonged to her, and had been provided to her exclusive of his *jus mariti*, which he renounced, was not relevant to dispense with caution in a question with a poinding creditor. *Cargill* v. *Somerville*, 1820, Hume 223.

48. Reputed Ownership—Investments.—Stockbrokers who carried on business on their own account as wine merchants, on the employment of a third party, purchased stock, which was paid for out of the funds of the employer, but was allowed for some time to remain untransferred in the names of the sellers, under the control of the stockbrokers; and the brokers caused transferences to be executed by the original sellers in favour of bankers, in security of the stockbrokers' promissory-note, discounted to them by the bankers. *Held*, in a question between the bankers and the true owners of the stock, after the bankruptcy of the brokers, that the bankers were entitled to retain the stock in security of their advances. *Attwood* v. *Kinnear*, 1832, 10 S. 817; 7 Fac. 620.

49. Reputed Ownership—Poinding.—The owner of a mine granted a missive letter to his overseer, conveying to him the horses, hay, and profits of the works, with power to take possession in security of advances in money to be made by the overseer; but there was no ostensible change in the possession, nor in the relative position of the parties. *Held* that a creditor of the owner was entitled to poind the horses, etc. *Johnstone* v. *Sprott*, 1814, Hume 448.

50. Reputed Ownership — Poinding — Prior Sale. — Circumstances in which a poinding of goods in a shop recently belonging to the debtor was *held* inept by the prior sale of them to a third party. *Walker* v. *Irvin & Co.*, 1841, 3 D. 985.

51. Reputed Ownership — Sale — Furniture. — The possession of moveables affords a legal presumption that the possessor is owner; and this presumption is especially strong as to movables for personal and family use. But possession and ownership may be severed, as, for instance, where the transaction by which the possession is parted with is of a nature which implies that the possessor will necessarily in the course of his business have possession of property not his own.

A purchased the furniture of B from B's trustee in bankruptcy. A left B in possession for six years. *Held* that A by his conduct in permitting B to possess could not vindicate the furniture as against a creditor of B poinding for a subsequent debt.

Opinions as to whether the doctrine of reputed ownership is founded on fraud. *Anderson* v. *Buchanan*, 1848, 11 D. 270; 21 J. 83.

52. Reputed Ownership—Sale of Plant by Tenant to Landlord.—The tenant of a printing office having sold the plant to his landlord, and taken a new lease of the premises with the use of the plant, after some years became bankrupt. *Held* that the *bona fides* of the transaction having been established, the possession of the plant by the tenant must be regarded as the landlord's possession, and that the sale was effectual. *Orr's Tr.* v. *Tullis*, 1870, 8 M. 936; 42 J. 566.

53. Road—Possession by Public.—Road trustees having been allowed by a proprietor to take land without any claim for the value, for the formation and improvement of a road leading from a turnpike road, which was, with his acquiescence, used as a public way for twenty-four years, *held* that he was not entitled to an interdict against the erection of a toll-bar on the road. *Dickson* v. *Lanark and Dumbarton Road Trs.*, 1848, 11 D. 115; 21 J. 17.

54. Stolen Property—Summary Application for Recovery—Competency.—*Question*, whether a summary application to a sheriff, on a vague allegation that a picture, in the possession of a party not alleged to be a *mala fide* possessor, had been stolen from the petitioner upwards of forty years previously, be competent; and a warrant granted before answer to seize the picture and place it in judicial custody (which was done), *held* to be incompetent. *Lord Fife's Trs.* v. *Snare*, 1849, 11 D. 1119; 21 J. 434.

55. Stolen Property—Bona fide Purchase at Public Market.—The proprietor of four bullocks which had been stolen from him, *held* entitled to recover them from a *bona fide* purchaser at a public market. *Henderson* v. *Gibson*, 17 June 1806, F. C.

56. Title—Boundary Undefined.—Where the boundary between two proprietors is undefined by the titles, it must be determined by proof of possession, and parole evidence is competent for this purpose. *Girdwood* v. *Paterson*, 1873, 11 M. 647; 45 J. 406.

57. Title—Limited Title.—In a declarator of right to a piece of ground adjoining a house, founded on a limited title, and on an allegation of forty years' possession, *held* that the title excluded the pursuer's claim and proof of possession. *Ross* v. *Milne, Cruden, & Co.*, 1843, 5 D. 648; 15 J. 309.

58. Title to Possess—Fraudulent Title.—In a possessory question, *held* competent for a sheriff to refuse to give effect to a title of possession when he is satisfied that it is fraudulent. *Brown's Trs.* v. *Fraser*, 1870, 8 M. 820; 42 J. 479.

59. Title to Possess—Road.—Petition to sheriff for interdict against using alleged private farm road *refused* on proof of seven

years' possession by public. *Calder* v. *Adam*, 1870, 8 M. 645; 42 J. 319.

60. Title to Possess — Seven Years' Possession. — *Held* that a tenant under a lease for 999 years, who had for seven years been in possession of a right of access over the ground of an adjoining tenant of the same proprietor, was entitled to an interdict to prevent the adjoining tenant from disturbing the possession. *M'Donald* v. *Dempster*, 1871, 10 M. 94.

61. Usage—Erection of Wall.—A party had been long in use to deposit dung in a space at the side of a common close, over which an outside stair to a building formerly existing on his property had projected. Having at a subsequent period surrounded this space with a parapet wall to keep in the dung, *held*, in an application to have this wall removed within seven years of the erection of the wall, that he was entitled to erect it. *Wilson* v. *Pattie*, 1829, 7 S. 316.

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1. Bar — Admission of Constitution of Debt — Compensation.— A defender having admitted the constitution of the debt libelled, and pleaded compensation, *held* barred from pleading prescription, seeing that if on a

reference to oath he had deponed to the same effect, compensation would have been repelled, and must have been proved by him. *Miller* v. *Baird*, 1819, Hume 480. See also *Gordon* v. *Innes*, 1826, 4 S. 577 and *Mitchell* v. *Ferrier*, 1842, 5 D. 169.

2. Bar—Suspension of Charge on a Decree—Failure to Plead Prescription in Original Action.—In a suspension of a charge on a decree, *held* that the suspender was barred from pleading prescription of the account for which decree had been given in respect that in his defence to the action on that account he had not pleaded prescription but had averred his belief that all claims had been settled. *Maule* v. *Sommers*, 1822, 1 S. 514.

3. Computation of Time — Minority — Deduction — Body of Creditors of whom Some Minors.—The purchaser at a judicial sale, in a process of ranking and sale, granted bond to pay the price at Martinmas 1792, which was lodged in process, and no demand was made on the bond for more than forty years. *Held* that it was prescribed, and that prescription was not elided, although some of the creditors were in minority during part of the period, and a long term of years elapsed after the death of the first common agent in the ranking before the appointment of another. *Allan* v. *Brander*, 1842, 1 Bell 167. Affg. 1839, 1 D. 678 ; 14 Fac. 755.

4. Computation of Time — Minority — Deduction—Entail—Contingent Rights. — In computing the prescriptive period of forty years, the minority of substitutes in an entail not to be deducted. *Auchindachy* v. *Grant*, 1794, 3 Pat. 317 ; and *D. of Buccleuch* v. *Cunynghame*, 1826, 5 S. 57 ; 2 Fac. 28 ; but see *Fullerton, etc.* v. *Hamilton*, 1797, 2 Pat. 631 ; 1801, 4 Pat. 175, in which the judges of the Court of Session were divided, some *holding* that the minority of an heir-substitute of entail, whether the nearest or most remote, could not be deducted ; some that the minority of the first heir-substitute, and others that the minority of the whole heirs-substitute, should be deducted.

5. Computation of Time — Minority — Deduction — Entail — Remote Heir-Substitute before Succession Opens to him.—A remote heir-substitute is not entitled to have his minority deducted during that part of the prescriptive period to which he had no immediate right to the estate. *Maule* v. *Maule*, 1829, 7 S. 527 ; 4 Fac. 689.

6. Computation of Time — Minority — Deduction — No Special Statutory Exception.—*Observed*, that where there is no special statutory exception, the years of minority are not deducted in questions of prescription, and that where usage is founded on as interpreting a grant, what occurred during the minority of the grantee's representative is not to be thrown out of view. *Baird* v. *Fortune*, 1861, 23 D. 1080 ; 3 J. 549.

7. Computation of Time — Minority—Deduction — Rights of Property — Decree against Pupil without Tutors. — Decrees reducing a disposition and sasine were pronounced against a pupil without tutors. In an action to set aside the decrees on the head of minority brought by the pupil's representatives, *held* (1) that to exclude the pursuer's title to sue the term of the negative prescription must have run ; and (2) that as the decrees affected the titles to land, the Act 1617 applied and that minorities must be deducted. *Sinclair* v. *Campbell's Trs.*, 1835, 13 S. 594 ; 10 Fac. 383. *Remitted* 2 S. & M'L. 105. *Decided* 15 S. 770 ; 12 Fac. 743.

8. Computation of Time — Minority—Deduction—Right of Way—User during Defender's Minority.—In an action of declarator, that the public had acquired, by prescriptive possession for forty years, a right of road through the lands of the defender and other proprietors, who were not called as parties, *held* that the acts of possession by the public during the defender's minority could not be founded on to his prejudice, and that the years of prescription must be counted back from the date of his immediate predecessor's death. *Craufurd* v. *Menzies*, 1849, 11 D. 1127 ; 21 J. 446.

9. Computation of Time—Minority—Non valentia agere — Deduction — Contingent Rights.—*Held* that a claim for debt had been extinguished by the negative prescription, and that pleas of *non valentia agere* and minority could not be stated in answer, in respect that there was, during the whole period of prescription, a party of full age who had a valid title to sue. *Buchanan* v. *Bogle*, 1847, 9 D. 686 ; 19 J. 278.

10. Computation of Time—Non valentia agere — Deduction. — The currency of the long negative prescription *held* not to be interrupted by the years of a lengthened service of a seaman, following on impressment in the navy. *Graham* v. *Watt*, 1846, 5 Bell 172 ; 18 J. 605. Affg. 1843, 5 D. 1368 ; 15 J. 605 ; and see *Campbell* v. *Wilson*, 1770, 2 Pat. 193 ; 1766, 5 Br. S. 543, 915, 926.

11. Computation of Time—Non valentia agere — Deduction — Entailer's Debts. — *Held* that where an entailed estate which was liable for the entailer's debts was possessed by a lady whose husband was in right of the debts, there existed such *non valentia agere* as to prevent the currency of prescription, he not being able to sue her *cum effectu*. *Lawrie* v. *Donald*, 1830, 9 S. 147.

12. Computation of Time — Terminus a quo — Action of Damages for Error Committed by Law Agent. — In an action of damages against a law agent who had blundered an inhibition, *held* that prescription did not run from the date at which the error was committed, but from the date at which it was discovered, and the inhibition set aside. *Question*, whether such an action raised without libelling gross ignorance or negligence, and blank in the sum concluded for, effectually

interrupted prescription. *Cooke* v. *Falconer's Reps.*, 1850, 13 D. 157; 23 J. 55, 424.

13. Computation of Time — Terminus a quo—Lease Followed by Feu—Possession.—Lands being possessed under a lease, and a feu of the same subsequently granted, *held* that the possession continued to be in virtue of the lease, and that prescription against the right of challenging the feu commenced only at the expiry of the lease, and not from the date of the charter. *D. of Roxburgh* v. *Don*, 1734, 1 Pat. 126.

14. Crimes — Act 22 Geo. III. c. 60 — Seducing Artificers to go out of Kingdom. — Question certified whether the crime of seducing artificers to go out of the kingdom had prescribed. *Lee*, 1822, 1 S. (J. C.) 86.

15. Crimes or Quasi-Crimes—Usury—12 Anne, c. 16.—The Act 12 Anne, c. 16 relative to usury having been repealed by the Act 17 and 18 Vict. c. 90, the cases relating to limitation of actions thereunder need only be referred to generally. See *Walker* v. *Allan*, 1802, 4 Pat. 303. Affg. 15 May 1800, F. C.; M. "Usury" App. No. 1. *Walker* v. *Allan*, 30 June 1807, F. C.; M. "Usury" App. No. 1. *Morrison* v. *Connel*, 24 June 1808, F. C.; M. "Usury" App. No. 2. *Meal* v. *Thom*, 27 Nov. 1810, F. C. *Paul* v. *Inglis & Co.*, 20 Jan. 1824, F. C.; 2 S. 626, 628.

16. Decennial—Act, 1696, c. 9—Curator —Extrajudicial Consent to Afford Information.—A curator neglecting to make up inventories does not forfeit the benefit of 1696, c. 9, establishing the decennial prescription, even if after the years of prescription he has given an extrajudicial consent to afford information respecting the affairs of the curatory. *Gowans* v. *Oswald*, 1831, 10 S. 144; 7 Fac. 117.

17. Decennalis et triennalis possessio—Churchmen—Continuance of Possession.—The rule in favour of churchmen *decennalis et triennalis possessor non tenetur docere de titulo* is part of the law of Scotland, but a title founded upon the rule is not merely liable to be redargued or elided by proof that the possession was had upon some different footing from that of property, but is also dependent upon continuance of the possession. *Cochrane* v. *Smith*, 1859, 22 D. 252; 32 J. 97.

18. Decennalis et triennalis possessio—Churchmen—Possession beyond what Title Warrants—Presumption.—Although a piece of ground had been possessed by a clergyman for more than thirteen years, yet *held* that this did not establish a prescriptive right, but only a presumption which relieved the clergyman from instructing his title, but which might be redargued by proof that the property belonged to another party. *Greig* v. *D. of Queensberry*, 21 Nov. 1809, F. C.

19. Decennalis et triennalis possessio—Churchmen — Precentor.— A precentor, not being an ecclesiastic, *held* not entitled to plead the *decennalis et triennalis possessio* in support of a claim against the proprietor of a particular estate in the parish for the continuance of a payment in use to be made to him and his predecessors by the owners of the estate for more than 100 years. *Trail* v. *Dangerfield*, 1870, 8 M. 579; 42 J. 280.

20. Imprisonment—Action for Wrongous — Act, 1701 — Debt. — The prescription of actions for wrongous imprisonment, established by the Act 1701 does not extend to those founded on imprisonment for civil debt. *M'Christie* v. *Kea*, 1831, 9 S. 312; 6 Fac. 224.

21. Interruption—Adjudication, Decree of—Infeftment.—Prescription of a decree of adjudication interrupted by an infeftment taken thereon. *King* v. *Walker*, 1828, 6 S. 643; 3 Fac. 682.

22. Interruption—Adjudication, Decree of—Infeftment—Possession, Partial.—*Held* that adjudication with charter and infeftment was not sufficient to save from the negative and positive prescription, no possession having followed of the lands adjudged, these having never been out of the proprietor's possession; and possession of a part not being sufficient to interrupt prescription as to the whole, but only the part so possessed. *Clarke* v. *E. of Home*, 1753, 1 Pat. 533.

23. Interruption — Negative — Acknowledgment by Executor of Resting-Owing of Legacy—Trust.—A claim for a legacy is saved from the operation of the negative prescription, by being, within the years of prescription, acknowledged by the executor to be unpaid. *Briggs* v. *Swan's Exrs.*, 1854, 16 D. 385; 26 J. 182.

24. Interruption — Negative — Acknowledgment of Resting-Owing—Payments of Interest.—*Held* that a debt incurred by an heir of entail prior to recording the entail was kept up against a succeeding heir, notwithstanding the lapse of sixty-six years, by its being specifically mentioned in a subsequent bond, by the payment of interest to the creditor, and by an obligation come under by the debtor's tutors on a reconveyance of the estate to procure discharges of outstanding debts amongst which the said debt was expressly mentioned. *Dundas* v. *Dundas*, 1827, 5 S. 790.

25. Interruption—Negative—Action and Arbitration against Other than Proper Debtor.—After the death of the granter of a bond, the creditor obtained against his heir decree *cognitionis causa*, followed by decree of adjudication. A claim was made on this debt more than forty years after this. Meanwhile another creditor had got into possession of the estate, and raised an action of reduction, declarator, and extinction of this and other debts, to which the debtor was no party, within the forty years. *Held* that (1) appearance of the creditor therein, with production of his bond and adjudication, although the court made avizandum with them, and they were excepted from a decree of reduction *contra non producta* pronounced with reference to the other debts, and (2) entering into an

obligation to refer his claim, were not sufficient to interrupt the negative prescription. *L. Adv.* v. *Hay*, 1758, 2 Pat. 266. Revg. 1756, M. 11276.

26. Interruption — Negative — Action — Minority—Entail.—A plea of prescription of a lease granted in violation of an entail, elided, where an action had been brought by the contravener's son within forty years, and another action by him and a substitute heir after that period, but within it after deducting the years of minority of the substitute. *Turner* v. *Turner*, 1813, 1 Dow 423. Affg. 17 Nov. 1807, F. C.; M. "Taillie" App. No. 16.

27. Interruption — Negative — Horning against some of Debtors.—*Question*, whether prescription of a debt due by a corporation was interrupted by a horning used against some of the members, who had been the representatives of the corporation when the decree on which the horning proceeded was pronounced. *Grant* v. *Crs. of York Buildings Co.*, 1785, 3 Pat. 17.

28. Interruption — Negative — Payment to Account of One of Two Bonds.—A debtor owing money on two bonds to the same creditor, made a payment to account. *Held* in an action raised after the years of prescription, that the payment to account had not the effect of interrupting prescription as to both bonds, but that the debtor might impute it to which he pleased. *Garden* v. *Rigg*, 1748, 1 Pat. 409. Affg. 1743, Elc. *voce* "Prescription" No. 25; M. 10450, 11274.

29. Interruption—Negative—Submission Applicable to Claim. — The negative prescription *found* to be interrupted by a submission specially applicable to the claim, on which proceedings took place. *Vans* v. *Murray*, 14 June 1816, F. C.

30. Interruption—Negative—Submission Applicable to One of Separate Debts Comprised in an Adjudication—Minority. — A bond was granted by a party to his creditor, upon which adjudication, charter, and infeftment followed in 1794, this adjudication comprising several other separate debts. In 1749 a claim was made under the Vesting Act, the proprietor of the estate having been attainted. The Crown pleaded the negative prescription; to which it was answered, that a submission, followed by decree-arbitral, entered into by the debtor with one of the creditors in the separate debts comprised in this adjudication in 1738, and assignation of the debt due to that creditor, preserved the whole adjudication from prescription; and that, moreover, the years of minority of the claimant's children, for whom she held the debt, although her title was *ex facie* absolute, would fall to be deducted, and would save the debt from prescription. *Held* that the bond, etc., were not prescribed. *L. Adv.* v. *Hay*, 1758, 2 Pat. 272.

31. Interruption — Negative — Wadset—Precept of clare constat.—*Question*, whether granting a precept of *clare constat*, to complete the heir's right to a wadset, sufficiently interrupted the negative prescription as to the wadset debt. *M'Neil* v. *Yorston*, 1749, 2 Pat. 276, footnote.

32. Interruption — Positive — Action of Declarator of Non-Entry within Forty Years.—A party obtained a decree of declarator of tinsel of the superiority against his superior, who held of the prince, and was afterwards infeft, under an unqualified charter, as immediate vassal of the prince, and enjoyed possession for more than forty years; but an action of declarator of non-entry was brought by the superior before the lapse of that period. *Held* that a prescriptive right to the superiority had not been acquired, to the effect of excluding the superior from reducing the infeftment under the Crown charter. *Wallace* v. *E. of Eglintoun*, 1830, 8 S. 1018; 5 Fac. 829.

33. Interruption—Quinquennial—Arrestments — Action taken upon the Arrestment. — An arrestment upon which the arrestee raised an action of multiplepoinding within the fifth year from its date, *held* not to have prescribed, although the arrester did not enter appearance till after the expiry of said five years. *M'Math* v. *Campbell*, 9 July 1802, F. C.; M. 11051. *Grahame* v. *M'Farlane*, 30 May 1811, F. C.

34. Interruption—Quinquennial—Arrestments—Execution of Citation.—An execution of citation in a furthcoming, although not lodged in process for two years after its institution, *held* sufficient to bar a plea of the quinquennial prescription of arrestment. *Cameron* v. *M'Ewen*, 1830, 8 S. 440; 5 Fac. 357.

35. Interruption—Quinquennial—Arrestments — Suspension. — Prescription of an arrestment on a dependence runs from the date of the decree, and not of a judgment finding the letters orderly proceeded in a subsequent suspension. *Paterson* v *Cowan*, 1826, 4 S. 477; 1 Fac. 383.

36. Interruption — Quinquennial — Tenants' Maills and Duties—Judicial Claim for by Way of Compensation. — A plea founded on the quinquennial prescription of rents, *repelled*, in respect they had been judicially claimed by way of compensation against a claim by the tenant within the five years. *M'Donald* v. *Jackson*, 1826, 5 S. 28.

37. Interruption — Quinquennial — Tenants' Maills and Duties—Sequestration and Arrestment in Security before Term of Payment.—A landlord, before the term of payment of the rent, used sequestration of his tenant's crop and stocking, the petition for which contained a prayer for payment. He thereafter used arrestments on the dependence; and the tenant was allowed to sell, on an arrangement that the proceeds were to be applied in extinction of the rent. *Held* that although the sequestration was never recalled, it was no bar to the running of the quinquennial prescription. *Cochrane* v. *Fergusson*, 1830, 8 S. 324; 5 Fac. 274; 1831, 9 S. 501.

38. Interruption — Quinquennial — Tenants' Maills and Duties—Sequestration Process.—A process of sequestration is a bar to the quinquennial prescription of rents. *Hogg* v. *Low*, 1826, 4 S. 702.

39. Interruption—Triennial—Palsy and Inability for Business of Debtor—Mennis ordinars.—*Held* not relevant to elide prescription, to allege that the debtor was struck with palsy within three years from the date of the last item in an account, so as to be unable to attend to business. *Fraser* v. *M'Keich*, 1838, 16 S. 1045; 13 Fac. 712.

40. Interruption — Triennial — Pursuit—Action against Trustee in Sequestration.—*Question*, whether a writer, holding a hypothec over the title deeds of a bankrupt, can, in place of lodging a claim in the sequestration, raise an action against the trustee, for the purpose of interrupting prescription. *M'Callum* v. *Christie*, 1833, 11 S. 321.

41. Interruption—Triennial — Pursuit—Action Dismissed as Incompetent.—*Held* that an action for payment of an account, brought within the three years, which was dismissed as incompetent, was insufficient to elide the triennial prescription pleaded against an action, brought subsequent to the three years, between the same parties, for the same account. *Cochran* v. *Prentice*, 1841, 4 D. 76.

42. Interruption—Triennial — Pursuit—Arbitration Proceedings—Personal Bar.—An action for furnishings was judicially referred, and a minute of reference was also executed, empowering the referee to settle all claims and demands between the pursuer and the defender. The reference fell, without a decree-arbitral, in consequence of the death of the referee; and an action was then raised, after the expiry of three years, to enforce payment of an account which, though not pursued for in the original action, had been imported into it by the pleadings of the defender. *Held* that the case did not fall within the statute 1579, c. 83, but that the pursuer was entitled to prove his demand *prout de jure*. *Dunn* v. *Lamb*, 1854, 16 D. 944; 26 J. 494.

43. Interruption — Triennial — Pursuit—Before Incompetent Court.—The triennial prescription of an account of furnishings to a vessel is not elided by a marking on it, without date, by the master; nor by the raising and executing within the three years a summons for payment before an incompetent court. *M'Laren* v. *Buik*, 1829, 7 S. 483, 780; 4 Fac. 27, 629.

44. Interruption — Triennial—Pursuit—Cognition and Sale—Production of Account and Oath of Verity in.—The production of an account for furnishings and oath of verity in a process of cognition and sale at the instance of tutors, to obtain authority to sell their pupil's heritage, does not interrupt the triennial prescription,—distinguishing from production of a claim in a multiplepoinding, where the creditor may obtain decree, whereas in a cognition and sale he cannot do so. *Ferrier* v. *E. of Errol*, 9 July 1811, F. C.

45. Interruption—Triennial—Pursuit — Constitution, Decree of.—A debtor died insolvent, leaving minor children, to whom a factor *loco tutoris* was appointed. A meeting of his creditors was held, at which the factor attended, and also certain creditors, whose debts were then prescribed. It was there agreed that all the creditors should assign their debts to a trustee to get a general decree of constitution against the representatives. This was obtained; but prior to it some of the debts became prescribed. *Held*, in a ranking and sale of the debtor's estate, that the debts which were prescribed prior to the meeting remained so, notwithstanding the subsequent decree, but that those which were not then prescribed were not liable to that objection. *Stewart* v. *Douglas*, 1823, 2 S. 226.

46. Interruption — Triennial—Pursuit—Notice of Demand by Way of Set-Off in Prior Judicial Proceedings.—The production, in an action by a defender, of an account for goods furnished within three years from its date, as a counter claim against the pursuer, interrupts prescription. *Sloan* v. *Birtwhistle*, 1827, 5 S. 742.

47. Interruption—Triennial — Pursuit—Notice of Demand by Way of Set-Off in Prior Judicial Proceedings.—In answer to an action raised by A in 1853 against a railway company, on an account said to have been incurred in 1842, the triennial prescription was pleaded. It was replied, that in 1843 the company had sued A for various sums, to account of which they said they had received the amount of the account now sued for, that A lodged defences, containing a reservation of his claim on this account, and that judgment was given against the company. *Held* that the proceedings in the former action did not amount to "pursuit," so as to obviate prescription. *Eddie* v. *Monkland Rlys. Co.*, 1855, 17 D. 1041; 27 J. 536.

48. Interruption—Triennial—Receipt for Rent during Currency of Three Years—House Maills.—A receipt for rent during the currency of the three years, and the absence of entries in the books of the tenant that he had paid rent, *held* not relevant to elide the triennial prescription. *Cumming's Trs.* v. *Simpson*, 1825, 3 S. 545.

49. Interruption — Triennial — Writ of Party—Delivery of Papers—Law Agent's Account.—Letters by a client to an agent implying the constitution and subsistence of an account for business, followed by delivery of his papers, *held*, in a question with the client's heir, to be sufficient to elide the triennial prescription, although they did not specify the particular account or amount, and were dated within the three years. *Davidson* v. *Hay*, 1806, Hume 460.

50. Interruption — Triennial — Writ of Party — Holograph States by Debtor Showing Sums Paid—Proof of Receipt

of Furnishings.—In an action for payment of an account of furnishings, *held* that holograph states sent by the debtor to the creditor, showing in detail that the debt was paid, could not be founded on as an acknowledgment of the furnishings sufficient to interrupt prescription, unless the creditor could prove that prior thereto he had rendered to the debtor a full state of the furnishings as libelled. *Nisbets* v. *Baird*, 28 Nov. 1816, F. C.

51. Negative — Adjudication.—A party obtained an adjudication, followed by a charge against superiors. He then raised a process of maills and duties, and decree was pronounced in it; and he exercised other acts of possession within the forty years. *Held* that although forty years had elapsed from the date of the adjudication, it was not extinguished by the negative prescription, and that he was entitled to decree of expiry of the legal. *M'Culloch* v. *Buchanan*, 1828, 6 S. 1059.

52. Negative — Agreement to Restrict Rights under Marriage-Contract — Non-Enforcement of—Condictio indebiti.—An antenuptial marriage-contract was entered into in 1825, and in 1827 the spouses granted to the wife's father a letter agreeing to restrict their rights if he desired it and found it necessary, and promising to execute a formal deed if wanted. No formal contract was subsequently drawn up and executed. In 1842 the father died, and in 1843 his son and representative paid the provisions in full. In 1870 the son, having, as he alleged, recently discovered the letter of 1827, raised an action of reduction and repetition of the sums paid in excess. *Held* that the obligation in the letter was not barred by prescription, but the defenders on other grounds *assoilzied*. *Fowler* v. *Mackenzie*, 1874, 11 S. L. R. 485; 1872, 44 J. 332.

53. Negative—Bond to Consign Price of Estate—Obligation to Consign.—A bond obliging the granter to consign the price of an estate purchased at a judicial sale if not enforced by the creditors within the prescriptive period, *held* to have prescribed, as also the obligation to consign. *M'Innes* v. *Brander*, 1844, 6 D. 512; 16 J. 234.

54. Negative—Bonds in English Form.—*Held* that bonds in the English form were not cut off by the Scots negative prescription. *Delvalle* v. *York Buildings Co.*, 1788, 3 Pat. 98.

55. Negative—Bond, Heritable Followed by Infeftment.—*Question*, whether an heritable bond followed by infeftment is affected by the negative prescription. *Barr* v. *Hamilton*, 1823, 2 S. 556.

56. Negative — Certificate by Commissioners of Supply and Collector of Cess—Entry of Lands in Cess-Book for Prescriptive Period — Freehold Qualification.—Where lands have been entered in the cess-book at a certain valuation, and, conformably thereto, have paid cess and other public burdens for a period of above forty years, it is no objection to a claim of enrolment as a freeholder, that irregularities (by slumping *cumulos* and splitting the mass, without reference to former decrees of division) have been committed, of a date prior to the entry, in apportioning the valuation of these lands. *Macdonald* v. *Riddell*, 1830, 8 S. 664.

57. Negative—Claim for Payment of a Legacy.—The negative prescription applies to the claim of a legatee against an executor for payment. *Jamieson* v. *Clark*, 1872, 10 M. 399; 44 J. 225.

58. Negative—Claim for Payment of a Legacy — Annuity — Arrears of, Outwith Forty Years. — An annuity payable half-yearly to a widow was conferred by contract of marriage in 1788; the husband died in 1807. *Held*, in an action raised in 1856 for the whole annuities from the date of the husband's death, that the action on the deed was not excluded by the negative prescription, but that arrears due for terms more than forty years past had prescribed. *Henderson* v. *Burt*, 1858, 20 D. 402; 30 J. 222.

59. Negative—Claim for Share of Goods in Communion—Prior Acceptance of Provision under Father's Settlement—Claims Constituted by Writing — Taciturnity.—*Question*, whether the Statute of Prescription is not applicable solely to claims constituted by writing, and *observations* as to the effect of taciturnity. *Cullen* v. *Wemyss*, 1838, 1 D. 32; 14 Fac. 17.

60. Negative—Crown.—*Question*, whether the negative prescription runs against the Crown. *L. Adv.* v. *Mags. of Stirling*, 1846, 8 D. 450; 18 J. 202. *E. of Fife's Trs.* v. *Commrs. of Woods and Forests*, 1849, 11 D. 889.

61. Negative—Decree Defining Parties' Rights to Property—Loss of Benefit of—Servitude.—The rights in a moor of two proprietors of lands adjoining thereto having been determined, by an old decree, to be of property in the one, and servitude in the other, *held* that no possession by the latter (whose titles bore "parts and pertinents"), consistent merely with a right of servitude, could confer on him, by prescription, a right of property in the moor. *E. of Fife's Trs.* v. *Cuming*, 1831, 9 S. 336; 5 Fac. 277.

62. Negative—Decree Finding Property Belonged to A—Loss of Benefit of.—The benefit of a decree finding property belonged to a party may be lost by the negative prescription. *Mags. of Perth* v. *E. of Wemyss*, 1829, 8 S. 82; 5 Fac. 80.

63. Negative — Entail — Extinction—Infeftment taken on Subsequent Unrecorded Entail.—An entailer who had reserved power to alter a recorded entail, executed a deed making material alterations upon it; and on this deed infeftment was taken, and possession followed for upwards of forty years, but it was never recorded. *Held* that it was invalid either as a distinct entail, or as qualifying the first, and that the first being extinguished by prescription, the lands were held in fee-simple.

Stewart v. *Stewart*, 1846, 5 Bell 139; 18 J. 508. Affg. 1844, 6 D. 1073; 16 J. 474.

64. Negative—Entail—Extinction—Infeftment on Subsequent Unrecorded Entail.—There were two entails applying to lands. The first was recorded but not feudalised for forty years; the second was not recorded but was the basis of the investiture. *Held* that as the first was not feudalised for the forty years and the second not recorded, the lands were not subject to the fetters of the entail. *Inglis* v. *Inglis*, 1851, 14 D. 54; 24 J. 17; 1 Stuart 30. See also *Lockhart* v. *Lockhart*, 1841, 3 D. 904; 16 Fac. 942.

65. Negative — Interest of Party to Plead.—The negative prescription cannot be pleaded against an obligation by one who has no interest. *Wauchope* v. *York Buildings Co.*, 1782, 2 Pat. 595. Affg. 1781, M. 10706.

66. Negative — Interlocutor — Ranking and Sale.—An interlocutor was pronounced by the Inner House in 1825 allowing a claim to be received. Upon a party craving in 1871 to be sisted as in right of said claim, it was pleaded that the interlocutor and the claim had prescribed. Plea *repelled* by Lord Jerviswoode, Ordinary. *Eccles, Ranking and Sale of*, 1871, 8 S. L. R. 450.

67. Negative — Res meræ facultatis — Power to Redeem within Limited Time—Positive—Possession.—A disposition of an old date found sufficient title to exclude a reduction, notwithstanding there appeared a back bond allowing redemption within six years, since the expiry of which period prescriptive possession had followed. *Sinclair* v. *E. of Breadalbane*, 1759, 6 Pat. 728.

68. Negative — Res meræ facultatis — Reserved Right to Open Entry off Common Stair.—The right of the proprietor of the ground storey of a tenement (reserved in his own titles and in those of the other storeys) to open and use at any time a door or entry which had originally existed, opening into his storey from the common stair, was *held* to be *res meræ facultatis*, and not affected by the negative prescription, nor lost *non utendo*. *Gellatly* v. *Arrol*, 1863, 1 M. 592; 35 J. 360. [This case was appealed and compromised at the bar of the House of Lords.]

69. Negative — Res meræ facultatis — Right to Levy Harbour Dues—Loss of, non utendo.—*Opinion*, that the right to levy harbour dues may be lost by the negative prescription. *Mags. of Renfrew* v. *Hoby*, 1854, 16 D. 348; 26 J. 165. [In H. of L., 1856, appeal dismissed as incompetent; 19 D. (H. L.) 2; 2 Macq. 478.]

70. Negative — Res meræ facultatis — Right to Levy Harbour Dues—Loss of, non utendo.—Immunity may be acquired from a right to levy dues, and from a grant of port and harbour, by dereliction on the part of the grantee of the right to exercise it for forty years at a place actually used as a separate harbour, to which vessels resorted, and where goods were loaded and unloaded. *Dundee Harbour Trs.* v. *Dougall*, 1852, 24 J. 385; 1 Stuart 660; 1848, 11 D. 6; 20 J. 542.

71. Negative—Res meræ facultatis—Right to Levy Tolls—Loss of, non utendo.—A party had a title to levy dues from all passengers, conform to use and wont, over the river Avon, betwixt the west bridge and the mouth of the Avon, but had not been in the practice for upwards of forty years of levying them at a ford between these two points. *Held* that his right to levy them at the ford was prescribed, and that it was not relevant to allege that he had levied them within forty years at other points. *Mags. of Linlithgow* v. *Mitchell*, 1822, 1 S. 515. *Held* also that the power to alter a road was *res meræ facultatis*, and not extinguished by prescription. *Shearer* v. *Hamilton*, 1871, 9 M. 456; 43 J. 218.

72. Negative—Res meræ facultatis—Superior and Vassal—Right of Superior to Claim Casualty—Positive—Title.—A party in 1682 feued lands to another for payment of a certain feu-duty, "and doubling the said feu-duty at the entry of every heir or assignee thereto"; and the superior, in 1766, granted to an heir a precept of *clare constat*, which did not contain the above, on which titles were made up and possession enjoyed for more than forty years. *Held*, that the above taxation of the casualty of entry was not extinguished by prescription. *Stewart*, 3 June 1813, F. C.

73. Negative—Res meræ facultatis—Superior and Vassal—Right of Vassal to Relief from Superior of Portion of Public Burdens—Loss of, non utendo.—A vassal was taken bound by a feu-contract to relieve the superior of the public burdens, under a qualification that the superior was to pay one-fourth part thereof, but which qualification was omitted in the charter granted twenty days thereafter, and the whole burdens were paid by the vassals for nearly two centuries. *Held* that they were not entitled to be relieved by the superior of one-fourth of the burdens. *Leslie* v. *E. of Moray*, 1827, 5 S. 284; 2 Fac. 177.

74. Negative—Res meræ facultatis—Superior and Vassal—Vassal's Right to Enter.—The right of a vassal to enter with an over-superior is *res meræ facultatis*, and is not abandoned by mere failure to exercise it within the prescriptive period. *Cheyne* v. *Smith*, 1832, 10 S. 622; 7 Fac. 479.

75. Negative—Reversions.—A clause of reversion in a disposition which did not specify the sum, or the reverser, or the term of redemption, and appeared intended to obviate any claim of absolute warrandice of the conveyance, *held* not sufficient to bar a prescriptive right founded on the disposition, sasine, and forty years' possession. *Nicolson* v. *Keith*, 1810, Hume 470.

76. Negative — Reversions.—A general reference to a right of reversion, which is not specially engrossed in the sasines for forty

years, is not sufficient to elide the negative prescription. *Geddes* v. *Miller*, 28 May 1819, F. C.

77. Negative — Reversions — Necessity of Engrossing in Sasines.—Although a right of reversion be engrossed in a charter, and referred to in the sasines, yet if it be not engrossed therein, it is not sufficient to elide the negative prescription. *Monro* v. *Monro*, 19 May 1812, F. C.

78. Negative—Right of Action—Deeds Challenged—Fraud and Incapacity—Possession—Positive.—The heir of the ancient investiture of an estate brought, in 1736, a reduction, on the ground of fraud, facility, and circumvention, of a variety of deeds, granted of various dates, from 1685 to 1711, when the granter died. All these altered the old destination, and in 1688 infeftment had followed on the deed of 1685; but the grantee had been *verus dominus* throughout. The parties holding the estate pleaded that the pursuer's ancestors being cut out by the deed of 1685, the action was barred both by the positive and negative prescription. Plea *repelled*. *Ross* v. *Ross*, 1776, 2 Pat. 393.

79. Negative—Right of Action—Entail—New Destination—Positive—Possession.—A deed containing a destination of an estate in 1708, *held* extinguished by the effect of another deed in 1735, renouncing for a sum of money all claims under the 1708 destination, and the negative prescription. *Routledge* (otherwise *Majendie*) v. *Carruthers*, 1819, 2 Bligh 692. Affg. 19 May 1812, F. C.; 4 Dow 392. Cf. *E. of Eglinton* v. *Montgomerie*, 1843, 2 Bell 149; 16 J. 1. Affg. 4 D. 425; 14 J. 177; and distinguish *Stewart* v. *Nicolson, etc.*, 1859, 22 D. 72; 32 J. 33.

80. Negative—Right of Action—Entail—Obligation ad factum præstandum—Computation of Time—Minority—Deduction.—A lady died in 1753, leaving a deed of entail of her landed property, and conveying her other funds to the institute and heirs of entail, to be applied, when realised, in the purchase of lands to be entailed on the same series of heirs; and the institute intromitted generally with the whole funds, and, in particular, obtained payment of certain debts and the price of a house in 1771–72 and 1787. *Held*, in an action brought by the heirs-substitutes after the lapse of forty years from 1753, that the *jus crediti* created in the substitutes to enforce this condition was lost by the negative prescription as to those funds which the heir of entail in possession had uplifted forty years prior to the date of action to enforce the obligation, and that minorities of the heirs were not to be deducted. *Kinloch* v. *Rocheid*, 1 March 1808, F. C.; M. "Prescription" App. No. 7; 27 May 1800, F. C.; M. "Prescription" App. No. 4.

81. Negative — Right of Action — Reduction of Decrees of Adjudication and Sale.—*Held*, in a reduction of decrees of adjudication and sale, and of the title made up under them, that although the defender's title was not fortified by the positive prescription, it was competent to him to plead the negative prescription as cutting off the right of the pursuer to challenge the decrees of adjudication and sale. *Cubbison* v. *Hyslop*, 1837, 16 S. 112; 13 Fac. 112.

82. Negative — Right of Action — Reduction of Decree of Expiry of Legal.—A party who held heritable bonds adjudged the property, and in 1733 got a decree of declarator of expiry of the legal in absence; and after the lapse of forty years from its date, an action of reduction of it was brought. *Held* that the right to institute such an action was extinguished by the negative prescription. *Paul* v. *Reid*, 8 Feb. 1814, F. C.

83. Negative — Right of Action — Reduction of Decree of Valuation ex facie Null.—A decree of valuation was not acted on for upwards of forty years. It was then founded on in a reduction of two decrees of locality subsequently pronounced. In an action of reduction of the decree of valuation, *held* that all objections other than those founded on incompetency or nullity, appearing *ex facie* of the decree, were cut off by the negative prescription. *Kinloch* v. *Bell*, 1867, 5 M. 360; 39 J. 185.

84. Negative — Right of Action — Reduction of Deed ex facie Null—Positive.—*Held* that an heir of line of an entailer was not barred from reducing a deed of entail by the circumstances of his immediate ancestors having taken infeftment under it at a distance of more than forty years prior to the reduction, the nullity appearing *ex facie* of the deed, and the possession under it not having commenced until after the death of a liferentrix, appointed by a separate deed, which event did not occur till within forty years of the reduction. *Shepherd* v. *Grant's Trs.*, 1847, 6 Bell 153; 19 J. 618; 3 Ross' L. C. 336. Affg. 1844, 6 D. 464; 16 J. 211.

85. Negative — Rights of Property — Correlation of Positive and Negative Prescriptions.—It is not relevant, in an action of reduction of certain titles at the instance of a mid-superior against a vassal on the ground of multiplication of superiors, to allege that the liferent (but not the fee) of the superiority had been divided for more than forty years; nor that the right of challenge is lost by the negative, where no right is alleged to have been acquired by the positive prescription. *Stewart* v. *Houston*, 14 May 1823, F. C.; 2 S. 300.

86. Negative — Rights of Property — Correlation of Positive and Negative Prescriptions.—The elder of two daughters passing by her father's settlement took infeftment under a precept of *clare constat*, as eldest heir-portioner. Having claimed a *precipuum*, she and her sister entered into a submission, under which a decree-arbitral was pronounced, fixing the extent of it. After the lapse of more than forty years from the decree, the son of the younger daughter expede a service, and was

infeft as heir-portioner of provision under the deed of settlement. *Held*, in an action at his instance of reduction of the decree-arbitral, brought on the ground that the elder daughter had no right to a *precipuum* under the father's settlement, that his right to challenge the decree was cut off by the negative prescription, whether the positive had run in the favour of the elder daughter or not. *E. of Dundonald* v. *Dykes or Mackenzie* (*Boyes' Trs.*), 1836, 14 S. 737 ; 11 Fac. 612.

87. Negative — Rights of Property — Correlation of Positive and Negative Prescriptions.—*Opinion*, that a reduction of a charter, being a step in the progress of titles of an heritable estate, loses effect by the negative prescription, if the adverse party is in a position to plead the positive. *Officers of Ordnance* v. *Mags. of Edinburgh*, 1862, 24 D. (H. L.) 3 ; 4 Macq. 447.

88. Negative — Rights of Property — Correlation of Positive and Negative Prescriptions—Personal Obligation to Make Titles Forthcoming.—An action concluded for production of an alleged disposition of, and declarator of right of property in, a park. The disposition had never been feudalised, and it was alleged to have been returned, as security for a loan, sixty-four years ago to the defender or his father, who, during the interval, had been in the undisturbed possession of the park in question, which was included in their titles from the year 1767, though infeftment had not been taken till 1832. *Held* that the pursuer was excluded by the negative prescription, and was not even entitled to a diligence to recover the alleged disposition in favour of his ancestor. *Paterson* v. *Wilson*, 1859, 21 D. 322 ; 31 J. 176.

89. Negative — Rights of Property — Correlation of Positive and Negative Prescriptions — Right to Adjudge.—*Opinion*, that a right to adjudge lands and other rights of action upon a general disposition may be cut off by the negative prescription under the Acts, 1469, c. 29, and 1474, c. 55, although not opposed by a prescriptive title. *Chisholm* v. *Chisholm-Batten*, 1864, 3 M. 202 ; 37 J. 97.

90. Negative — Rights of Property — Feudal Subjects.—The negative prescription does not apply to a right of property in a feudal subject. *Macdonell* v. *D. of Gordon*, 1828, 6 S. 600 ; 3 Fac. 618.

91. Negative — Rights of Property — Positive — Possession without Title. — Possession of land for forty years without a title does not entitle the possessor to plead the negative prescription against a party claiming on a title. *Mags. of Perth* v. *Presbytery of Perth*, 1730, 1 Pat. 39. Affg. 1729, M. 10723.

92. Negative — Rights of Property — Rights of Superiority—Possession under—Title not Adverse to.—A possession of lands for forty years, derived from the authors of A as superiors and not ascribable to an express title derived from another person as superior, is not a possession attributable to any right adverse to the original superior's rights, and cannot create a prescriptive title to exclude A's right of superiority although not acted upon for greatly more than the years of prescription. *Hill* v. *D. of Montrose*, 1833, 11 S. 958.

93. Negative — Succession — Entail — Destination—Vicennial.—A challenge by a person who founded on a clause of devolution of the right of an heir of entail who had been in possession for more than sixty years, *held* not barred by either the vicennial or the long prescription. *Campbell* v. *Campbell*, 1868, 6 M. 1035 ; 40 J. 589.

94. Negative—Teinds—Decree of Valuation of—Loss of Right to Reduce—Crown—Persons not Called in Original Action—Homologation.—*Held* that a decree which was *ex facie* a permanent valuation of teinds, bearing to have been pronounced in an action to which the titular was a party, must be held to have been within the knowledge of the crown as titular and of its donatories for upwards of forty years, and that a reduction of it at their instance was therefore excluded by the negative prescription ; also, that if originally invalid, the decree had been validated by homologation. *Opinions* on the effect of the negative prescription in protecting a decree from challenge at the instance of persons not called in the action in which it has been pronounced. *Deans of the Chapel Royal and H. M. Adv.* v. *Johnstone, etc.*, 1867, 5 M. 414 ; 39 J. 220.

95. Negative—Teinds, Inhibition of—Tacit Relocation.—*Held* that an inhibition of teinds, upon which the titular had not for a period of above sixty years taken any proceedings, was prescribed, and was ineffectual to interrupt tacit relocation on a tack of teinds. *Trinity Hospital* v. *Common Agent of South Leith*, 1848, 11 D. 266 ; 21 J. 71.

96. Negative — Teinds — Overpayments under Interim Pending Final Decree of Locality.—If payments of stipend are made under an interim decree of locality, there is an implied judicial contract, that when the legal obligations of the heritors are determined by final decree, their several interests shall be adjusted from the commencement of the process according to the true state of their rights and obligations ; and therefore the claims of relief thus arising cannot be affected by the length of time during which the settlement of a final scheme and decree may have been delayed. *Weatherstone* v. *M. of Tweeddale*, 1833, 12 S. 1 ; 9 Fac. 1.

97. Negative—Trust—Actings of Trustees ultra vires.—Trustees who were directed to invest free residue in land, to be entailed, with concurrence of the beneficiaries at the time, purchased an estate, the price of which exceeded the amount of the trust funds. More than forty years after payment of part of the price, but not forty years after the completion of the transaction, the heir in possession challenged the purchase as *ultra vires*, in respect of the excess

of the price over the funds. The trust subsisted still. *Held* that the trustees were entitled to plead the negative prescription. *Barns* v. *Barns' Trs.*, 1857, 19 D. 626; 29 J. 292.

98. Negative—Trust—Right to Administer Charitable Bequest. — A testator bequeathed money to the provost and bailies for the aged and impotent. It was paid to the provost and magistrates, who invested it chiefly in land, taking the titles to the "Hospital Master for the poor of the Hospital"—a trust created by an earlier deed—in connection with which the magistrates administered the bequest for upwards of two centuries. In an action to have the provost and magistrates compelled to denude in favour of the provost and bailies, and the latter ordained to administer the property under the terms of the bequest, and not as part of the hospital, *held* that the claim was cut off by the negative prescription; that the provost and magistrates could not be ousted from the management, but were the lawfully constituted trustees of the charity. *Baird* v. *Mags. of Dundee*, 1863, 1 M. (H. L.) 6; 35 J. 305.

99. Negative — Warrandice — Superior and Vassal—Loss of Right to Remove Mid-Superiority.—If lands be conveyed in warrandice of a disposition of other lands with a double manner of holding, under which the disponee takes a base infeftment—should the mid-superior convey the mid-superiority, and the disponee of the mid-superiority obtain a charter from the superior, this will operate as an eviction of warrandice, upon which prescription will run against the original disponee. *Gardner* v. *Scott*, 1843, 2 Bell 129; 16 J. 45. Revg. 2 D. 185; 15 Fac. 169.

100. Negative — Warrandice — Teinds, Augmentation of.—A superior having granted an obligation in a feu-charter conveying teinds, to relieve his vassal of augmentations of stipend, *held* that the negative prescription did not run against the obligation, but only against each augmentation. *Lennox* v. *Hamilton*, 1843, 5 D. 1357; 15 J. 602. *Elliot* v. *M. of Lothian*, 1808, Hume 465. *E. of Aberdeen's Trs.* v. *Dundas*, 1821, 1 S. 157. *Home* v. *M. of Breadalbane's Trs.*, 1835, 13 S. 296; 10 Fac. 163. Reversed on the ground that the pursuer had not shown a title to the warrandice, 1842, 1 Bell 1; and *Sinclair* v. *M. of Breadalbane*, 1844, 6 D. 378; 16 J. 195. Reversed on the same ground, 1846, 5 Bell 358; 18 J. 626.

101. Negative — Warrandice — Teinds, Augmentation of—Computation of Time.—A claim of relief of augmented stipend under an obligation of warrandice, *sustained* after the lapse of more than forty years from its date; and *held* that prescription began to run, not from the date of the augmentation, but from that of the decree of locality. *Walker* v. *Dundas*, 1815, Hume 466.

102. Negative — Warrandice — Teinds, Augmentation of—Right of Relief upon Sale under Burden of Obligations.—Lord Breadalbane, in 1715, sold certain lands and teinds, forming a portion of the earldom of Caithness, to a party, with warrandice against augmentation of stipend, and in 1719 he conveyed the whole of the estates of the earldom (including the above) to Sinclair, under burden of obligations "concerning the lands" disponed; and the representatives of Lord Breadalbane having been found liable under the warrandice, *held* that he was entitled to relief from Sinclair's representative, and that the obligation of relief was not cut off by the negative prescription, there having been no distress till within forty years. *Breadalbane's Trs.* v. *Sinclair*, 1838, 16 S. 815; 13 Fac. 528.

103. Positive — Property — Possession—Bounding Title.—The proprietor of a barony, to which a commonty belonged, feued the barony in portions, giving to some of the feuars a right of property in the commonty, and to others a right of servitude only. *Held*, in an action of division of the commonty, that he was entitled to a share in the commonty effeiring to the valued rent of those portions feued with servitudes only, although he had had no possession, except through the servitude men, for more than forty years. *D. of Buccleuch* v. *Erskine*, 16 June 1812, F. C.

104. Positive — Property — Possession—Bounding Title.—*Held* that a party with a bounding title had acquired no right to a piece of ground beyond his boundary, by the possession of a building upon it, which had been unchallenged for more than forty years. *Mags. of St. Monance* v. *Mackie*, 1845, 7 D. 582; 17 J. 286. Cf. *Suttie* v. *Gordon*, 1837, 15 S. 1037; and *Berry* v. *Holden*, 1840, 3 D. 205.

105. Positive — Property — Possession—Bounding Title—Parts and Pertinents of Principal Property.—*Held* that the proprietor of a barony, with a clause of parts and pertinents, whose titles described his lands as lying within a particular parish, could not acquire by prescriptive possession any right of common property in lands lying beyond the limits of that parish. *Gordon* v. *Grant*, 1850, 13 D. 1; 22 J. 171.

106. Positive — Property — Possession—Bounding Title—Servitude—Common Law.—*Held* that a bounding charter, without a clause of parts and pertinents, did not exclude a party from pursuing a declarator of servitude over adjoining lands, in respect of alleged prescriptive possession. *Beaumont* v. *Lord Glenlyon*, 1843, 5 D. 1337; 15 J. 586.

107. Positive — Property — Possession—Bridge Customs—Charter to Burgh—Title.—A right to levy customs under ancient charters and a Scots Act confirming the same "as it has been in use to be exacted," *held* to be qualified by usage and restricted by prescription. *Maxwell* v. *Provost of Dumfries*, 1866, 4 M. 764.

108. Positive — Property — Possession —Church Patronage—Crown—Charter to Burgh—Dissolution.—The Crown, after acquiring right to a patronage by the Act, 1587, c. 29, granted a charter in 1621, conveying the patronage to a burgh (but without any previous act of dissolution), on which sasine was taken; and thereafter, in 1630, presented a minister, and two others in 1743 and 1746. *Held* (1) that the charter in 1621 was inept, in respect of the want of an act of dissolution; and (2) that even if good, a prescriptive right had been acquired *jure coronæ*, although a minister was appointed by the burgh, in 1716, on a popular call, and the last incumbent died in 1799. *Mags. of Peebles* v. *Officers of State*, 1800, Hume 457.

109. Positive — Property — Possession— Conjunction of with Possession on Apparency.—If a party has by himself and his authors possessed an estate on a retour with sasine, prior and posterior to a possession on apparency, for a period, including the apparency, of more than forty years, but not so, exclusive of apparency, he has a good prescriptive possession. *Neilson* v. *Erskine*, 1823, 2 S. 247.

110. Positive — Property — Possession— Conjunction of with Possession of One's Author.—By a marriage-contract, lands were destined to the heirs-male of the marriage, whom failing, to the nearest lawful heirs-male of the husband. He was survived by a son, who succeeded. A grandson made up a title by special service as nearest and lawful heir-male of his father, but not as heir-male of provision, and was infeft on a precept from Chancery in 1788. He died in 1818, having executed an entail in favour of an illegitimate son, who was infeft on it in 1818. The lawful heir under the destination in the marriage-contract raised a reduction of the title in 1854. *Held* that this was not a case of double title in the defender's father, and that the defender had a good title to exclude founded on the sasines in favour of his father and himself, fortified by the positive prescription—he being entitled to plead his father's possession subsequent to his sasine as making up the period of prescription, although, until his death, no one could pretend a better title; and the pursuer's plea of *non valens agere* repelled, it being held that it could not be maintained as an answer to the positive prescription. *M'Neill* v. *Macneal*, 1858, 20 D. 735; 30 J. 395.

111. Positive — Property — Possession— Conjunction of with Possession of One's Author—Entail—Loss by Negative Prescription of Right to Insist upon Valid Entail.—Trustees, directed to entail, executed a deed of entail which turned out to be defective under the Entail Amendment Act. The institute, who died a few weeks before completing forty years' possession, granted a *mortis causa* general conveyance of her whole means and estate, heritable and moveable, in favour of the substitute first called, who made up no title under the entail, but, after the completion of the forty years, brought a declarator to have it found that the entail was ineffectual, and that he was entitled to possess in fee-simple. *Held* that it was clearly the intention of the general conveyance by the institute that the entailed lands should be carried; that the pursuer was entitled to found on the conveyance, and plead forty years' possession adverse to the entail; and that the substitute heirs had, by the negative prescription, lost their right to insist upon a valid entail being executed in terms of the original trust: therefore that the pursuer was entitled to prevail in his declarator. *E. of Eglinton* (*Lady Hamilton's Tr.*) v. *E. of Eglinton*, 1861, 23 D. 1369; 33 J. 475. Cf. *D. of Hamilton & E. of Selkirk* v. *Archibald Douglas*, 1777 and 1779, 2 Pat. 449. Affg. M. 4358; and on obligation to execute entail see *Baillie* v. *Cochrane*, 1857, 19 D. (H. L.) 14; 2 Macq. 529; 29 J. 336. Affg. 1855, 17 D. 659; 27 J. 279.

112. Positive — Property — Possession— Continuity and Uninterruptedness of.—In an action as to the right to a superiority, the defender pleaded, as a title to exclude, that he had possessed the right for more than the prescriptive period in virtue of charter and seisin; that he had obtained a decree of declarator of non-entry in an action to which the pursuer's author was a party, as husband of his wife; had granted a charter to the vassal in possession of the lands; drawn non-entry duties, and received a composition for the entry. *Held* that this was not sufficient to exclude, as the pursuer's author had, during the greater part of the same period, been enrolled and voted as a freeholder on the same superiority, so that there was not a continuous and uninterrupted possession. *E. of Fife's Trs.* v. *Sinclair*, 1849, 12 D. 223; 22 J. 38.

113. Positive — Property — Possession — Entail.—A superior possessing under an entail, granted a charter of resignation in favour of a vassal, embracing an entail containing a series of heirs. Sasine was taken, and possession enjoyed for forty years. An heir of entail succeeded to the superiority, and refused to receive as his vassal a party claiming entry as an heir of entail under the charter, except in the character of a singular successor, and on payment of a year's rent. *Held* that he was bound to enter him as an heir. *D. of Hamilton* v. *Baillie*, 1827, 6 S. 94.

114. Positive — Property — Possession — Exemption from Payment of Teinds. — Where no words such as are now considered necessary to constitute a *decimæ inclusæ* right of teinds, appeared in titles until nearly half a century subsequent to the Statute of Annexation in 1587, and the lands were recognised in a sub-valuation and in various localities as exempt from payment of teind on the ground of such right, *question* as to the effect of the positive prescription in such case. *E. of Hopetoun* v. *Ramsay*, 1846, 5 Bell 69. Affg. 1841, 3 D. 685; 16 Fac. 713.

115. Positive — Property — Possession — Ferry—Barony Title.—*Held* that a charter of barony, with a clause of parts and pertinents, is a sufficient title, when followed by the requisite possession, to constitute by prescription a right to a ferry over a piece of water assumed to be a navigable river. *D. of Montrose* v. *Macintyre*, 1848, 10 D. 896; 20 J. 317.

116. Positive — Property — Possession — Ferry—Charter to Burgh—Title.—A charter in favour of a royal burgh, confirming former charters, which conferred a right of port and haven, and petty customs, but not containing any express grant of ferry—*held* a good title on which to found a prescriptive right to exclusive possession of a ferry by the burgh. *Greig* v. *Mags. of Kirkcaldy*, 1851, 13 D. 975; 23 J. 442.

117. Positive — Property — Possession — Feu-Duties.—A, by contract ratified by Act of Parliament, acquired right to feu-duties which had pertained to an heritable keepership, and obtained from the Crown a charter of resignation comprehending these feu-duties, upon which infeftment followed, and they were included in the infeftments of his successors, and paid by the proprietors of the lands, from which they were exigible till a recent date, when payment was refused on the ground that, more than forty years preceding that date, the tenure of the lands had been by royal charter converted into a blench holding, under which the subsequent titles were made up. *Held*, in an action for declarator of right to and payment of the feu-duties in arrears, that A had right to them, notwithstanding the lands had been held blench for more than the years of prescription. *D. of Montrose* v. *Bontine*, 1840, 2 D. 1186; 15 Fac. 1276.

118. Positive — Property — Possession — Fiar and Liferenter.—The possession of a liferenter is that of the fiar, and therefore, where a party has a personal right to an estate in which another is infeft in fee, the possession of the liferenter does not found a plea of *non valens agere* in a question of prescription. *Neilson* v. *Erskine*, 1823, 2 S. 247.

119. Positive — Property — Possession — Fiar and Liferenter.—Infeftment on a disposition conveying lands absolutely, but with an exception of certain jointure lands from the clause of assignation of rents and clause of warrandice, followed by forty years' possession — the possession having been obtained, as regards the jointure lands, by a transaction with the widow, to whom the purchaser assigned certain feu-duties payable from other lands in lieu of her right,—*held* to afford a prescriptive title to exclude a challenge. *Campbell* v. *Wilson*, 1770, 2 Pat. 193. Revg. 1766, 5 Br. Sup. 543, 915.

120. Positive — Property — Possession Following on Charter of Confirmation and New Erection versus Renewals more burgi of Investitures.—It is no objection to the magistrates of a royal burgh prescribing right to a property within the bounds of the burgh by exclusive possession, that they had granted to the competing party and his authors renewals *more burgi* of investitures specially containing the piece of ground in dispute. *Aytoun* v. *Mags. of Kirkcaldy*, 1833, 11 S. 676.

121. Positive — Property — Possession — Fishings—Right to Dry Nets and Draw up Boats.—In a declarator of a right of property in ground near the sea, directed against fishermen, the defence was founded upon an alleged prescriptive right to use a portion of the lands for drawing up fishing-boats, drying nets, and other purposes connected with the herring fishery, and the provision of the stat. 29 Geo. II. c. 23, empowering fishermen so to use waste ground on the seashore. The court *allowed* a proof before answer as to the origin, nature, and character of the alleged possession of the ground claimed by the defenders. *Ferguson* v. *Hoyle*, 1858, 20 D. 843; 30 J. 485.

122. Positive — Property — Possession — Glebe.—Possession of glebe for upwards of 200 years by ministers *held* to exclude prescriptive possession by the owner of a farm of which it was part, although possessed by the latter for upwards of forty years, during which period the successive ministers had on various occasions stipulated for and obtained from the proprietor of the farm and his tenants an increase in the money payment for the glebe. *Presbytery of Selkirk* v. *D. of Buccleuch*, 1869, 8 M. 121; 42 J. 55.

123. Positive — Property — Possession — Issue.—In a declarator of property in certain subjects by a party who produced as his title an infeftment on a precept of *clare constat* in 1712, and an infeftment on a precept of *clare constat* in 1828, the issue adopted by the court for trying the question of prescriptive possession was, whether the pursuer and his predecessors had, in virtue of the titles in process, for forty years and upwards prior to the commencement of the action, or for time immemorial, enjoyed the exclusive possession. *Christison* v. *Hope*, 1847, 10 D. 119; 20 J. 29.

124. Positive — Property — Possession — Long Lease.—A long lease signed by the proprietor only, but left in possession of the tenant, *held* to have been validated by prescriptive possession though the rent paid during the whole period of possession was not the rent stipulated in the lease, but a larger rent which had been paid prior to the date of the lease. *Carlyle* v. *Baxter*, *etc.*, 1869, 41 J. 342; 6 S. L. R. 425.

125. Positive — Property — Possession — Minerals—Possession of Surface—Title.—Forty years' possession of the surface alone is sufficient to complete a prescriptive title to minerals where there is an express grant of the minerals, the working thereof being *res meræ facultatis*. *Crawford* v. *Bethune*, 1821, 1 S. 111.

126. Positive — Property — Possession — Must be Referable to and Consistent with

Title.—An alleged possession for over forty years under a title which excluded any such right cannot found any prescriptive claim to property. *Ross* v. *Milne, Cruden, & Co.*, 1843, 5 D. 648 ; 15 J. 309.

127. Positive — Property — Possession— Must be Referable to and Consistent with Title—Conveyance of Superiority of Entailed Lands—Minerals—Negative Prescription Cutting off Right to Challenge Conveyance as Carrying Minerals.—Where a conveyance of the superiority of entailed lands, the minerals in which had been reserved, appeared to be *ex facie* a conveyance of the bare superiority, *opinions* that the negative prescription would not cut off the right of an heir of entail to challenge the effect of the conveyance as carrying minerals, and that the vassal could not acquire right to the minerals by the positive prescription. *Fleeming* v. *Howden*, 1868, 6 M. 782 ; 40 J. 401.

128. Positive — Property — Possession — Must be Referable to and Consistent with Title — Minerals under Park — Claim of Keeper to Work.—The keeper of the King's Park sought declarator of his right to work quarries in the park of Holyrood House in virtue of an alleged forty years' possession of the right as a pertinent of his feudal grant as keeper. *Held* that the prescriptive usage of the right alleged had not been proved, that the right claimed could not be a pertinent of the grant as keeper but was repugnant to the nature of that office, in that it would destroy and waste rather than preserve the park for the purposes of the grant, and that rights claimed by a prescriptive usage must be consistent with the title to which the possession is referable. *Officers of State* v. *E. of Haddington*, 1831, 5 W. & S. 570. Revg. 1830, 8 S. 867 ; 5 Fac. 690 ; 1826, 2 W. & S. 468. In part Affg. 1823, 2 S. 420.

129. Positive — Property — Possession— Must be Referable to and Consistent with Title—Misapplication of Trust Funds.—No misapplication of trust funds or non-fulfilment of trust purposes can be fortified by long usage or prescription, so as to afford a defence to an action for enforcing the due execution of the trust ; and usage adverse to the terms of the grant cannot be founded on as *contemporanea expositio*. *Presbytery of Dundee* v. *Mags. of Dundee*, 1861, 23 D. (H. L.) 14 ; 4 Macq. 228 ; 33 J. 707.

130. Positive — Property — Possession — Must be Referable to Title.—Where several charters of *novodamus* of the same barony have been granted to a family, possession must be attributed to the subsisting titles at the time, and not to a grant of an earlier period. *King's Adv.* v. *E. of Mansfield*, 1831, 5 W. & S. 723. Affg. 8 S. 765 ; 5 Fac. 597.

131. Positive — Property — Possession — Must be Referable to Title—Teinds.—A charter under the Great Seal, granted in 1784, followed by infeftment, in favour of a heritor who had a tack of the teinds of the parish, contained a grant of the patronage and teinds of the parish generally. The heritor had admittedly possessed neither the patronage nor the whole teinds of the parish, but had possessed the teinds of his own lands since 1784. He had in 1789 applied to the Crown for a renewal of the tack, which, however, was not granted. *Held* that the charter, notwithstanding the limited nature of the possession, afforded a good prescriptive title, so far as followed by possession. *L. Adv.* v. *Balfour*, 1860, 23 D. 147 ; 33 J. 68.

132. Positive — Property — Possession— Must be Referable to Title—Teinds.—The erection of lands into a burgh does not imply a conveyance of the teinds thereof to the grantee ; and such a charter of erection will not found a prescriptive right to the teinds. *Learmonth* v. *City of Edinburgh*, 1859, 21 D. 890 ; 31 J. 491.

133. Positive — Property — Possession— Parts and Pertinents of Principal Property.—It is not sufficient for a proprietor founding on a conveyance of heritage, with parts and pertinents, as a prescriptive title to lands not mentioned in the conveyance, to show that he has possessed them along with the principal lands for forty years, but the onus lies upon him of showing that he has had possession of them as pertinents of the principal lands. *L. Adv.* v. *Hunt*, 1867, 5 M. (H. L.) 1 ; 39 J. 248 ; L. R. 1 Sc. App. 85.

134. Positive — Property — Possession— Parts and Pertinents of Principal Property.—A party having claimed right to heritable subjects (which had been possessed by the defender without title for upwards of thirty years), on the allegation that they were part and pertinent of his property, and founding also on a disposition recently granted to him by his father of the specific subjects, *held* bound to prove his possession of them during the prescriptive period ; and, having failed to do so, a verdict returned against him. *Wilson* v. *Martin*, 1843, 6 D. 7.

135. Positive — Property — Possession— Parts and Pertinents of Principal Property.—*Opinion* by a majority of the whole judges that certain lands extending to more than 800 acres, and formerly held under a separate title, had been merged in a larger estate, by possession as part and pertinent during the years of prescription. *Dalrymple* v. *E. of Stair*, 1841, 3 D. 837 ; 16 Fac. 885.

136. Positive — Property — Possession— Parts and Pertinents of Principal Property —Acquiescence—Title.—Two conterminous proprietors both claimed a piece of ground. The defender having had possession for upwards of forty years without a title, pleaded that the pursuer was barred by prescription and also acquiescence. Pleas *repelled*. *M'Cowan* v. *Shields*, 1867, 4 S. L. R. 179.

137. Positive — Property — Possession— Parts and Pertinents of Principal Property —Competition — Servitude.—Two baronies, A and B, the titles to which contained clauses

of parts and pertinents, were erected into one, C. The proprietor sold a portion of A, with parts and pertinents, and this portion was excepted from, and the clause of parts and pertinents applicable to it was omitted in, his subsequent titles. Thereafter a competition arose between his heir and the heir of the purchaser as to a tract of ground belonging to A, which was not expressly contained in either of their titles, but was claimed by both as part and pertinent of their respective lands,—by the heir of the purchaser in exclusive property, and by the heir of the seller in common property with the heir of the purchaser. *Held* that the heir of the seller having in his titles the new barony C, which included the barony A, with part and pertinent, or at all events the barony B, with part and pertinent, and the barony A had a title on which to prove prescriptive possession of commonty, or of servitudes in the ground; that the exception in the title of the seller of the subjects sold could not bar the claim of his heir to the right of commonty, as the ground over which it was claimed was not contained in the titles of the purchaser; and that as both parties claimed under clauses of part and pertinent, the extent of their respective rights fell to be determined by proof of the state of possession. *Carnegie* v. *MacTier*, 1844, 6 D. 932, 985, 1381; 16 J. 435, 453, 585.

138. Positive — Property — Possession—Parts and Pertinents of Principal Property —Foreshore—Crown—Title.—In a question between the Crown and a vassal, *held* (1) that where an estate on the seashore, whether barony or not, is held under a Crown charter which does not, by express grant or specific boundary, extend the right of the vassal beyond the high-water mark, there is no presumption that the foreshore is a pertinent of the land; but (2) that in such a case the charter may be shown to include the foreshore by such long-continued possession thereof as can only be ascribed to a right of property. *Agnew* v. *L. Adv.*, 1873, 11 M. 309; 45 J. 214. Cf. *L. Adv.* v. *Maclean*, 1866, 2 S. L. R. 25, in which *held* that possession for prescriptive period under a barony title with a clause of parts and pertinents excluded the Crown's rights.

139. Positive — Property — Possession—Parts and Pertinents of Principal Property —Pertinent Claimed Expressly Included in Titles of Third Party—Old Decree Defining Parties' Rights—Competition—Negative.—Titles to a barony form a sufficient title on which to prescribe a right of property in an island situated in a river opposite to it, as part and pertinent, though the island be included *per expressum* as *separatum tenementum* in the titles of a third party, though a decree of declarator of property in the island had passed in 1637 in favour of that third party, and though the fishings in the branch of the river between the island and the barony belong to the third party who never enjoyed possession. *Mags. of Perth* v. *E. of Wemyss*, 1829, 8 S. 82; 5 Fac. 80.

140. Positive — Property — Possession—Parts and Pertinents of Principal Property —Title.—A proprietor having from time immemorial possessed certain ground as part and pertinent of his estate, which possession was fortified by a possessory judgment, and the evidence of a plan made by the Crown surveyor when the estate was vested in the Crown, *held* entitled to the exclusive right and possession, in preference to another party whose titles bore expressly to convey the property of said grounds. *Mackenzie* v. *Mackenzie*, 1818, 6 Pat. 376.

141. Positive — Property — Possession—Patronage—Single Act of Presentation.—A single act of presentation under a title to a patronage is not sufficient to constitute a prescriptive possession. *Macdonell* v. *D. of Gordon*, 1828, 6 S. 600; 3 Fac. 618.

142. Positive — Property — Possession—Petty Customs—Charter to Burgh—Title.—The magistrates of Edinburgh have a sufficient title to acquire, by immemorial possession, a right to levy certain petty customs on potatoes brought into the city for private sale to the inhabitants. *Hill* v. *Mags. of Edinburgh*, 1830, 8 S. 449; 5 Fac. 368.

143. Positive — Property — Possession—Public Use of Burghal Property.—An averment that inhabitants (though not heritors) of a burgh of barony had used and enjoyed from time immemorial a bleaching-ground and well, situated within the burgh, *held* relevant to sustain their title to defend the use of the bleaching-ground and well. *Home* v. *Young*, 1846, 9 D. 286; 19 J. 109.

144. Positive — Property — Possession—Superior and Vassal.—Where charters by the prince had been granted, and services expede, from 1602 till 1702, followed by infeftment on a tenure and *reddendo* of free blench, and from 1702 downwards the tenure remained the same, but the *reddendo* was for payment of a sum of money and a duplicand, which, however, had never been levied, *held* that the prince had acquired no prescriptive right to the money *reddendo*, and that the vassal was entitled to possess in free blench. *M'Kerrel* v. *L. Keith*, 1801, Hume 458.

145. Positive — Property — Possession—Superior and Vassal—Change of Tenure.—A change of tenure may be gained by prescription; and therefore, where a subject within burgh had been possessed for more than forty years on titles holding burgage, *held* not relevant to allege that the tenure had been formerly feu. *Hamilton* v. *Scotland*, 1807, Hume 461.

146. Positive — Property — Possession—Teinds.—A disposition of lands, with all right the disponer might have to the teinds thereof, accompanied by a precept for infefting in the teinds and sasine thereon, *held* a sufficient title on which to prescribe an heritable right to the

teinds against the titular. *Learmonth* v. *D. of Hamilton*, 1829, S. (Teinds) 192 ; 4 Fac. 1093.

147. Positive — Property—Possession—Teinds.—A disposition of unfeudalised teinds in 1700, granted as was alleged *a non habente*, and a decree of sale in a process in 1745, to which it was alleged the true titular was not called as a party, followed by possession for more than forty years, *held* to establish a prescriptive right. *Solicitor of Teinds* v. *Budge*, 1797, Hume 455.

148. Positive — Property — Possession—Teinds — Personal Right Clothed with Possession versus Feudal Title.—A personal right of a heritor followed by prescriptive possession cannot prevail against a feudal title. *E. of Fife* v. *E. of Seafield*, 1831, S. (Teinds) 254.

149. Positive — Property — Possession—Tolls—Charter to Burgh—Title.—A royal charter clothed with prescriptive exercise of the right constitutes a sufficient title in magistrates of a burgh to levy tolls at piers within the whole precincts of their grant. *Mags. of Campbeltown* v. *Galbraith*, 1845, 7 D. 482 ; 17 J. 236.

150. Positive — Property — Possession—Two Titles in One Person.—*Held* that an estate which was conveyed to a party and his heirs-male, failing whom, to return to the Earl of Morton, the donor, had become an unlimited fee in the possessor, by his possessing for forty years on a charter giving him the absolute fee thereof. *Douglas* v. *Douglas*, 1754, 1 Pat. 553. Affg. Elc. "Notes" 378 ; M. 10955.

151. Positive — Property — Possession—Two Titles in One Person.—A was publicly infeft in lands which he disponed to his son, B, who was base infeft. B's daughter, C, on his death passed him over, and got a precept of *clare* as heiress of A, and was infeft. By contract of marriage she disponed them to her husband, D, and the heirs of the marriage, with precept and procuratory, and D was infeft on the precept. After the death of C and D, their son, E, while possessing on apparency, disponed one-half by contract of marriage to F (the heir-male of the marriage), and the other to trustees, and thereafter E got a precept of *clare* as heir of his mother, C. On the death of E the estates of F were sequestrated under the Bankrupt Act. The trustee set aside E's precept of *clare* as inept, got one in favour of F, as heir of provision of his grandfather D, and also as heir-male under E's contract, and a confirmation of the precept and infeftment in favour of D. The trustees of E concurred with the trustee of F in selling the property ; and more than forty years' possession followed on the titles made up by C. *Held*, in a question with a purchaser, that the base right of B was swept away, and that the title *quoad ultra* was good. *Harvey* v. *Hamilton*, 29 Jan. 1822, F. C. ; 1 S. 277.

152. Positive — Property — Possession—Two Titles in One Person.—An entail of lands was executed, but never feudalised. A fee-simple title was afterwards made up in the person of a third party, whose heirs were likewise heirs under the entail, and the lands were possessed by several heirs in succession, on apparency merely, for more than forty years, when the then heir connected himself by service and infeftment with the fee-simple title. *Held* that prescription had run in favour of the fee-simple right, and that the fetters of the entail were worked off. *D. of Hamilton* v. *Westenra*, 1827, 6 S. 44.

153. Positive — Property — Possession—Two Titles in One Person—Ascription of Possession.—An entail in 1763 referred to a prior contract of marriage, to which the entailer was a party, and professed to be in implement thereof ; but it differed from the contract, in omitting a clause excluding heirs-portioners. Succeeding heirs were infeft, and possessed on the entail for more than forty years, there being no exclusion of heirs-portioners in the investiture, and the last heir left two daughters. *Held* that they succeeded as heirs-portioners, in terms of the entail, fortified by prescription, and that the entail could not be controlled by the reference to the marriage-contract. *Macdonald* v. *Lockhart*, 1842, 5 D. 372 ; 15 J. 169.

154. Positive — Property — Possession—Two Titles in One Person—Ascription of Possession.—A party executed a deed of settlement of lands in favour of his brother in liferent, and certain heirs in fee, subject to a power of revocation ; and thereafter he executed an entail of the same lands, in which he revoked the deed of settlement, and conveyed them to the same liferent institute as in the settlement, and to the next substitute there mentioned also in liferent, and to other substitutes in fee, directing them, under an irritancy, to make up titles under the entail. In place of this the liferent institute made up titles under the settlement ; and the liferent substitute, on the death of the institute, took possession, but, having made up no titles, the next heir of entail insisted that this should be done, and it was arranged that the heir should take infeftment under the entail, subject to the burden of the substitute's liferent, which was done ; and the liferent substitute continued to possess for several years, and, at his death, above forty years' possession had run on the deed of settlement. *Held* that the possession was to be imputed to the entail, and therefore prescription did not apply to the deed of settlement. *French* v. *Pinkstan*, 1835, 13 S. 743 ; 10 Fac. 484.

155. Positive — Property — Possession—Two Titles in One Person—Ascription of Possession.—A party infeft in fee-simple bound himself, by a postnuptial contract in 1754, to convey and settle his lands "to and in favour of the heir-male to be procreated betwixt him and his present spouse ; whom failing, to the heir-male to be procreate of his body in any subsequent marriage ; whom failing, to the heir-female to be procreate

of this or any other marriage, the eldest always succeeding without division"; and there were a son and two daughters. *Held* that although there was no disposition of the lands and no procuratory or precept, and although the son was served and infeft as nearest lawful heir in 1776, and executed a trust-disposition of the lands, chiefly to pay his father's debts, and under an obligation to reconvey "to him, his heirs or assignees," under which the trustees were infeft base, and after possessing the lands for ten years, redisponed to the son with a procuratory of resignation and renunciation in order to extinguish the base fee and the trust, which was done accordingly, and more than forty years had elapsed from the date of the marriage-contract, yet, as the son died intestate, and as his right under the marriage-contract was equally unlimited with his right as heir of his father, his possession did not infer prescription of that obligation; and that the destination in the contract being still in force, his eldest sister's representative had right to the lands, to the exclusion of his younger sister. *Ogilvy* v. *Erskine*, 26 May 1837, 15 S. 1027; 12 Fac. 940.

156. Positive — Property — Possession —Two Titles in One Person—Ascription of Possession—Teinds.—Although a party had a tack of teinds under which he might have drawn them, yet as he had also a charter and seisin, and possession of the teinds for more than forty years, *held* that he was entitled to impute his possession to the charter, and not to the tack; and therefore he had an heritable right to his teinds. *E. of Fyfe* v. *Innes*, 1809, Hume 468.

157. Positive — Property — Possession —Two Titles in One Person—Ascription of Possession — Teinds. — Where a party had a disposition containing a grant of teinds, and followed by sasine which flowed *a non habente potestatem*, and also a tack, and the possession was proved to have been on the tack, *held* that the party, after the expiry of the tack, was to be localled on as having no heritable right to his teinds, although a period much exceeding the long prescription had followed since the date of the sasine. *Peterkin* v. *Com. Agent in Loc. of Forres*, 1840, 2 D. 723.

158. Positive — Property — Possession —Two Titles in One Person—Consolidation. —*Held* that where a party is infeft in the *dominium directum*, and has also a right to the *dominium utile*, but standing on mere apparency, and where both of these rights are equally unlimited, and are descendable to the same series of heirs, the possession of the party for forty years upon his real right operates consolidation of the *dominium utile* with the *dominium directum*, by the aid of the positive prescription. *Wilson* v. *Pollock*, 1839, 2 D. 159; 15 Fac. 146; see also *Elibank* v. *Campbell*, 1833, 12 S. 74; 9 Fac. 55. *Bontine* v. *Graham*, 1840, 1 Robin. 347. Affg. 15 S. 711; 12 Fac. 664. *Dalrymple* v. *E. of Stair*, 1841, 3 D. 837; 16 Fac. 885; 13 J. 353; and *Hill* v. *Lockhart*, 1854, 17 D. 148; 27 J. 47.

159. Positive — Property — Possession —Two Titles in One Person—Consolidation. —A proprietor of lands feued them, and infeftment was taken. He thereafter granted to the feuar a disposition of the lands, with two manners of holding. Titles were made up, and the lands possessed thereon for more than forty years, without reference to the feu-contract. *Held* that although the property and superiority had been thus separated, yet a good prescriptive title to both had been acquired. *Walker* v. *Grieve*, 1827, 5 S. 469; 2 Fac. 270.

160. Positive — Property — Possession — Two Titles in One Person—Consolidation. —Consolidation of superiority and property *held* to be effected by prescription without resignation *ad remanentiam*. *Gordon's Trs.*, 1849, 21 J. 174.

161. Positive — Property — Possession —Two Titles in One Person—Limited and Partial Title under Marriage-Contract versus Unlimited Title and Possession on Apparency.—A party was infeft in lands. He thereafter, in his grandson's contract of marriage, conveyed them to his grandson, and "the child or children of the marriage," and a base infeftment followed. The eldest son of the marriage possessed on apparency for more than forty years, and then made up titles, connecting himself with his great-grandfather's title. *Held* that the possession on apparency was a good prescriptive possession to acquire right to the *dominium utile*, although the title on which it proceeded was prior to the constitution of the base fee, and the apparency was only to a mid-superiority. *Waddell* v. *Pollock*, 1828, 6 S. 999; 3 Fac. 1017.

162. Positive — Property — Possession — Two Titles in One Person — Limited versus Unlimited Title.—*Held* that, where successive heirs, in whom co-existed the character both of heir of line, institute, and heir of entail, had possession for more than forty years, without making up a feudal title in any of these characters, their possession was to be imputed to the entail, as the only title on which it was lawful for them to possess; and therefore that the entail was not extinguished by the negative prescription. *Welsh Maxwell* v. *Welsh Maxwell*, 29 July 1814, F. C.; 6 Pat. 65. Affg. 21 June 1808, F. C.; M. "Prescription" App. No. 8; and see *Lumsden* v. *Balfour*, 14 Mar. 1816, F. C.; 6 Pat. 150. Affg. 13 June 1811, F. C.

163. Positive — Property — Possession — Two Titles in One Person — Limited versus Unlimited Title — Ascription of Possession.—A fee-simple proprietor in 1732 executed an entail of his estate to his son and the heirs of the son's marriage, and other substitutes, reserving power, with consent of his son, to alter, except as to the heirs of the marriage, on which infeftment was not taken.

In 1741, with his son's consent, he executed a disposition of the estate, without fetters, on which sasine was taken; and, having cancelled the entail, one of the heirs of the marriage afterwards, by a decree of proving the tenor, revived the entail, on which infeftment was taken in 1768. The heirs of the marriage became extinct in 1797; and a party who was entitled to succeed, both under the entail and the unfettered disposition, in ignorance of the latter, made up titles under the entail, and there had been possession for a period exceeding forty years from the date of the infeftment in 1768. *Held* that, having two titles, he was entitled to impute his possession to the unfettered disposition, and that the entail was not rendered effectual against the estate by prescription. *L. Reay* v. *Mackay*, 1825, 1 W. & S. 306. Affg. 25 Nov. 1823, F. C.; 2 S. 520. See also *D. of Hamilton's Trs.* v. *D. of Hamilton*, 1824, 3 S. 24.

164. Positive — Property — Possession — Two Titles in One Person — Limited versus Unlimited Title — Ascription of Possession.—A son and heir who had right to two estates (A and B), both as heir and as heir of provision under a marriage-contract, executed an entail of them, containing a prohibition against granting leases except for nineteen years, and he then was served in special to both, and was infeft in A, but not in B. Both estates were possessed by the heirs of entail (who were also heirs under the fee-simple title), but they were infeft only in A. One of them granted a lease of B for thirty-one years, if it should be found that he had power to do so; and a succeeding heir having made up titles to both estates under the entail, challenged the lease. *Held* (1) that the entail was valid, that the heir who granted the lease, having taken A in virtue of it, was bound by its terms in regard to B, and therefore he had no legal right to grant the lease, which being conditional on his having such power, was ineffectual; and (2) that although the heirs had possessed for more than forty years, prescription did not apply so as to extinguish the obligation. *Murray* v. *Ramsay*, 17 Jan. 1811, F. C. See also *Dalrymple* v. *E. of Stair*, 1841, 3 D. 837; 16 Fac. 885.

165. Positive — Property — Possession — Two Titles in One Person — Limited versus Unlimited Title — Conjunction of Possession—Possession on Apparency.—An infeftment in fee-simple upon a precept of *clare constat* in the superiority of land contained in an entail, with forty years' possession, which, however, *quoad* the property had commenced on apparency, *held* sufficient to establish a right to the fee of the lands by the positive prescription. *Bruce* v. *Bruce*, 1772, 2 Pat. 258. Affg. M. 10805.

166. Positive — Property — Possession — Two Titles in One Person—Limited versus Unlimited Title—Lease.—A party held a fee-simple assignation of a lease in his own favour, and was also institute under an entailed assignation granted by the same party of the same lease. He enjoyed possession of the subjects for forty years, and did certain acts, referring his possession to the fee-simple assignation. *Held* that he had acquired a prescriptive fee-simple right, and that the entailed assignation was extinguished. *Maule* v. *Maule*, 1829, 7 S. 527; 4 Fac. 689; 1819, 6 Pat. 449; 2 Dec. 1817, F. C.

167. Positive — Property — Possession — Two Titles in One Person—Negative.—An heiress possessed under an entail, with a destination in favour of her second son, and "the descendants of his body without division," and it contained a prohibition against altering the order of succession, with a forfeiture against contraveners and their descendants. She propelled, in the marriage-contract of her second son, the estate to him and the heirs-male of his body, whom failing, the heirs-female successively, and then to the substitutes contained in the original entail, "conform to the destination of succession contained in the original bond of taillie, and not otherwise," and under exactly the same prohibitions and conditions. Possession for more than forty years followed on the disposition in the marriage-contract. *Held* that the new destination was secured from challenge by prescription, the substitute under the original entail having lost the power of challenging it *non utendo*. *Hope Vere* v. *Hope*, 1828, 6 S. 517; 3 Fac. 527. See also *Paterson* v. *Purves*, 1823, 1 Shaw's App. 401.

168. Positive — Property — Possession — Two Titles in One Person—Negative.—The investiture following on a deed of strict entail bore to proceed on that deed as the title of possession, and set forth the clauses of it, all in the exact terms of the deed, with the exception of the resolutive clause, which varied from that contained in the deed. After more than forty years' possession on this investiture, it was *held* in a question with creditors that the entail as set forth in the investiture was invalid, but *inter hæredes* that the possession for more than forty years on the defective investiture did not extinguish the fetters of the deed of entail. *Cuninghame's Trs.* v. *Cuninghame*, 1852, 14 D. 1065; 24 J. 652; 1 Stuart 1125.

169. Positive — Property — Possession — Two Titles in One Person—No Adversity of Interest.—A proprietor disponed his estate "to Jean Bruce in liferent, and Robert Durham, eldest lawful son of Adolphus Durham, and to the heirs to be lawfully procreated of his body, in fee, which failing, to the other heirs-male or female, without division, procreate or to be procreate between the said Adolphus Durham and Jean Bruce"; and on the death of Robert, titles were made up by service for more than forty years by a series of heirs-male as heirs of line, and eventually the succession opened to two heirs-female. *Held*, that, as the heirs of line were also heirs of provision, and no alteration had been made by them on the destination, the eldest heir-female was entitled

to succeed without division. *Durham* v. *Durham*, 5 Mar. 1811, F. C.; 5 Pat. 482. Affg. 24 Nov. 1802, F. C.; M. 11220; and *Gray* v. *Smith & Bogle*, 1752, M. 10803; see also *Zuill* v. *Morison*, 4 Mar. 1813, F. C.

170. Positive — Property — Possession — Two Titles in One Person—Possession in Defiance of Title.—A party was heir under two different entails of the same estate, one made in 1682, and the other in 1723, and the estate had been possessed for more than forty years under that of 1723, which contained a clause that it should not prejudge any other right or title to the lands, but that the heirs might possess the estate "by one or more of the said rights and titles conjunctly and severally, without extinction, innovation, or confusion of rights, none of them prejudicial to the other, *sed accumulando jura juribus*"; and the heir was not affected by the limitations in the entail of 1682, but was so by those in that of 1723. *Held* that the above provision prevented prescription from running against the entail of 1682, and that the heir was entitled to attribute his possession to that entail *quandocumque*, although he and his predecessor had made up titles under the entail 1723. *Dalzell* v. *Dalzell*, 17 Jan. 1810, F. C.

171. Positive — Property — Possession — Two Titles in One Person—Prescriptive Possession on Entail Alone notwithstanding Valid Alteration of Succession.—A party executed a deed of entail in favour of an institute and the heirs-male and female of his body, and the heirs-male of the entailer's body; whom failing, heirs to be named by any writing under his hand; whom failing, other heirs; reserving power to alter the succession generally, except as to the institute and the heirs-male and female of his and the entailer's body. He thereafter made a deed, whereby he altered the line of succession, and nominated heirs preferably to the heirs-female of the institute, and to the other heirs called after the substitution *heredibus nominandis*; and the estates were possessed for more than forty years on the entail alone, without reference to the deed of nomination. *Held* that the deed of nomination was a valid exercise of the faculty to name heirs; that an heir called by it was preferable to an heir called by a posterior substitution; and that prescription had not taken place so as to exclude the former. *Porterfield* v. *Stewart*, 1831, 5 W. & S. 515. Affg. 8 S. 16; 5 Fac. 21; 1826, 2 W. & S. 369; 15 May 1821, F. C.; 1 S. 9.

172. Positive — Property — Possession — Two Titles in One Person—Trust—Possession by Beneficiary not Adverse to Trustees' Possession—Negative.—A testator having executed a will in English form disposing *inter alia* of his Scots estates, his eldest son, in respect that the English testament did not enable the trustees to make up proper feudal titles to the Scots estates, executed in 1794 a disposition in the Scots form conveying to them the said estates for the uses and purposes expressed in the English will, and at the same time completed regular feudal titles to the estates in his own person in fee-simple as his father's heir-at-law. The trustees were infeft and possessed until 1804, when said son took possession. *Held* that the son's possession for the prescriptive period thereafter was as a beneficiary of the trust and not adverse to the trustees, and that positive prescription did not run in his favour nor negative prescription against the trustees. *Stewart* v. *Tennant*, 1868, 5 S. L. R. 684.

173. Positive — Property — Sasine — Infeftment without Possession versus Possession — Competition — Negative. — The proprietor of a burgage tenement disponed one storey of it to a purchaser in 1792, and in 1793 disponed the whole gratuitously in favour of his wife, without excepting the storey previously disponed to the said purchaser. Infeftment passed in 1794 in favour of his wife. The purchaser and his heirs possessed the one storey down to the raising of the present action, but on a personal title till 1837, when the heir of the purchaser was infeft. In 1862 a singular successor of the wife, who acquired his right in 1853, and was duly infeft, raised this action of removing against the heirs of the purchaser. *Held* (1) that neither party had a title by prescription; (2) that the title of the heir of the purchaser was preferable, as in right of an onerous disponee, while the original disposition by the common author to his wife was gratuitous. *Anderson* v. *Lows*, 1863, 2 M. 100; 36 J. 45.

174. Positive—Property—Service—Hereditas jacens—Heir non valens agere.—A son was base infeft on dispositions from his father in 1653 and 1656. In 1680 the father, after the son's death, resigned the lands and took new charters from the Crown, under which the lands were held till 1725, without making up titles under the son's base infeftment. *Held* that the lands being still in *hæreditate jacente* of the son, a title to them could only be made up by a service to him, and plea of prescription repelled in respect that the full prescriptive course had not run, the heir being *non valens agere* during the lifetime of the liferenter. *M. of Clydesdale* v. *E. of Dundonald*, 1726, M. 1262; Robert. 564.

175. Positive—Property—Title—Adjudication—Charter and Infeftment—Computation of Time—Minority—Deduction.—A deed was executed in favour of an infant, narrating that the granter was on the eve of going abroad, and conveying his estate. Thereafter debts were contracted by the granter, and a party having obtained right to certain adjudications over his estate, and obtained charter and infeftment thereon, and having thereafter obtained possession of the estate and held it for over forty years, *held* that the granter of the deed was not divested of the estate, and that the adjudging creditor had acquired an exclusive title by the positive prescription, and the minorities pleaded were not sufficient to elide it. *Ross* v. *Mackenzie*, 1776, 3 Pat. 676.

176. Positive—Property—Title—Adjudication, Decree of — Decree cognitionis causa—No Charter or Seisin—Possession—Redeemable Right.—A decree of adjudication, proceeding on a bill accepted *ex facie* by a married woman, a decree *cognitionis causa* against her *hæreditas jacens*, duly recorded and followed by letters of horning against superiors, and possession for about seventy years, *sustained* in a question with her heir, but only as a redeemable right, in respect it had not been feudalised. *Thomson* v. *Stewart*, 1840, 2 D. 564; 15 Fac. 586.

177. Positive—Property—Title—Adjudication, Decree of, not Followed by Decree of Expiry of the Legal or Infeftment.—*Held* that a decree of adjudication on which no decree of expiry of the legal and no charter nor infeftment had followed, was merely a redeemable right, although forty-nine years had elapsed. *Ormiston* v. *Hill*, 7 Feb. 1809, F. C. *Campbell* v. *Scotland*, 1794, M. 321; Bell's Cases, p. 15, folio p. 109; 2 Bell's Illustrations 57; 1 Ross' L. C. 155.

178. Positive—Property—Title—Adjudication with Infeftment—No Declarator of Expiry of the Legal — Possession. — An adjudication of lands, followed by a Crown charter, with infeftment, and forty years' possession, without any decree of declarator of expiry of the legal, *held* in a question with the heir of the debtor to constitute an absolute right to the property. *Robertson* v. *D. of Atholl*, 1815, 3 Dow 108; 6 Pat. 116; 1 Ross' L. C. 208. Affg. Hume 463. *Spence* v. *Bruce*, 1807; 1 Ross' L. C. 206.

179. Positive—Property—Title—Adjudication with Infeftment—Possession from Expiry of the Legal.—A plea of prescription founded on an infeftment on an adjudication, followed by upwards of forty years' possession, from the date of the sasine but not from the expiry of the legal, against a reduction of a decree of expiry of the legal, obtained only nine years before the action was brought, *repelled*. *M'Kenzie* v. *Robertson*, 1827, 5 S. 694.

180. Positive—Property—Title—Agreement to Grant Feu—Glebe—Possession.—The possession by a proprietor of a barony for upwards of forty years, of a piece of ground formerly the grass glebe of the minister of the parish, but situated in the centre of the barony, under an agreement by the presbytery to grant a feu, but without any feu having been granted, *held* not sufficient to establish a prescriptive right thereto. *Scott* v. *Ramsay*, 1827, 5 S. 367; 2 Fac. 211.

181. Positive — Property — Title—Canal Possessed on Unwritten Agreement.—The tenant of a coal-work was allowed to form a canal to a neighbouring seaport through the lands of an intervening proprietor, without any written title, and the canal was possessed by him and his landlord and the succeeding tenants in the coal-work for many years, they paying yearly to the intervening proprietor a sum fixed originally by a valuation as damages. *Held* that the owner of the coal-work had no right over the *solum* for the purpose of a canal, but was a precarious possessor, whom the intervening proprietor might at any time remove. *Campbell* v. *D. of Argyll*, 1836, 14 S. 798; 11 Fac. 72.

182. Positive—Property—Title—Charter and Sasine Followed by Possession.—The Duke of Atholl and his predecessors had been in the actual and exclusive possession of land forming part of the earldom of Atholl, from 1691 downwards, under charters and seisins, which, although alleged to have reference to the superiority alone, conveyed the earldom; and also of other lands specifically disponed in 1725, followed by seisin for more than forty years. *Held* sufficient to constitute a prescriptive right, exclusive of that of a party producing prior titles as vassal. *Robertson* v. *D. of Atholl*, 1815, 6 Pat. 116. Affg., Hume 463.

183. Positive—Property—Title—Charter and Sasine — Possession. — Possession on charter and sasine for forty years is sufficient to exclude objections to the title of an estate. *Lawrie, etc.* v. *Livingstone*, 1816, 6 Pat. 194.

184. Positive—Property—Title—Charter and Sasine — Possession—Glebe—Personal Title.—A charter and sasine of glebe lands in 1567, with possession thenceforward, *held* to constitute a prescriptive right, although receipts were produced as for rent paid by the possessors; but no tack was exhibited, and the lands were vested in singular successors, and the payment had been of the same sum for two centuries. *Observed*, that even a personal title, with possession, is sufficient to constitute a prescriptive right to glebe or kirk lands. *Liston* v. *Smythe*, 1816, Hume 475.

185. Positive—Property—Title—Charter not Followed by Sasine.—A party who had for more than forty years made use of part of the interior of an abbey belonging to the Crown as a family burial-place, in virtue of a disposition *a non domino*, but which was not followed by sasine, *held* not entitled to a prescriptive right, or to prevent the Officers of State from taking possession of the ground, removing a wall, and clearing away rubbish — they consenting to inter on the spot the remains of the dead found there. *Officers of State* v. *Ouchterlony*, 1825, 1 W. & S. 533. Affg. 2 S. 437.

186. Positive—Property—Title—Charter of Confirmation and New Erection—No Sasine.—A charter of confirmation and new erection in favour of a royal burgh, narrating and confirming rights set forth as previously belonging to the burgh, *held* to be a sufficient title on which to prescribe a right of property, although no sasine could be produced. *Aytoun* v. *Mags. of Kirkcaldy*, 1833, 11 S. 676.

187. Positive—Property—Title—Charter of Restoration of Forfeited Lands.—*Held* that a charter of restoration of lands forfeited, and annexed to the Crown, under the Vesting and Annexing Acts and sasine follow-

ing thereon formed a good title on which to prescribe an absolute right to the estate. *Glassford* v. *Mackenzie*, 1829, 7 S. 423; 4 Fac. 526.

188. Positive—Property—Title—Church Sittings.—If there has been no judicial division of the area of a parish church on its being rebuilt, and no division by agreement among the heritors, and no special right of property, but merely possession of a particular pew, although it be for a period of forty years, such possession does not establish a prescriptive right in the pew so as to exclude a judicial division according to legal rules. *Wemyss* v. *E. of Morton*, 1838, 16 S. 332; 13 Fac. 297.

189. Positive—Property—Title—Church Sittings.—Where the corporation of a burgh had held uninterrupted possession of a gallery in a parish church for more than a century, under an agreement with the principal heritor, of whose proportion of the church the gallery was a part, *held*, on a new division and allocation of the sittings, in consequence of the internal alterations, but which did not alter the position and accommodation of the gallery, that the corporation had a right to possess the gallery as repaired. *Mags. of Hamilton* v. *D. of Hamilton*, 1850, 7 Bell 1; 22 J. 266. Affg. 8 D. 844; 18 J. 456.

190. Positive—Property—Title—Common Subject—Pro indiviso Proprietors—Loss by One non utendo—Res meræ facultatis—Negative—Servitude.—Averments by one of two proprietors of two contiguous tenements, to the effect that for upwards of forty years, and from the time when it was built, a staircase built on a piece of ground held *pro indiviso* by the two proprietors had been used and possessed by him and his authors exclusively as an access to his tenement—*held* irrelevant and insufficient to exclude the right of the other *pro indiviso*, proprietor of the ground on which the staircase was built to use the stair. *Observed*, that the right of the other *pro indiviso* proprietor was *res meræ facultatis*, and could not be lost *non utendo*. *Leck* v. *Chalmers*, 1859, 21 D. 408; 31 J. 223.

191. Positive—Property—Title—Commonty—Possession.—A proprietor of the estate of X, whose titles included a *pro indiviso* right of commonty, obtained a portion of the common on division, and afterwards in 1780 purchased twelve acres, the portion allotted to the proprietor of Y, an adjoining estate, from whom he obtained a disposition with a *de me* blench holding. No infeftment followed, but the purchaser possessed the twelve acres as part of his estate of X. In 1799 the purchaser expede a Crown charter to the estate of X, with pertinents, and "cum libera communitate," and he was infeft. *Held*, in a question between the proprietor of X and a singular successor of the seller in the estate of Y, that the title to the commonty contained in the Crown charter was a *habile* title to which to ascribe his prescriptive possession of the twelve acres. *Walker* v. *Miler*, 1871, 9 M. 823; 43 J. 575.

192. Positive—Property—Title—Crown Charter—Possession.—A barony was held under two separate titles, part of the lands being held of the Crown, and part of a subject superior. In 1604 the lands were sold. The purchaser executed an entail, and resigned the whole lands in favour of the Crown, and for new infeftment. He got a Crown charter, and several successive heirs made up their title to the whole lands under the Crown. In an action of reduction-improbation and declarator of non-entry at the instance of the subject superior, *held* that the possession of the lands under the Crown charter was fortified by the statute 1617, c. 12, and excluded the title of the subject superior. *Moreton or Macdonald* v. *Lockhart*, 1853, 25 J. 559; 2 Stuart 104; 1 Macq. 790.

193. Positive—Property—Title—Crown Charter—"Wrak" in tenendas but not in Dispositive Clause—Possession—Against Crown.—Prescriptive possession of "wreck" under a Crown charter in which "wrak," etc., was in the *tenendas* but not in the dispositive clause, although it was in the dispositive clauses of charters by progress—*held* sufficient to establish proprietor's right to "wreck" against a claim by the Crown. *L. Adv.* v. *Hebden*, 1868, 6 M. 489; 40 J. 254.

194. Positive—Property—Title—Designation to a Glebe.—A designation to a glebe by a presbytery confirmed by the Crown commissioners in whom the glebe was vested as a portion of a confiscated estate, *held*, when followed by possession, to be a sufficient title to the glebe to exclude others. *L. Panmure* v. *Halkett, etc.*, 1860, 22 D. 1357; 32 J. 622.

195. Positive—Property—Title—Ex facie Absolute—Reference to Former Titles.—A disposition and sasine *ex facie* absolute, with possession for forty years, *held* sufficient to exclude an allegation that the right originally flowed from a title qualified with a power of redemption. *Chambers* v. *Law*, 1823, 2 S. 366.

196. Positive—Property—Title—From Crown—Act of Annexation.—A party who possessed an estate on a title from the Crown for upwards of forty years, *held* to have acquired a prescriptive right, although his title bore that the Crown had right only by virtue of the Act of Annexation, in which there is an express exception of the right of the Crown to such lands. *D. of Buccleuch* v. *Cunynghame*, 1826, 5 S. 57; 2 Fac. 28.

197. Positive—Property—Title—Instruments of Sasine—No Charter Produced.—Heirs are entitled to found a prescriptive title upon instruments of sasine, one or more continued and standing together, without producing their charter, though there be a charter extant. *Monro* v. *Monro*, 19 May 1812, F. C.

198. Positive—Property—Title—Minute of Sale—Coals.—*Question*, whether a singular successor, founding on a minute of sale by an apparent heir not infeft, can plead the positive

prescription in a question as to coals. *Lady M. L. Crawford* v. *Durham*, 20 Dec. 1822, F. C.; 2 S. 97; 1826, 4 S. 665.

199. Positive—Property—Title—Patronage—Against Crown.—A grant of patronage *held* to form a sufficient title of prescription on which, if followed by possession, to prescribe against the Crown, as coming in place of the bishop, a right to the patronage of parishes specially contained in the titles of the bishopric. *King's Adv.* v. *L. Dundas*, 1831, 5 W. & S. 723. Affg. 8 S. 755; 5 Fac. 597.

200. Positive—Property—Title—Patronage—Personal—Against Crown.—In an action brought by the Crown for reducing a party's title to a patronage, on the ground that the right had never been validly disponed by the Crown, *held* that prescription had run in the defender's favour against the Crown upon a formal title *ex facie* good and sufficient. *Observed*, that a personal title to a patronage is a sufficient title on which to plead prescription. *L. Adv.* v. *Graham*, 1844, 7 D. 183; 17 J. 90.

201. Positive—Property—Title—Patronage—Possession—Grant of Patronage under Reservation of Crown's Right to Present.—A grant of patronage, qualified by a declaration that the Crown's right to present was reserved, is not a sufficient title on which to prescribe a right by possession. *King's Adv.* v. *E. of Mansfield*, 1831, 5 W. & S. 723. Affg. 8 S. 765; 5 Fac. 597.

202. Positive—Property—Title—Possession—Ex facie Absolute Conveyance—Alleged Right of Reversion.—A conveyance was made of certain lands, *ex facie* absolute, and bearing to be for a price then paid. Eight days previously a wadset had been granted of the same lands in favour of the same party, which obliged the party to grant a letter of reversion. No letter of reversion was adduced, and there was no appearance of it on the records. Possession by the grantee for upwards of forty years followed. *Held* that the possession on the absolute title established the grantee's right to hold the lands irredeemably. *Sutherland* v. *Countess of Sutherland, etc.*, 1777, 2 Pat. 415.

203. Positive—Property—Title—Possession—Ex facie Absolute Conveyance—Back Bond—Action of Redemption Allowed to Fall Asleep.—A proprietor of heritable subjects granted an *ex facie* absolute disposition, on which infeftment was taken, qualified by a back bond containing a power of redemption within eleven years. He assigned this bond to a third party, and disponed the property to him. The assignee, within the eleven years, raised an action of redemption, which fell asleep. The heir of the original disponee acquired right to the assignation and relative action, which he afterwards wakened; and more than forty years had elapsed from the date of the above deeds. *Held* that a prescriptive title had not been obtained so as to exclude the heir of the original proprietor. *Duncan* v. *Hume*, 1831, 5 W. & S. 43. Affg. 1829, 7 S. 467.

204. Positive—Property—Title—Possession—Mines and Minerals—Failure to Work the Minerals.—A vassal held his lands under a reservation of the coal in favour of his superior. On the attainder of his superior, he obtained, in virtue of the Clan Act, from the Barons of Exchequer, a Crown charter of his lands generally, without any reservation of the coal; and a party had acquired right from the commissioners of the forfeited estates to the estate of the superior, as it stood in his person. *Held* that the Crown charter of the vassal was a valid title on which to prescribe a right to the coal, although the Barons were only authorised to pass Crown charters of the proprietors as held under the forfeited superior; but that the possession of the surface, without having worked the coal, was not sufficient to prescribe the right; and that the acts of possession by working the coal were not such, or so continuous, as to amount to a prescriptive possession. *Forbes* v. *Livingstone*, 1827, 6 S. 167; 3 Fac. 151; 1825, 1 W. & S. 657; 31 Jan. 1822, F. C.; 1 S. 282.

205. Positive—Property—Title—Teinds.—Where a party having a right to teinds under a tack, disponed the lands and teinds, as possessed by himself, but without mention of the tack, and the disponee took infeftment both in the lands and teinds, *question*, whether such a title could form a ground for a prescriptive right to the teinds. *Officers of State* v. *Spier*, 1858, 20 D. 525; 30 J. 282.

206. Positive—Property—Title—Teinds.—*Observations* on the *jus coronæ* as constituting a title to teinds on which prescription may run in favour of the Crown. *Cheape* v. *L. Adv.*, 1871, 9 M. 377; 43 J. 182.

207. Positive—Property—Title—Teinds—Annexation.—In a question between the heritors of St. Cuthberts parish, Edinburgh, and the minister of North Leith, *held* that the teinds of certain lands formerly belonging to St. Cuthberts, but afterwards annexed *quoad omnia* to North Leith, were liable to be allocated to the minister of the latter as stipend, and not relevant to allege that they had, for the years of prescription, been allocated to the minister of St. Cuthberts. *Johnston* v. *Heritors of St. Cuthberts*, 3 Mar. 1802, F. C.; M. 14834.

208. Positive—Property—Title—Teinds—Decree of Apprising—Infeftment.—*Held* that a decree of apprising of teinds (which had been originally bishop's teinds, and had been feudalised), and on which possession had been enjoyed for more than forty years, but on which no infeftment had been taken, did not confer a prescriptive heritable right to the teinds. *Graham* v. *Orr*, 1826, S. (Teinds) 96.

209. Positive—Property—Title—Teinds—Decree of Approbation of Sub-Commissioners' Valuation.—A decree of approbation of a valuation by the sub-commissioners, followed by forty years' possession, *sustained*,

although alleged to be subject to objections in form. *M'Intyre* v. *M'Lean*, 1828, S. (Teinds) 160; 3 Fac. 794.

210. Positive—Property—Title — Teinds —Decree of Locality—Reduction of—Possession Referable to a Title which is Reduced.—A final decree of locality was pronounced in 1726, localling an overpayment beyond a decree of valuation of the High Commission in 1636. The decree of 1726 was reduced in 1764, and the overpayment restricted to the amount in the decree of valuation; but the overpayment was, nevertheless, made by singular successors in the lands down to 1824. *Held* still competent to the heritor to surrender his valued teind, in terms of the decree 1636. *Baird* v. *Minister of Polmont*, 1832, 10 S. 752; 7 Fac. 567.

211. Positive—Property—Title — Teinds —Decree for Teinds Payable out of another Parish — Right to Reclaim — Negative. — *Question*, whether a decree in favour of the minister of one parish, with possession of teinds for forty years, payable out of another parish, can exclude the minister of the latter from reclaiming them. *Smith* v. *Hunter*, 5 Mar. 1823, F. C. Appx. 1; S. (Teinds) 49.

212. Positive—Property—Title — Teinds —Decree of Valuation.—*Opinion* (*per* Lord Benholme), that a decree of valuation of teinds is a foundation for the positive prescription. *Opinions contra*. *Deans of the Chapel Royal and H. M. Adv.* v. *Johnstone, etc.*, 1867, 5 M. 414; 39 J. 220.

213. Positive—Property—Title — Teinds —Decree of Valuation.—A decree of valuation is not a title under which a proprietor can prescribe a right to teinds of land not included in the valuation. *Macleod* v. *Heritors of Morvern*, 1873, 11 M. (H. L.) 62; 45 J. 461.

214. Positive—Property—Title — Teinds —Final Locality—Possession under.—A heritor having paid stipend for upwards of forty years under a final locality, *held* that the minister had acquired a prescriptive right thereto. *Bain* v. *Officers of State*, 1858, 20 D. 1006; 30 J. 617.

215. Positive—Property—Title — Teinds —Right of Exemption—Ex parte—Decree of Locality Exempting — Possession. — A judgment without discussion in a locality exempting lands from stipend, with the lapse of forty years, is not sufficient to give a permanent right of exemption. *Leslie* v. *Heritors of Rayne*, 14 Jan. 1800, F. C.; M. "Stipend" App. No. 2.

216. Positive—Rights Independent of Statute—Common Law—Dues Attaching to Burying-Ground.—Members of a friendly society had exercised, for above a century, the right of levying dues for the hire of mortcloths used for a burying-ground, of letting out the grass, and of exacting dues from parties who enclosed private lairs within it, etc. *Held*, in a question with the heritors and kirk-session, that the society was entitled to continue to exercise these rights. *Kirk-Session of South Leith* v. *Scott*, 1832, 11 S. 75.

217. Positive — Rights Independent of Statute—Common Law—Nuisance.—*Held* in a question with a party who had come to the place, that he was not entitled to complain of the proprietors on the banks of a stream called the Foul Burn, by which the fuilzie of the city of Edinburgh is carried to the sea, collecting the contents in pits for the purpose of manure, they having been in the habit of doing so for more than fifty years. *Duncan* v. *E. of Moray*, 9 June 1809, F. C.

218. Positive — Rights Independent of Statute—Common Law—Right of Way—Continuity of Possession.—In a declarator of a right of footpath, it was averred that the pursuer and others, inhabitants of a certain village, and their predecessors, had for time immemorial exercised and enjoyed the right of passing along the path without challenge, or lawful or admitted interruption, but that the proprietor through whose grounds it led had recently obstructed the passage, and interrupted the pursuer and the others in the exercise of their right. An issue having been granted, whether for forty years, or for time immemorial, immediately preceding the interruption in question, the pursuer and his predecessors and others were in possession of the footpath, etc., the word "immediately" ordered to be struck out of the issue. *Mercer* v. *Reid & Rutherford*, 1840, 2 D. 520, 616; 15 Fac. 548.

219. Positive — Rights Independent of Statute—Common Law—Right to Send Representatives to a Guildry — Onerous Contract.—In a question as to the right of brewers to send representatives to a guildry, an onerous contract with the guildry found a good title to prescribe a right to do so. *Gray* v. *Guildry of Arbroath*, 1823, 2 S. 122.

220. Positive—Servitude—Possession.—A right to a loaning or passage for cattle from lands of one party, through lands of another, to lands of the former on the other side, and also a right of pasturage over said intersecting lands after removal of the crop having been possessed for the prescriptive period, *sustained*. *Chatto* v. *Lockhart*, 1790, Hume 734.

221. Positive — Servitude — Title. — The proprietor of a well having closed it, a note of suspension and interdict was presented by certain "householders and inhabitants" of a village, who pleaded a prescriptive right to use it. It was objected that the village, not being a burgh, its inhabitants, as such, could not acquire a prescriptive title. One of the complainers averred that he was a feuar, and prayed for a diligence to recover his titles, which were in the possession of a third party. Diligence *granted* to the feuar; but the note *refused* as to the other complainers. *Mackenzie* v. *Learmonth*, 1849, 12 D. 132; 22 J. 6.

222. Positive—Servitude—Title—Claim for a Servitude not Recognised by Law of Scotland.—In an action of declarator brought by a party designed as residing in and a magis-

trate of a royal burgh, and founded on alleged prescriptive usage, to have it found that he had right to a servitude of walking and recreation over a piece of ground in the vicinity of the burgh, *held* that such servitude is not recognised in the law of Scotland, and that there was no sufficient title to sue. *Dyce* v. *Lady James Hay*, 1852, 24 J. 465 ; 1 Stuart 783. Affg. 11 D. 1266 ; 21 J. 506.

223. **Positive — Servitude—Title — Parts and Pertinents of Principal Property.**—In a declarator of a right to take water for the use of tanneries belonging to the pursuers from a mill dam belonging to the defender, the pursuers produced a prescriptive title, consisting of a disposition to the tanneries with pertinents. The cause being remitted to the jury roll, motion by the defender for a diligence to recover the pursuer's prior titles *refused*, the pursuer not being bound to produce any previous titles, a prescriptive title having been already produced. *Brand* v. *Charteris*, 1841, 4 D. 292.

224. **Positive — Servitude — Title — Possession.**—*Held* that fishermen being allowed, by the Act 29 Geo. II. c. 29, to use the seashore for the purpose of their trade, any possession they may have had thereof must be ascribed to this statutory privilege ; and an issue *refused* of a prescriptive use and possession, with the view of having a servitude found to exist at common law. *Cameron* v. *Ainslie*, 1848, 10 D. 446 ; 20 J. 130.

225. **Positive—Servitude—Title—Right of Pasturage as Accessory to Right of Public Way.**—In an action as to whether a right had been acquired by prescription to a drove-road, and to drove-stances (or places for resting and feeding cattle) as accessories thereof, an averment that the proprietors and tenants of lands, and the public generally, had for time immemorial used and enjoyed the drove-road and the drove-stances as accessories of the drove-road, *held* irrelevant *quoad* the stances, a right to which could not be established as accessory to a right of public way, but could only be instructed as a servitude to a dominant tenement of which none of the pursuers could claim to be a heritor. *M. of Breadalbane* v. *M'Gregor*, 1850, 7 Bell 43. Revg. 9 D. 210 ; 10 J. 65.

226. **Quinquennial—Actions Proceeding upon Warnings, Spuilzies, etc.—Wakening —Act, 1685, c. 14—Act, 1669, c. 9.**—Prescription of actions, if not wakened within five years, under the statute 1685, c. 14, runs from the last step of procedure in the process. *Graham* v. *M'Farlane*, 30 May 1811, F. C.

227. **Quinquennial — Arrestments—Multiplepoinding Raised by Arrestee.** — A multiplepoinding raised by an arrestee, does not prescribe, by the lapse of the period sufficient to prescribe the arrestment. *Boyes' Trs.* v. *Hamilton*, 1829, 7 S. 459 ; 4 Fac. 607 ; 8 S. 102.

228. **Quinquennial—Bargains Concerning Moveables—Accounts between Commission Agent and his Principal — Triennial — Merchantes comptes.**—The quinquennial and triennial prescriptions do not apply to accounts between a commission agent and his principal. *M'Inlay* v. *M'Inlay*, 1851, 14 D. 162 ; 24 J. 71 ; 1 Stuart 143.

229. **Quinquennial—Bargains Concerning Moveables—Claim for Payment of Farm Stocking.** — Quinquennial prescription *sustained* against a claim for payment of the stocking of a farm. *Lawson* v. *Milne*, 1839, 1 D. 603.

230. **Quinquennial—Bargains Concerning Moveables — Consignment of Goods in Security of Advance—Triennial.**—*Held* that neither the triennial nor the quinquennial prescription is applicable to a consignment of goods, made in security of an advance of money, and with power to sell in the event of the money not being repaid within a specific period. *M'Farlane* v. *Brown*, 1827, 5 S. 205 ; 2 Fac. 127.

231. **Quinquennial—Bargains Concerning Moveables—Constituted by Writing.**—*Held* that the quinquennial prescription applies only to verbal bargains, and not to those constituted by writing. *Hunter* v. *Thomson*, 1843, 5 D. 1285 ; 15 J. 546.

232. **Quinquennial—Bargains Concerning Moveables—Lease—Verbal Agreement re Dung.**—A verbal agreement, that a tenant entering under a written lease should, at the end of it, leave the dung on the farm at a certain rate, *held* not liable to the quinquennial prescription from the date of it. *Wilson* v. *Swan*, 1804, Hume 817.

233. **Quinquennial—Bargains Concerning Moveables — Price of a Cow.**—The quinquennial prescription applies to the price of a cow. *Nobles* v. *Armstrong*, 11 June 1813, F. C.

234. **Quinquennial—Bargains Concerning Moveables—Unauthorised Removal of Moveables—Action for Restitution—Triennial—Spuilzies.**—A claim for the value of a quantity of cast-iron rails alleged to have been removed from an ironworker's works without his authority is not an action founded on a bargain concerning moveables to which the quinquennial prescription would apply, nor, being a simple action for restitution and damages, is it affected by the triennial prescription of spuilzies. *Baillie* v. *Young*, 1835, 13 S. 472 ; 10 Fac. 279.

235. **Quinquennial—Debt, Constitution of—Proof—Competency of other Evidence to Explain Debtor's Writ.**—In an action for the price of furnishings, in defence to which the quinquennial prescription was found to apply, *held* that a letter from the defender to his agent in this country, stating, "I have to inform you that I paid the money to the party who had ordered it," *i.e.* the article furnished, "for me," was insufficient to prove the constitution of the alleged contract. *Opinion* that, in proving the contract by writ, the pursuer was not entitled to eke out statements in the defender's letters by combining them with

statements culled from the record, and from the defender's deposition as a haver. *Kennard & Sons* v. *Wright*, 1865, 3 M. 946; 37 J. 498.

236. Quinquennial—Debt, Constitution and Subsistence of—Necessity of Proof of—Triennial.—The statute 1669, c. 9, establishing the quinquennial prescription, requires, equally as in the case of the triennial prescription statute, after the period of prescription, proof by writ or oath of the debtor, not only of the constitution, but of the subsistence of the debt. *Campbell* v. *Grierson*, 1848, 10 D. 361; 20 J. 124.

237. Quinquennial—Holograph Missive, Action Founded on.—An action of reduction which had been asleep for five years, founded on a holograph missive, is not affected by the quinquennial prescription. *Stein* v. *Sands*, 1825, 4 S. 105.

238. Quinquennial—Tenants' Maills and Duties—Bargains Concerning Moveables—Mora.—An outgoing tenant whose shop stock was partly sequestrated by the landlord, and partly poinded by a creditor, transferred the stock to the incoming tenant by a transaction partly judicial and partly extrajudicial, for a price which was applied in paying the rent and the debt due to the poinding creditor; and at the distance of seventeen years, a creditor of the outgoing tenant arrested in the hands of the incoming tenant, and raised a reduction of the proceedings. *Held* that the quinquennial prescription applied; and that the arrester being in no better situation than his debtor, was barred from challenging the proceedings in respect of the *mora* which had occurred. *Adie* v. *M'Martin*, 1837, 15 S. 1045; 12 Fac. 952.

239. Quinquennial—Tenants' Maills and Duties—Oath, Construction of—Tenant Need not Instruct Payment.—In a question between a landlord and tenant as to a balance of rent, against which the quinquennial prescription was pleaded, the tenant, on a reference to oath, deponed that the landlord had obtained payment by means of a sequestration. *Held* that the oath was negative, and that the landlord could not contradict it by production of the proceedings in the sequestration, which he had not laid before the tenant and made part of the oath. *Heddle* v. *Blaikie*, 1847, 9 D. 1254; 19 J. 540.

240. Quinquennial—Tenants' Maills and Duties—Retention of Rents by Tenant to Cover Ameliorations—Personal Bar against Pleading Prescription.—A tenant who had retained rents in his hands to answer an alleged claim for ameliorations, several years after he left his farm, brought an action for payment of this claim. *Held* not entitled to object to the counter claim for rents retained being set off against it, on the ground that the five years' prescription of rents had taken place. *Nicolson* v. *M'Alister's Trs.*, 1832, 10 S. 759.

241. Quinquennial—Tenants' Maills and Duties—Urban Subjects.—Quinquennial prescription applies to the rents of an urban brewery. *Boyes* v. *Henderson*, 6 Feb. 1823, F. C.; 2 S. 190.

242. Triennial—Act, 1701, c. 6—Wrongous Imprisonment—Reparation—Wakening of Action.—An action of damages founded on the Act, 1701, c. 6, for refusal to accept bail, having been allowed to fall asleep, *held* prescribed. *Andrew* v. *Murdoch*, 12 June 1823, F. C.; 2 S. 399.

243. Triennial—Continuous Account—Account Divided into Separate Branches—Later Branch already Paid—Terminus a quo.—A party received furnishings in 1823, and again in 1825. These last were proved to have been paid in 1826; and action was raised against him in 1828 for the balance of the account-current. *Held* that the furnishings in 1825 having been paid, could not form an item in the account between the parties; and therefore that the furnishings in 1823 were prescribed. *Beck* v. *Learmonth*, 1831, 10 S. 81; 7 Fac. 72.

244. Triennial—Continuous Account—Account Divided into Separate Branches—Later Branch already Paid—Law Agent's Account for Several Separate Actions—Terminus a quo.—An Edinburgh agent's claim against a country agent is a continuous account though divided into branches applicable to different clients, and the currency of the account may be preserved by the later items which may be referred to—even if not libelled on—to exclude a plea of prescription, although some of the later branches of the account had already been paid. *Fisher* v. *Ure*, 1836, 14 S. 660; 11 Fac. 561.

245. Triennial—Continuous Account—Account Divided into Separate Branches—Law Agent's Account for Several Separate Actions—Terminus a quo.—A law agent was employed in several separate actions by the same party, and his accounts as rendered were divided into corresponding branches. *Held* that the whole made one course of employment, and that prescription did not begin to run till the close of the whole. *Elder* v. *Hamilton*, 1833, 11 S. 591.

246. Triennial—Continuous Account—Account Divided into Separate Branches—Law Agent's Account for Separate Actions—Three Years' Break in Account—Proof of Employment in Interval—Terminus a quo.—In an action by a law agent for payment of two professional accounts, which were separated by an interval of three years, the defender pleaded triennial prescription with special reference to the three years following the date of the last item in the earlier account. *Held* that the pursuer was entitled in reply to the plea, when urged at the bar, with reference to the break between the two accounts, to show that the accounts were continuous by proving employment during the intervening period, the summons containing a general reservation of other claims not mentioned in it. *Wotherspoon* v. *Henderson's Trs.*, 1868, 6 M. 1052; 40 J. 584.

247. Triennial—Continuous Account—Death of Debtor—Terminus a quo—Article Ordered by Debtor but Delivered after his Death—Proof of Resting-Owing—Oath of Party—Nothing Paid since Date of last Item.—Where the last article in an account had been ordered by the debtor but had not been delivered till after his death, on the admission by his executor that he had not paid the account, it was *held* that the account had been continued by that article and that resting-owing had been proved. *Broughton* v. *Weston*, 1826, 4 S. 496; 1 Fac. 421.

248. Triennial—Continuous Account—Death of Debtor—Terminus a quo—Continuance with his Heir's Tutors.—*Question*, whether an account which was current at the death of the ancestor, was prescribed, although a new one was opened with the tutors of the heir. *Wilson* v. *Rutherford*, 1826, 4 S. 427.

249. Triennial—Continuous Account—Death of Debtor—Terminus a quo—Debtor Dies within Three Years of last Item.—In an action raised against the representatives of a debtor for payment of an open account, of which the last item was dated within three years of the debtor's death, *held* that prescription did apply. *Aiken* v. *Smeal*, 1853, 15 D. 868; 25 J. 519; 2 Stuart 532. Overruling *Auld* v. *Aikman*, 1842, 4 D. 1487.

250. Triennial—Continuous Account—Death of Debtor—Terminus a quo—Funeral Furnishings as an Interruption.—The triennial prescription of an account for goods furnished to a deceased party is not elided by the circumstance that the furnishing for the party's funeral was provided by the same firm, this not being a continuation of the currency of the account. *Cockburn* v. *Hamilton*, 1712, Robert. 32.

251. Triennial—Continuous Account—Death of Debtor—Terminus a quo—Opening of new Account by Widow.—A claim by a surgeon for medicines and attendance on a husband till his death, made after the lapse of three years, *held* prescribed, although he had, previously and subsequently to the husband's death, furnished medicines to and attended his wife, within a period shorter than three years. *Lyon* v. *Mitchell*, 1819, Hume 481.

252. Triennial—Continuous Account—Death of Debtor—Terminus a quo—Proof of Resting-Owing—Continuation of Account by eadem persona cum defuncto—Oath of Party—Nothing Paid since Date of last Item.—An account was contracted by a father, and on his death continued by his son, who did not allege that he had paid any part of it, and, on a reference to oath, deponed that he had heard his father say that, on a balancing of accounts, the balance would be in his favour. *Held*, although three years had elapsed from the date of the last item, that the account, having been a continuous one down to the date of the father's death, was not prescribed. *Leslie* v. *Mollison*, 15 Nov. 1808, F. C.

253. Triennial—Continuous Account—Death of Debtor.—Four years after A's death, B sued A's representative for payment of an account. The defender admitted the employment of B by A, and that nothing had been paid since A's death, but alleged that nothing was owing by A. *Held* that the triennial prescription was elided. *Ross* v. *Guthrie*, 1839, 2 D. 6; 15 Fac. 7.

254. Triennial—Continuous Account—Fictitious Entry—Last Item—Law Agent's Remuneration.—In an action for payment of a writer's account, the triennial prescription was applicable on the supposition that the last item (which was for drawing a pleading) was not chargeable. *Held* that as that pleading bore to be drawn by the client (who was then a procurator of the court to which it was addressed), the writer could not claim payment on the footing of having drawn it; and therefore prescription *sustained*. *Dick* v. *Richardson*, 1841, 3 D. 1141; 16 Fac. 1232.

255. Triennial—Continuous Account—Fictitious Entries—Terminus a quo.—In an action for payment of a law agent's account, *held* that the account was prescribed—the court considering that certain entries in the close of the account, and which continued its currency to a period within the years of prescription, had been inserted merely for the purpose of evading prescription. *Stewart* v. *Scott*, 1844, 6 D. 889; 16 J. 398.

256. Triennial—Continuous Account—Fictitious or bona fide Entries—Terminus a quo.—The triennial prescription of a law agent's account elided by two items being within three months from the date of the action. *Moffat* v. *Marshall*, 1825, 3 S. 475.

257. Triennial—Continuous Account—Identity of Creditor—Account Incurred Partly to Firm and Partly to One of Individual Partners.—See *Barker* v. *Kippen*, 1841, 3 D. 965; 16 Fac. 1022.

258. Triennial—Continuous Account—New Item within Three Years—Terminus a quo.—A law agent was employed, while carrying on business in his own name, from 1825 till 1833; when having formed a partnership with another, the employment was transferred to the company. The partnership being dissolved in 1834, he was employed in his own name till 1838, when he raised an action for both accounts. *Held*, in a question of triennial prescription, that the continuity of his account was not interrupted in 1833, so as then to close it, and that it extended till 1838; but that the account of the partnership closed in 1834, and therefore was prescribed. *Torrance* v. *Bryson*, 1840, 3 D. 186; 16 Fac. 143.

259. Triennial—Continuous Account—Separate Account—Different Employment—Terminus a quo.—The triennial prescription of an open account is not elided by one or two entries within three years, these being

on a separate account, and on other employment. *Campbell* v. *Jolly*, 1823, 3 S. 39.

260. Triennial — Continuous Account — Yearly Summation with Interest — Terminus a quo. — In a continuous account of furnishings from 1806 to 1813, the creditor added up in his books each year's furnishings into a distinct sum, and charged interest as separately arising on each annual sum; but this method of charging interest was objected to and disallowed. *Held* that each year's accounts did not suffer a separate course of prescription, but the whole account remained open till the furnishing of the last article. *Whyte* v. *Currie*, 1829, 8 S. 154.

261. Triennial—Debt—Constitution and Resting-Owing — Proof — Judicial Admissions.—After the lapse of three years, the creditor in a debt falling under the triennial prescription must prove not merely the constitution but the resting-owing of the debt by the writ or oath of party. *Question*, whether judicial admissions made in a process by the debtor can be referred to as proof *scripto*. *Cullen* v. *Smeal*, 1853, 15 D. 868; 25 J. 519; 2 Stuart 532.

262. Triennial—Divisibility of Items in Account. — In a general accounting, the triennial prescription is not pleadable as to particular parts of the accounts on one side. *Boyes' Trs.* v. *Hamilton*, 1829, 7 S. 815; 4 Fac. 1115.

263. Triennial—Divisibility of Items in Account—Cash Advances and Furnishings. —A creditor who held an absolute disposition in security for advances made and to be made by him, besides advancing money, supplied furnishings from his shop to his debtor. In an accounting brought by the debtor, *held* that the triennial prescription did not apply to the creditor's account for furnishings. *Murray* v. *Wright*, 1870, 8 M. 722; 42 J. 388.

264. Triennial—Divisibility of Items in Account — Written Obligation, Certain Items Founded on.—A tradesman, employed during a course of years to execute various pieces of work for road trustees, partly on estimate and partly without estimate, who had given in a general account for the whole, and received payments to account, *held* not entitled to pick out afterwards the charges for the pieces of work on estimate, as if on separate and special contract, so as to elide the plea of prescription applicable to the account generally. *Hotson* v. *Threshie*, 1833, 11 S. 482.

265. Triennial — Executors—Duty of, to Plead.—An executor paying debts of the settler, which at the time of his death had prescribed, cannot charge these payments against the estate unless he can show that there were circumstances connected with the debts which would have made it unjust or unrighteous in him not to have made the payment. *Fraser* v. *Lovat*, 1875 (H. L.), 12 S. L. R. 399.

266. Triennial — House Maills — Verbal Lease.—The triennial prescription *sustained* against a claim for house rents, there being no written lease. *Cumming's Trs.* v. *Simpson*, 1825, 3 S. 545.

267. Triennial — Mennis ordinars — Aliment—Contract—Equitable Debt.—A claim for having alimented a party who was major, was *sustained*, after the lapse of about ten years, in respect that although originally there was no legal debt, there was a natural debt which was sufficiently constituted by a letter written by the debtor to certain trustees to whom she had conveyed her property, in which she asked them to pay to the pursuer £20 per annum in full of her fourteen years of board, lodging, and clothes. *Easton* v. *Newland's Trs.*, 1822, 1 S. 244.

268. Triennial—Mennis ordinars—Aliment—Natural Relationship.—The claim against the father of a bastard child for arrears of aliment does not fall under the triennial prescription. *Thomson* v. *Westwood*, 1842, 4 D. 833; 14 J. 286.

269. Triennial—Mennis ordinars—Aliment—Natural Relationship.—A man, on the birth of a natural child, went to Jamaica, where he died after the lapse of twelve years, and the child had in the meantime resided with and been supported by its maternal grandmother for eleven years. *Held* that she was entitled to payment from the father's executors of £10 annually for the eleven years, and that the triennial prescription did not apply. *M'Dowall* v. *M'Lurg*, 19 Feb. 1807, F. C.; M. "Prescription" App. No. 6.

270. Triennial—Mennis ordinars—Aliment — Relationship. — *Held* that the Act 1579, c. 83, does not apply to actions for the aliment of minors. *Davidson* v. *Watson*, 1740, 1 Pat. 288. Revg. M. 11077; 5 Br. Sup. 200; Clerk Home, No. 135; Kilkerran 415.

271. Triennial—Mennis ordinars—Board of Child — Contract. — *Held* that a claim against a father for board and lodging afforded to his child, founded on contract, falls under the triennial prescription. *Taylor* v. *Allardyce*, 1858, 20 D. 401; 30 J. 224.

272. Triennial—Mennis ordinars—Board of Child—Contract Implied.—*Held* that the triennial prescription applied to a claim against a father for aliment afforded to his illegitimate child by a person other than the mother, the only foundation for the claim being implied contract. *Ligertwood* v. *Brown*, 1873, 10 M. 832; 44 J. 472.

273. Triennial—Mennis ordinars—Board of Child—Contract—School.—A Scottish nobleman, whose domicile was in Scotland, when transiently in England placed his eldest son at an academy there, and on the death of both of them, the master, with whom the son had been boarded, brought an action in the Court of Session for payment of a sum for board and tuition. *Held* that the triennial prescription applied. *Thomson* v. *L. Duncan*, 1808, Hume 466. Distinguishing from the case of

the *York Building Co.* v. *Dalavalle*, 1786, M. 4525, where the defender was domiciled in England.

274. Triennial—Mennis ordinars—Board of Child—Contract for Separate Periods—Separation of Debts.—In an action for payment of an account, the two first articles of which were for board and lodging for a certain number of weeks, at so much a week, and after the break of a year, for other articles, consisting chiefly of furnishings of provisions, *held* that the former must be separated from the latter, and that as more than three years had elapsed from their date, they were prescribed. *Fraser* v. *M'Keich*, 1838, 16 S. 1045; 13 Fac. 712.

275. Triennial—Merchantes Comptes—Account for Advertising in Newspaper—Proof—Constitution and Resting-Owing.—An account for inserting advertisements in a newspaper, including the Government duty, *held* prescribed; and *observed*, that after prescription had run, the onus lay on the pursuer of proving not merely the constitution of the debt, but also that it is resting-owing. *Robertson & Fyfe* v. *National Monument Association*, 1840, 2 D. 1343.

276. Triennial—Merchantes Comptes—Foreign—English Merchant versus American—Arrestment jurisdictionis fundandæ causa.—The triennial prescription *held* not a relevant defence to an action in the Court of Session by an English merchant against an American merchant (founded on an arrestment *jurisdictionis fundandæ causa*), for payment of the balance of an open account of shipments of cargoes of goods between America and England. *Anderson* v. *Wood*, 1809, Hume 467.

277. Triennial — Merchantes Comptes — Foreign Merchant.—*Held* that the triennial prescription did not apply to an account for goods sold by a manufacturer in Scotland to a merchant in Australia. *Laing & Irvine* v. *Anderson*, 1871, 10 M. 74; 44 J. 53.

278. Triennial—Other the Like Debts—Advances by Parochial Board to Aliment Pauper.—*Opinion*, that the triennial prescription does not apply to advances made by a parochial board to aliment a pauper. *Henderson* v. *Alexander*, 1857, 29 J. 559.

279. Triennial—Other the Like Debts—Advocate's Clerk's Remuneration—Where Recovered by Agent from Client.—*Held* that the triennial prescription applies to an action by an advocate's clerk for payment of an account of fees. *Opinion*, that the triennial prescription would not apply to a claim of an advocate's clerk against an agent for his fees, rested upon the ground that the agent had received the amount thereof from his client. *Fortune's Exrs.* v. *Smith*, 1864, 2 M. 1005; 36 J. 520.

280. Triennial—Other the Like Debts—Bequest of Moveable Estate—Quinquennial — Mora — Acquiescence. — A claim by two sisters on the sequestrated estate of their brother, in 1848, for the value of seed supplied from crop 1826, and spring labour (to which, as legatees of their father, they had right, while he succeeded as heir to the lease of the farm), *held* not barred by the triennial or the quinquennial prescription, nor by their silence and delay in prosecuting it; and a remit made to the trustee to allow them to adduce evidence of their claim. *Mackintosh* v. *Taylor*, 1849, 11 D. 1244; 21 J. 499.

281. Triennial—Other the Like Debts—Cash Advances. — *Question*, whether the triennial prescription applies to items of lent cash in an open account. *Paterson* v. *Mackenzie*, 1825, 3 S. 620.

282. Triennial—Other the Like Debts—Cash Advances by Factor.—*Held* that the triennial prescription does not apply to advances made by a party in this country purchasing articles of dress under a commission from his constituent in America, though the question arose with the constituent's heir residing in this country above three years after the constituent's death. *Grubb* v. *Porteous*, 1835, 13 S. 603.

283. Triennial—Other the Like Debts—Cash Advances by Law Agent — Law Agent's Remuneration.—Cash advances made by a law agent do not fall under the triennial prescription; but his proper business account does. *Kerr* v. *Mags. of Kirkwall*, 1827, 5 S. 802.

284. Triennial—Other the Like Debts—Cash Advances by Law Agent—Ordinary Disbursements—Law Agent's Remuneration.—The triennial prescription applies to the "commission charges for payment of money," as well as to the other articles of business in a law agent's account. *Scott* v. *Gregory's Trs.*, 1832, 10 S. 375; 7 Fac. 281.

285. Triennial—Other the Like Debts—Cash Advances by Law Agent—Ordinary Disbursements—Law Agent's Remuneration—Divisibility of Items in Account.—A Glasgow law agent was employed to oppose a bill before Parliament. He conducted the opposition in conjunction with Parliamentary solicitors in London. In actions by the Glasgow law agents, and by the Parliamentary solicitors, *held* that the triennial prescription applied to the accounts of both, and that there was no room for excepting from the operation of the statute items of expenditure consisting, in the case of the Glasgow agent, of travelling expenses to London, and payment to a witness there; and in the case of the London solicitors, of fees to counsel, payment for fees to Parliament, etc.,—these being ordinary disbursements falling within the business of agents to make. *Richardson, etc.* v. *Merry, etc.*, 1863, 1 M. 940; 35 J. 555.

286. Triennial—Other the Like Debts—Cash Advances by Law Agent—Law Agent's Remuneration — Divisibility of Items in Account.—*Held* that the triennial prescription applied to that part of a law agent's account which consisted of charges for business done as a law agent, but did not apply to that

part of the account composed of advances of money to his client, or travelling expenses incurred on her behalf, or town-clerks' fees for extracts of the minutes of certain parliamentary burghs, including fees to himself as town-clerk of one of these burghs. *Moncrieff* v. *Durham*, 1836, 14 S. 830.

287. Triennial—Other the Like Debts — Cash Advances by Tradesman. — The triennial prescription is not pleadable against an action for advances in money. *Smith* v. *Mitchell's Trs.*, 1829, 7 S. 771.

288. Triennial—Other the Like Debts—Claim Founded on Mandate.—The triennial prescription does not apply to a claim founded on mandate. *Berry's Reps.* v. *Wight*, 1822, 1 S. 433.

289. Triennial—Other the Like Debts—Claim Founded on Mandate—Law Agent's Remuneration. — Accounts incurred to an attorney in Exchequer, employed by the distillers of Scotland to attend to their interests in regard to certain legislative measures affecting their trade, *held* to have arisen *ex mandato* and not to fall under the triennial prescription. *Walker* v. *M'Nair*, 1832, 10 S. 672.

290. Triennial—Other the Like Debts—Claim for Money Obtained on Behalf of Another.—A party who obtained payment of money on behalf of another, *held* not entitled to plead the triennial prescription. *Freer* v. *Paterson*, 1826, 4 S. 396; 1 Fac. 263. *Waddel* v. *Morton*, 1825, 4 S. 170.

291. Triennial—Other the Like Debts—Claim of Relief among Partners or Co-Adventurers.—The triennial prescription does not apply in questions of relief between *correi debendi*. *Bland* v. *Short*, 1825, 3 S. 419.

292. Triennial—Other the Like Debts—Commission on Cash Transactions.—Commission on cash transactions between an agent and client falls under the triennial prescription. *Todd's Trs.* v. *Melville*, 1836, 14 S. 432; 11 Fac. 361.

293. Triennial—Other the Like Debts—Contract of locatio operarum — Superintendence of Execution of Building Contract.—A claim for the superintendence of the execution of a contract for building houses, *held* not liable to be affected by the triennial prescription. *Donaldson* v. *Ewing*, 1819, Hume 481.

294. Triennial—Other the Like Debts—Contract of locatio operarum — Terminus a quo.—A party contracted verbally with another to excavate a piece of ground for the foundation of a house, at a certain rate per cubic foot. The work was completed in December 1841, and measured on 14th May 1842, and an action was raised for payment on 7th May 1845. *Held* that the triennial prescription applied, and that the *terminus a quo*, in reckoning the three years, was the date at which the work was completed, and not the date of measurement. *M'Kay* v. *Carmichael & Christie*, 1851, 14 D. 207; 24 J. 90; 1 Stuart 180.

295. Triennial—Other the Like Debts—Contractor's Remuneration — Parliamentary Order—Written Obligation.—*Held* (1) that the triennial prescription did not apply to the charges of a railway contractor employed to give evidence before a Parliamentary committee in London, in support of a bill for a railway in which he was said to be personally interested; (2) that letters from the secretary of the promoters implying previous communings between the parties, and requesting his attendance as a witness, did not constitute a written contract of employment taking the case out of the statute. *Barr* v. *Edinburgh & Glasgow Rly. Co.*, 1864, 2 M. 1250; 36 J. 626.

296. Triennial—Other the Like Debts—Count and Reckoning.—Where a case resolves into a count and reckoning, the triennial prescription is not pleadable as to one of the items. *Brunton* v. *Angus*, 1822, 2 S. 61.

297. Triennial—Other the Like Debts—Doctor's Remuneration.—*Question*, whether the triennial prescription applies to an account for medical attendance on death-bed, payment of which was not averred by the representatives of the deceased. *Macdowall* v. *Loudon*, 1849, 12 D. 170; 22 J. 24.

298. Triennial—Other the Like Debts—Engineer's Remuneration—Parliamentary Order—Work outside Ordinary Employment — Written Obligation. — *Held* by the whole court, that the triennial prescription did not apply to the charges of an engineer employed under a written engagement by the agent for opponents of a bill before Parliament, to give professional evidence in opposition to it. *Blackadder* v. *Milne*, 1851, 13 D. 820; 23 J. 373.

299. Triennial—Other the Like Debts—Engraver's Remuneration—Parliamentary Order.—The claim of an engraver for preparing Parliamentary plans of a projected railway falls under the triennial prescription. *Johnston* v. *Scott, etc.*, 1860, 22 D. 393; 32 J. 174.

300. Triennial—Other the Like Debts—Factor's Remuneration.—*Held* that an annual factor fee for uplifting rents and managing affairs falls under the triennial prescription. *Grubb* v. *Porteous*, 1835, 13 S. 603.

301. Triennial—Other the Like Debts—Law Agent's Remuneration.—A writer's accounts fall under the triennial prescription, both as to constitution and payment. *Wallace* v. *M'Kissock*, 1829, 7 S. 542. *Campbell* v. *Shearer*, 1833, 11 S. 600.

302. Triennial—Other the Like Debts—Law Agent's Remuneration—Conducting House of Lords' Appeal.—The triennial prescription is applicable to the account of an English solicitor for business done in an appeal to the House of Lords for a person domiciled in Scotland. *Campbell* v. *Stein*, 1818, 6 Dow 116; 23 Nov. 1813, F. C.

303. Triennial—Other the Like Debts—Law Agent's Remuneration—Constitution of Debt — Payment — Proof. — *Held* that reference in a letter by the debtor to a statement of accounts prepared by the creditor proved constitution of the debt *scripto*, and there being no allegation of payment a plea of prescription *repelled*. *Clyne* v. *Snody*, 1830, 8 S. 1004.

304. Triennial—Other the Like Debts—Law Agent's Remuneration—Constitution and Resting-Owing—Proof.—Plea of prescription *sustained* against an account of a law agent, as to which there was no written evidence either of the constitution or resting-owing, the employment being denied. *Milligan* v. *Skinner*, 1831, 9 S. 720. *Scott* v. *Donaldson*, 1831, 10 S. 107; 7 Fac. 102.

305. Triennial—Other the Like Debts—Law Agent's Clerk's Remuneration.—A clerk raised an action against his employer for the balance of an account for salary at so much a week, but only two items of the account had been incurred within the last three years. The amount of these items, with interest, having been tendered, and consigned by the employer, but the constitution and subsistence of the rest of the debt denied by him, *held* that, with the exception of the two last items, the account was prescribed. *Smith* v. *Hamilton*, 1845, 7 D. 499; 17 J. 148.

306. Triennial—Other the Like Debts—Loans upon Receipts Acknowledging Payments to Account of Goods Furnished.—The triennial prescription *held* to apply to a claim as for money advanced in loan, founded on receipts, which, however, were merely acknowledgments of payments to account of goods furnished and to be furnished. *Paterson* v. *Strachan*, 1808, Hume 480.

307. Triennial—Other the Like Debts—Poor-Rates.—Poor-rates do not fall under the triennial prescription. *Munro* v. *Graham*, 1857, 20 D. 72; 30 J. 49.

308. Triennial—Other the Like Debts—Single Purchase—Bullock.—The triennial prescription does not apply to the price of a bullock alleged to have been purchased for family consumption. *Smith* v. *Miller*, 1827, 5 S. 338.

309. Triennial—Other the Like Debts—Single Purchase—Flock of Sheep.—The triennial prescription *held* not to apply to the sale of 130 sheep at one time. *M'Gregor* v. *Stewart*, 1811, Hume 462.

310. Triennial—Other the Like Debts—Single Purchase — Interruption — Action afterwards Abandoned.—*Held* (1) that the triennial prescription applies to a single purchase of goods; and (2) that an action which is afterwards abandoned cannot interrupt prescription. *Gobbi* v. *Lazzaroni*, 1859, 21 D. 801.

311. Triennial—Other the Like Debts—Stockbroker's Remuneration—Parliamentary Order.—*Held* that the triennial prescription applied to a stockbroker's account for services rendered to the promoters of a proposed railway company in attending to the preliminaries necessary in applying for an Act of Parliament, and that there was no distinction in regard to certain services which had been rendered in compliance with written instructions given by the committee in the course of the employment. *White* v. *Caledonian Rly. Co., etc.*, 1868, 6 M. 415; 40 J. 198.

312. Triennial—Other the Like Debts—Surveyor's Remuneration—Interruption—Letters by Debtor—Proof.—*Held* (1) that the triennial prescription applied to a surveyor's account; but (2) that it was elided by a letter from the defender, dated within the years of prescription, which established the employment; and two other letters from him, posterior to the three years, which admitted that an account between the parties was still unsettled; and (3) that its precise amount could be proved *prout de jure*. *Stevenson* v. *Kyle*, 1850, 12 D. 673; 22 J. 245.

313. Triennial — Process — Interlocutor Sustaining Plea—Additional Findings re Accounts — Defender's Oath. — The Lord Ordinary, in an interlocutor sustaining a plea of triennial prescription, introduced certain special findings as to the accounts sued on, with reference to other pleas in defence. The court declined to alter it on a reclaiming note, which prayed merely to have the plea of prescription repelled, but reserved to the party to refer all special points to the oath of the defender. *Granger's Exrs.* v. *Lamb's Trs.*, 1833, 11 S. 671.

314. Triennial—Proof—Oath—Indecisive—Proof prout de jure—Continuous Account — Death of Debtor — Continuation of Account by Widow—Surgeon's Remuneration. —In an action by a surgeon against the widow of a defunct, for an account due for attendance on him for several years prior to the time of his death, and thereafter for attendance on herself, she pleaded the triennial prescription, and, on a reference to oath, deponed that she did not know whether her husband had paid the account due by him, and that she had offered £1 in payment of her own, but it was refused. *Held* competent to inquire by other evidence as to the subsistence of the debts. *Brown* v. *Paterson*, 1809, Hume 469.

315. Triennial — Proof — Oath—Married Woman—Furnishings.—*Held* that it is competent to prove by the oath of a wife the resting-owing to elide the triennial prescription in regard to furnishings. *Young, etc.* v. *Playfair*, 2 Dec. 1802, F. C.

316. Triennial — Proof — Writ — Admissions on Record.—A plea of triennial prescription, stated against liability for an account of a London solicitor, *repelled*, the constitution and resting-owing being proved by the defender's letters to the solicitor. *Observed*, that admissions on record cannot be taken to eke out the proof by writ. *Webster* v. *M'Clelland*, 1852, 14 D. 932; 1 Stuart 981.

317. Triennial — Proof — Writ — Company's Minutes of Meeting—Oath—Chairman and Directors.—*Question*, as to sufficiency of minutes of meeting and correspondence as proof *scripto* of a prescribed claim against a railway company for professional services, chiefly rendered in connection with the promotion of the company, and before its corporation ; and as to competency of reference to oath of chairman, directors, and permanent officials. *White* v. *Caledonian Rly. Co., etc.*, 1869, 7 M. 583 ; 41 J. 314.

318. Triennial — Proof — Writ — Law Agent's Account — Letters Referring to Terms of Employment.—In 1845 a party to an action before an inferior court, signed, along with his agent, a letter to an Edinburgh agent, authorising him to advocate the process, and in 1849 the client, in answer to a demand for payment of the Edinburgh agent's account, wrote, referring to the terms of the employment, and denying his liability ; *held* that the letters proved both the constitution of the debt and resting-owing, so as to exclude the plea of the triennial prescription. *Macandrew* v. *Hunter*, 1851, 13 D. 1111 ; 23 J. 530.

319. Triennial—Proof—Writ—Letter of Factor.—The triennial prescription *held* to be elided by letters of a factor, as constructively the writ of the principal, which admitted that there was an old claim against the principal which it would be agreeable to him to have settled. *Smith* v. *Falconer*, 1831, 9 S. 474 ; 6 Fac. 341.

320. Triennial—Proof—Writ—Letter of Party's Law Agent — Authority. — Letter from a country agent authorising the business to be done, but without evidence of authority, general or special, from the client to the country agent, *held* not sufficient to elide prescription. *Wallace* v. *M'Kessock*, 1829, 7 S. 542.

321. Triennial—Proof—Writ—Letter of Party's Law Agent—Resting-Owing.—A letter from an alleged debtor's law agent, containing not an acknowledgment of anything being due, but, on the contrary, a statement that the balance is the other way, *held* not sufficient to elide the triennial prescription of a tradesman's account. *Mackintosh* v. *Ashburton*, 1834, 12 S. 929 ; 6 J. 496.

322. Triennial — Proof — Writ — Letter within the Three Years.—*Held* that letters in reference to the quality of goods, addressed within the three years by the party who ordered and received them to the seller, did not, when taken in connection with the party's statements on record, amount to a constitution of the debt sued for, much less to proof of resting-owing. *Gobbi, etc.* v. *Lazzaroni*, 1859, 21 D. 801.

323. Triennial—Proof—Writ—Sexennial —Bill of Exchange.—In an action brought many years after the period of the sexennial prescription, for payment of the balances due on four debts, three of which had been constituted originally by bills of exchange, and the other as a book debt—evidence that the debtor had granted a trust deed for behoof of his creditors, had acknowledged in a state of claims the amount of said four debts, had set out the nature of said debts in an heritable bond, and in three subsequent holograph memoranda had included the debts as unpaid while certain others were marked paid, *held* sufficient, as the writ of the debtor, to prove that the balances due on all the four debts were resting-owing, although in such evidence there was no reference to the bills. *Watson* v. *Johnston*, 1846, 18 J. 598.

324. Triennial—Servand's Fees—Admission of no Payment.—In an action for wages raised five weeks after the death of the master, the master's representatives admitted the employment, and that wages had not been paid, but disputed the rate. *Held* that prescription did not apply. *Ritchie* v. *Little*, 1836, 14 S. 216 ; 11 Fac. 164.

325. Triennial—Servand's Fees—Foreign —Lex loci contractus.—A Scotsman engaged a servant in England, took him abroad for some years, and thereafter brought him to Scotland, where the servant remained with him for five years, but left his service four years before his master's death. *Held* that a claim for wages was cut off by the triennial prescription ; and plea that the law of England, the *locus contractus*, did not recognise that prescription, *repelled*. *Robertson* v. *M. of Annandale*, 1749, 1 Pat. 293.

326. Triennial—Servand's Fees—Granddaughter and Grandparents. — A granddaughter went to reside with her grandfather and grandmother, and acted as the only servant for eleven years (during which time the grandmother died), and did the duties of sick-nurse to her grandfather on his death-bed, never receiving any wages. *Held* entitled to wages as a servant and sick-nurse for the last three years, and to mournings, but *quoad ultra*, that her claim was prescribed. This latter point doubted as correct law by the reporter. *Shepherd* v. *Meldrum*, 1812, Hume 394.

327. Triennial — Servand's Fees — Other the Like Debts — Single Purchase. — The triennial prescription applies to a servant's claim for wages. *Question*, whether that prescription applies to the purchase of cows singly and forming part of an account current. *M'Dougall* v. *Campbell*, 1833, 7 W. & S. 19 ; 1830, 8 S. 959.

328. Triennial — Servand's Fees — Payment—Proof.—A girl in destitute circumstances, ten years old, resided with her uncle till she was twenty-five, and acted as his servant during that time. *Held*, in an action by her for wages during six years, that that payment not being alleged, a defence founded on the triennial prescription was irrelevant. *M'Naughton* v. *M'Naughton*, 1813, Hume 396.

329. Triennial — Servand's Fees — Payment—Proof.—In an action for wages, in which the triennial prescription was pleaded,

held that it was not necessary for the defender to aver payment or extinction of the debt, as, in terms of the statute 1579, c. 83, the pursuer should have "no action," without a proof by writ or oath. *Alcock* v. *Easson*, 1842, 5 D. 356; 15 J. 147.

330. Triennial — Servand's Fees — Payment—Proof.—*Question*, whether the triennial prescription can be pleaded against a claim for servant's wages where the service is admitted, and payment not averred. *Anderson* v. *Halley*, 1847, 9 D. 1222; 19 J. 532.

331. Triennial — Servand's Fees — Remuneration as Housekeeper.—*Held* that a claim of remuneration for services rendered to a brother-in-law was substantially a claim for wages as a housekeeper or servant; and therefore fell under the triennial prescription, though there had been no agreement as to the remuneration. *Smellie* v. *Cochrane*, 1835, 13 S. 544; 10 Fac. 345; 1835, 13 S. 12; 11 Fac. 6.

332. Triennial — Written Obligation — Bargain for Flock of Sheep under Written Reference to Fix Value—Quinquennial.—*Held* that neither the triennial nor the quinquennial prescription is applicable to a bargain for a flock of sheep, sold under a written reference to a third party to fix the value, he having done so accordingly. *Cameron* v. *Cameron*, 1801, Hume 472.

333. Triennial — Written Obligation — Extra Work under Written Contract.—*Held* that the plea of the triennial prescription did not apply to extra work executed under a written contract providing for such work. *Morrison* v. *Jefferies*, 1867, 5 S. L. R. 5.

334. Triennial — Written Obligation — Partnership, Writ of.—A letter written in the name of G. & Co., by a partner of and entitled to bind the yet undissolved firm of G. & A., and addressed from the admitted place of business of G. & A. to a merchant with whom G. & A. dealt, *held* to be the writ of G. & A. and to elide the triennial prescription. *Treacher* v. *Galloway*, 1844, 17 J. 55.

335. Vicennial — Decree — Entail — Judicial Sale under Act of Parliament—Failure to Appoint Tutor ad litem.—An objection was made to the validity of a decree against a pupil, that no tutor *ad litem* had been appointed. In answer to this, it was pleaded that more than twenty years had elapsed from its date, and therefore the grounds and warrants were not necessary to be produced. *Held* that, as the extracted decree did not set forth that any tutor had been appointed, and no evidence of any appointment was produced, the objection was good. *Agnew* v. *E. of Stair*, 1822, 1 Shaw's App. 333.

336. Vicennial — Holograph Letter Acknowledging Receipt of Money—Act 1669, c. 9.—Holograph letters acknowledging receipt of money *held* to fall under the vicennial prescription established by the Act 1669, c. 9. *Mowat* v. *Banks*, 1856, 18 D. 1093; 28 J. 542.

337. Vicennial — Holograph Writing Importing Receipt of Money—Act 1669, c. 9—Mora.—An action being raised after the lapse of nearly forty years, partly on a general claim for money had and received, and partly on a holograph writing importing to be a receipt of money for behoof of another, *held* that, under the circumstances of the case, the claim must be presumed to have been extinguished. *Campbell* v. *Halket*, 1749, 1 Pat. 427. Affg. Elc. *voce* "Prescription" No. 29; M. 11634.

338. Vicennial—Negative—Succession—Entail—Destination.—An entailer entailed his estate of R in favour of the second son of A and the heirs-male of his body, whom failing, the second son of B and his heirs-male, etc., subject to the condition that upon any of the heirs of tailzie succeeding to the estate of S that of R should forthwith devolve to the next immediate heir of tailzie and his heirs-male. In 1806 C, one of the heirs of tailzie in possession, succeeded to the estate of S and denuded of R in favour of his brother the next substitute, who took possession and subsequently completed his title by service. In 1867 his right was challenged in an action at the instance of C's eldest son, who was born in 1827. *Held* that the action was not barred by either the vicennial or the long prescription. *Campbell* v. *Campbell*, 1868, 6 M. 1035; 40 J. 589.

339. Vicennial—Retours and Services—Averment of Fraud—Act 1617, c. 13.—*Question*, whether a relevant allegation that a service had been obtained by fraud be sufficient to elide the vicennial prescription of the retour. *Shedden* v. *Patrick*, 1852, 14 D. 721; 24 J. 313; 1 Stuart 611.

340. Vicennial—Retours and Services—Error Appearing ex facie of Retour—Entail.—A retour *ex facie* invalid is worthless and cannot be made valid by mere lapse of time. The vicennial prescription is a prescription of a retour of a person as a proper heir, but if the retour is as heir of taillie and provision, if the entail is set aside, the whole flies off. *Fullarton* v. *Hamilton*, 1825, 1 W. & S. 410. Affg. 12 Feb. 1824, F. C. App. No. 2; 2 S. 698; 1822, 1 Shaw's App. 265.

341. Vicennial—Retours and Services—Of Heirs of Taillie and Provision—Act 1617, c. 13.—*Observed*, that the vicennial prescription introduced by the Act, 1617, c. 13, applies not merely to retours of heirs *jure sanguinis*, but also to those of heirs of taillie and provision. *Campbell* v. *Campbell*, 1848, 10 D. 461; 20 J. 137.

342. Vicennial—Retours and Services—Persons with Stronger Title than that of Mere Heirship—Relation of Act 1617, c. 13 to Act 1617, c. 12.—The Act 1617, c. 13, establishes an absolute protection of retours against challenge by parties alleging themselves to be the true heirs after the lapse of twenty years, the only party who may then disturb the person served as heir being some

one who comes in with a stronger title than that of mere heirship. *Neilson* v. *Cochrane's Reps.*, 1840, 1 Robin. 82. Affg. 15 S. 365; 12 Fac. 303. *Wallace* v. *Eglinton*, 1835, 13 S. 564; 10 Fac. 350.

343. Vicennial — Retours and Services —Reduction of Retour.—*Question*, whether a reduction of a retour was barred by the vicennial prescription. *Neilson* v. *Erskine*, 1823, 2 S. 247.

PRESUMPTION

DEBITOR NON PRÆSUMITUR DONARE, see titles *Donation* and *Succession*.

LEGITIMACY, AS TO, see title *Parent and Child*.

PAYMENT, AS TO, see title *Payment*.

1. Child-Bearing.—The payment of funds held in trust and payable at the expiry of liferent to parties failing issue of the liferentrix *allowed* during the lifetime of the liferentrix on caution against issue being born being found. *Scheniman* v. *Wilson*, 1828, 6 S. 1019. *Shaw* v. *Shaw*, 6 S. 1149. See also *Blackwood* v. *Blackwood's Trs.*, 1833, 11 S. 443.

2. Life.—*Question*, whether there were sufficient circumstances to presume the death of a party who, being confined on a charge of murder on board a ship in 1806, had escaped, and never been heard of. *Don* v. *Rutherford*, 5 June 1813, F. C.

3. Life.—A party sailed for Australia in 1852 and nothing thereafter was heard of him. In 1866 the court *refused* to presume his death. *Cahill* v. *Spence*, 1866, 2 S. L. R. 9.

4. Life.—*Held* that there was no presumption that a labouring man, who had deserted his wife and gone to America, and had not been heard of for seventeen years, was dead. *Fife* v. *Fife*, 1855, 17 D. 951; 27 J. 485.

5. Life.—The court *refused* to hold that there was any presumption of the death of a person who in 1853, when fourteen years of age, had gone to sea, and of whom nothing had been heard for twelve years, the last tidings being in 1854. *Tait* v. *Wood*, 1866, 4 M. 443; 38 J. 206.

6. Life.—A was born in 1768 and was last heard of in 1825. In a question as to whether he had survived 1849, *held* that his death before that was to be presumed. *Bruce* v. *Smith*, 1871, 10 M. 130; 44 J. 82.

7. Life — Disposition — Service of Substitute — Payment without Caution.—A party who was institute under a disposition went as a sailor to Tobago and had not been heard of for twenty years. If alive he would have been fifty. *Held* that he could not be presumed dead, but that the substitute in the deed who had served heir to the party was meantime entitled to the interest of the subject. *Campbell* v. *Lamont*, 1824, 3 S. 145.

But nine years later, on proof that some information had been received that the institute was dead, the court *allowed* the subject to be made over to the substitute without caution. *Campbell's Trs.* v. *Campbell*, 1834, 12 S. 382.

8. Life—Factor loco absentis.—The proprietor of one-half of a tenement disappeared for twenty years. The court *refused* to appoint a factor *loco tutoris* to his heirs as this would assume he was dead, and instead appointed a factor *loco tutoris*. *White* v. *Stevenson*, 1829, 7 S. 555.

9. Life—Factor loco absentis.—A person who had been appointed factor *loco absentis* to a person who had not been heard of for nineteen years, in his own name as factor raised a reduction of a service. An objection to his title to sue, that the absent person must be presumed to be dead, *repelled*, upon his sisters, who would be his heirs if he had no issue, sisting themselves as pursuers along with the factor. *Kennedy* v. *M'Lean*, 1851, 13 D. 705; 23 J. 310.

10. Life—Judicial Factor.—A seaman in the royal navy, who was heir of conquest of his brother, not having been heard of since 1814, his niece, on the supposition of his death, being the heir of conquest, was served. *Held* that although the seaman, if alive, would only be sixty-three years old, the younger brother, as his heir of line, was not entitled to have a judicial factor appointed, the niece having found caution for her intromissions. *Chambers* v. *Chambers*, 1849, 11 D. 1359; 21 J. 538.

11. Life — Judicial Factor—Recal.—In 1868 a petition was presented for the recal of a judicial factory, on the ground that the ward who had disappeared in 1866 (after threatening suicide) must be presumed dead. The court *recalled* the factory, but only on caution being found. *Milne* v. *Wills*, 1868, 40 J. 221.

12. Life—Marriage Law.—In a question as to the validity of a marriage, *held* that there was no evidence that a party who had gone abroad in 1801 and was heard of in 1804 was dead in 1810. *Observed*, that the presumption of life is strong. *Lapsley* v. *Grierson*, 1845, 8 D. 34; 18 J. 17. *Cahill* v. *Spence*, 1866, 2 S. L. R. 9.

13. Life—Price of Lands—Payment on Security.—A person to whom money was due sailed for India in 1806. The vessel was never afterwards heard of, and it was understood and acted on that all on board had perished. The heir in 1808 was served to him; and the debtor had in the meantime deposited the money in bank. *Held* that, on the heir finding security to repay in case of the reappearance of the party, he was entitled to payment of the debt. *Lord Ashburton* v. *Baillie*, 7 Feb. 1811, F. C.

14. Life—Service.—*Observed*, that where an absentee of middle age was shown to have been alive in 1819, and to have then had two sons, the mere lapse of time, and want of further intelligence concerning them, could not afford a presumption, either that the party or

his children were dead; and that a service, being an *ex parte* proceeding, could not raise the presumption of death in these circumstances. *Reid* v. *Brown*, 1834, 12 S. 278.

15. Life—Succession—Payment on Caution.—Two persons having gone abroad as sailors in 1791, and never having been thereafter heard of, sums bequeathed to them, whom failing, to substitutes, ordered to be paid to the latter, on finding caution to repeat. *Fettes* v. *Gordon*, 1825, 4 S. 149.

16. Life—Succession—Payment on Caution.—A party went to India in 1805, and had never since been heard of. A sum of money was consigned on his account, in a process of exoneration by the trustees under the settlement of his father, who died in 1803. The party had executed, before his departure, a settlement of his interest in his father's succession in favour of relations. These relations *allowed* to uplift the consigned money on caution to repeat, if the party should appear. *Hyslop*, 1830, 8 S. 919.

17. Life—Succession—Payment on Caution—Date of Death.—*Held* that a party who had gone abroad, and of whom no tidings had been heard for thirty-seven years, was probably dead; and his heir *authorised* to uplift an heritable fund belonging to him, with a part of the interest, on caution to make repetition in case of his reappearance; the other portion of the interest being ordered to remain consigned in the meantime, owing to a doubt, arising from the uncertainty of the period of death, whether the heir was entitled to it. *Garland* v. *Stewart*, 1841, 4 D. 1.

18. Life—Succession—Payment on Caution.—Where annuitants had not been heard of for thirty years the trustees were authorised by the court to pay over the sums set apart to secure the annuities to the party who would be entitled thereto on the death of the annuitants on his granting a personal bond to the trustees to relieve them of all claims in respect of the annuities. *Stirling* v. *Mackenzie*, 1847, 9 D. 923; 19 J. 417.

19. Life—Succession—Payment on Caution.—In the case of a person who had gone to sea and had not been heard of for thirty-three years, *held* that his interest in a succession which had vested in him, if he was alive, was sufficiently protected by caution. *Murray* v. *Wright*, 1870, 8 M. 722; 42 J. 388.

20. Life—Succession—Date of Death.—A testator left his estate to A, whom failing, to B. The testator died in 1853. A had gone to the Arctic regions on an exploration in 1845 and the expedition was never thereafter heard of. *Held* that A must be presumed to have predeceased the testator, and that the estate might be paid to B without caution. *Fairholme* v. *Fairholme's Trs.*, 1858, 20 D. 813; 30 J. 435.

21. Life—Succession.—A sailor, in the prime of life, suddenly disappeared at a seaport town in England, about four months prior to his father's death. Twelve years afterwards his father's trustees, acting under a deed of settlement, by which, in the event of the son's survivance, he had right to share of his father's funds, paid a debt due by the son. *Held* that they were not liable for that payment in accounting with the father's residuary legatees, though there was no evidence that he survived his father. *Bruce* v. *Robson*, 1834, 12 S. 486.

22. Life—Succession.—A native of Scotland, born in 1792, removed to Nova Scotia, where he was last heard of in 1848. Extensive advertisements were made for him, but without eliciting any information. *Held* that this was not sufficient to overcome the presumption of life. *Barstow* v. *Cook*, 1862, 24 D. 790; 34 J. 399. But on application being made in 1874 the court authorised the division of the estate on the assumption that he was dead. *Ibid.*, 1874, 11 S. L. R. 363.

23. Omnia rite et solenniter acta.—See *Badger* v. *Lord Blantyre*, 1844, 17 J. 53.

24. Omnia rite et solenniter acta—Appointment of Schoolmaster.—Where a person had acted as schoolmaster for twenty-seven years, *held* that his appointment must be presumed to be valid, and that the minutes of election need not be produced. *M'Alpine* v. *Campbell*, 1840, 2 D. 481; 15 Fac. 513.

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1. Abandonment — Judicature Act, 1825—Form of Minute—Reservation of Right to Bring New Action.—A minute of abandonment should contain no reservation or qualification, but simply say that the pursuer "abandons this cause in terms of the statute." *Adamson, Howie, & Co.* v. *Guild, etc.*, 1868, 6 M. 347.

2. Abandonment — Jury Trial — Failure to Proceed—A. S. 16 Feb. 1841, s. 46—Absence of Material Witness. — Issues having been adjusted in a jury cause, but no further procedure having taken place for more than twelve months, the defender moved for absolvitor. On the report of the Lord Ordinary, absolvitor *granted*, although the pursuer attributed the delay to the absence abroad of a material witness, who he was now willing should be examined on commission. *Kerr* v. *Boswell's Reps.*, 1858, 20 D. 959; 30 J. 579.

3. Abandonment—Jury Trial—Failure to Proceed—A. S. 16 Feb. 1841—Absence of Material Witness. — Action *dismissed*, in respect of no procedure within twelve months after adjustment of issues, under provisions of A. S. 16 Feb. 1841. *Boutelleau* v. *Mackenzie*, 1859, 21 D. 1301.

4. Abandonment—Jury Trial—Failure to Proceed—A. S. 16 Feb. 1841, s. 46.—After issues had been adjusted for more than a year, and five notices and countermands of trial given by the pursuer, the defender moved to have the action dismissed; which was opposed by the pursuer, who averred as the cause of the delay that he was bankrupt, and had been divested under a trust deed; but as he did not offer to prove that bankruptcy had supervened since the date of the last notice of trial, the court *dismissed* the action. *Craig* v. *Brock*, 1843, 5 D. 1261; 15 J. 516.

5. Abandonment—Jury Trial—Failure to Proceed—A. S. 16 Feb. 1841, s. 46.—*Held* that sufficient cause for delay to proceed to trial within year and day of adjustment of issues may be shown after the delay has occurred; and motion to dismiss an action on account of such delay was refused, on the ground principally, that correspondence with the defender's agent showed acquiescence on the part of the latter. *Angus* v. *Grier*, 1853, 16 D. 303; 26 J. 139.

6. Abandonment—Jury Trial—Failure to Proceed—A. S. 16 Feb. 1841, s. 46—Counter Actions.—Where two parties were pursuing actions of damages against one another, and had each applied to have the other's action dismissed, in respect that no notice of trial had been given within a year after issues were adjusted, the court *dismissed* both actions. *Gordon* v. *Scott*, 1845, 7 D. 883; 17 J. 457.

7. Abandonment—Jury Trial—Failure to Proceed—A. S. 16 Feb. 1841, s. 46—Notice of Trial Given within the Year.—In this case issues were adjusted on 26th February 1862. On 13th February 1863, notice of trial for the spring sittings was given by the pursuer. The defender now moved that the action should be dismissed, under the Act of Sederunt, in respect the pursuer had not "proceeded to trial" within a year of adjustment of issues. Motion *refused*. *Couston* v. *Millar*, 1863, 1 M. 508; 35 J. 307. Cf. *Wilson* v. *Haggart*, 1863, 1 M. 1115.

8. Abandonment—Jury Trial—Failure to Proceed—A. S. 16 Feb. 1841, s. 46—Sufficient Cause for Delay — Decree in Terms of Tender.—Circumstances in which the court, holding that sufficient cause had been shown by a pursuer for not proceeding to trial within twelve months after adjustment of issues, *refused* a motion by defender for absolvitor on account of the delay, and gave decree for pursuer in terms of a tender made before adjustment of issues. *Moore* v *Forth Iron Co.*, 1867, 5 M. 531 ; 39 J. 267.

9. Abandonment—Jury Trial—Failure to Proceed—A. S. 16 Feb. 1841, s. 46—Sufficient Cause for Delay. — Where a notice of trial had been discharged, on the understanding that the pursuer should go to trial at the next sittings, but before the time for giving notice of trial for these sittings expired, a year and day had elapsed since issues were adjusted, motion to have the action dismissed *refused*. *Blair* v. *Buchanan*, 1860, 22 D. 1271.

10. Abandonment—Jury Trial—Failure to Proceed—A. S. 16 Feb. 1841, s. 46—Change of Agency—Notice of Motion.—The court, on the motion of a defender, *dismissed* an action, in terms of A. S. 16 Feb. 1841, on account of the pursuer's failure to proceed to trial, without directing personal intimation of the motion to be made to the pursuer, though informed that a change of agency had taken place. *Nimmo* v. *M'Caul*, 1855, 17 D. 751 ; 27 J. 314.

11. Abandonment—Jury Trial—Failure to Proceed—A. S. 16 Feb. 1841, s. 46—Notice of Motion.—Motion by a defender in a jury cause to dismiss the action, in respect no step had been taken within a year from approval of issues, *refused* upon the ground that thirty-six hours' previous notice of the motion had not been given to the pursuer. *Farr* v. *Williams & Son*, 1846, 8 D. 710.

12. Abandonment—Jury Trial—Failure to Proceed—A. S. 16 Feb. 1841, s. 46—Pursuer's Right to Abandon under Judicature Act—Right to Bring New Action. —*Held* that though notice of motion in respect of failure to proceed has been given, the pursuer is not deprived of his right to abandon the action under the Judicature Act. *Exrs. of A. B.* v. *Scottish Widows' Fund*, 1858, 20 D. 1073 ; 30 J. 649.

13. Abandonment — Jury Trial — Issue for Defender—Failure to Proceed—A. S. 16 Feb. 1841, s. 46—Decree in Pursuer's Favour.—An issue was allowed a defender to prove a counter claim, in answer to an admitted demand, and remitted for trial to the Lord Ordinary. The defender failed to proceed to trial within twelve months, his counter claim was repelled, and decree in favour of the pursuer pronounced in the Inner House. *Caution* v. *Burt*, 1861, 23 D. 1127 ; 33 J. 567.

14. Abandonment—Jury Trial—Failure to Proceed—A. S. 16 Feb. 1841, s. 46—Insolvency of Defender.—The insolvency or doubtful and embarrassed circumstances of the defender is not a "sufficient cause" for delay on the part of a pursuer in proceeding to trial, and is no answer to a motion for absolvitor in respect of the pursuer's failure to proceed to trial within twelve months after issues have been adjusted. *Batters* v. *Macdonald*, 1860, 22 D. 986 ; 32 J. 420.

15. Abandonment—Jury Trial—Failure to Proceed—A. S. 16 Feb. 1841, s. 46.—A motion for dismissal of an action, in terms of the A. S. 16 Feb. 1841, s. 46, on the ground that the pursuer had failed to proceed to trial within twelve months of the adjustment of issues, made by one of three defenders pending an appeal by the pursuer against a judgment assoilzieing the other two, and which appeal had been to some extent recognised by the defender now moving, as a reason for not going to trial at the previous sittings, and was now expected to be immediately disposed of—*refused*. *Cullen* v. *Johnston*, 1862, 24 D. 800 ; 34 J. 406.

16. Abandonment—Jury Trial—Failure to Proceed—Court of Session Act, 1850, s. 40 — A. S. 29 Nov. 1825. — Where a motion to have a day for trial fixed is made by a pursuer within a year from the date of adjusting issues, though so late as to make it impossible that the trial should take place within the year and day, the defender is not entitled to have the action dismissed. *Maclaren* v. *Robertson*, 1859, 22 D. 278 ; 32 J. 132.

17. Abandonment—Jury Trial—Failure to Proceed—A. S. 16 Feb. 1841, s. 46—Inner or Outer House.—Issues having been adjusted by the Lord Ordinary in a jury cause, but no further procedure having taken place at the instance of the pursuer for more than twelve months, the defender moved for absolvitor under the Act of Sederunt. The Lord Ordinary reported the case, in respect the Court of Session Act of 1850 conferred on him no jurisdiction to deal with such a motion. Absolvitor *granted*. *Bett* v. *Aberdein*, 1853, 16 D. 322 ; 26 J. 151. Cf. *Stewart* v. *Burt*, 1859, 21 D. 510 ; 31 J. 274. *Ferguson* v. *Ferguson*, 1861, 23 D. 1290 ; 33 J. 646.

18. Abandonment—Jury Trial—Failure to Proceed—A. S. 16 Feb. 1841, 7, ss. 46—Court of Session Act, 1850, s. 40.—Circumstances in which *held* that sufficient cause had been shown why a motion for absolvitor, in respect of failure to proceed to trial within twelve months after the adjustment of issues, should be refused. *Question*, whether such a motion should be made in the Inner or Outer House? *Stobie* v. *Melvin*, 1865, 1 S. L. R. 52. See also *Rayner* v. *Scott*, 1868, 5 S. L. R. 613 ; and *Gavine* v. *Brown*, 1873, 10 S. L. R. 545.

19. Abandonment—Partial—Declarator of Five Different Rights of Way—Issues for two Roads only.—A summons concluded for declarator of five different rights of way as to which a record was made up. After the record was closed, the pursuer asked and

obtained issues for two roads only, and the defender consented to judgment. Thereafter the court pronounced decree of declarator. The pursuer then lodged a minute abandoning the action as regarded the other three roads, reserving right to bring a new action. *Held* that the interlocutor adjusting the issues had exhausted the cause, except as to those issues, and that *quoad ultra* there remained nothing to abandon, and that the defender was entitled to absolvitor. *White* v. *Lord Morton's Trs.*, 1866, 4 M. (H. L.) 53; J. 543; L. R. 1 Sc. Apps. 70.

20. **Abandonment—Partial—Declarator of Right of Way Along Five Paths—Only two Put in Issue—Verdict for Pursuers by Consent—Incompetency of Pursuer Abandoning as to other three Paths and Defenders Assoilzied quoad Them.**—In a declarator of public right of way along five different paths, issues were adjusted, and two only of the five roads were put in issue. Thereafter the defender consented to a verdict for the pursuers. *Held* that the pursuers were not entitled to abandon the cause so far as relative to the three roads not put in issue, and the defender assoilzied from the conclusions of the action relative to these roads. *Question*, whether the Judicature Act and Act of Sederunt authorise a partial abandonment of an action. *Hay* v. *E. of Morton's Trs.*, 1862, 24 D. 1054; 34 J. 538.

21. **Abandonment—Inner House.**—After an action had been discussed before the Inner House, and the pursuer obtained a renewal of a diligence, *held* entitled to abandon the action on payment of the defender's expenses. *Lockhart* v. *Sir N. M. Lockhart*, 1845, 17 J. 184.

22. **Abandonment by Letter — New Summons — Expenses.** — A pursuer before enrolment is entitled to abandon his action by letter and raise a new summons containing *in gremio* an abandonment of the former without giving the defender an opportunity by enrolment of getting expenses awarded him. *Laidlaw* v. *Smith*, 1834, 12 S. 538.

23. **Abandonment — Before Record Closed.**—It is not competent, before the record is closed, to abandon an action, reserving right to bring a new action, under the provisions of the Judicature Act and relative Act of Sederunt. *Hay* v. *E. of Morton's Trs.*, 1862, 24 D. 1054; 34 J. 538.

24. **Abandonment—Abandonment after Opinions of Court Delivered.**—An action may be abandoned in terms of the Act 6 Geo. IV. c. 120, s. 10, and relative Act of Sederunt, notwithstanding the court have delivered their opinion with a view to judgment against the relevancy of a considerable portion of the action, no interlocutor having been pronounced. *Western Bank* v. *Baird*, 1862, 24 D. 859; 34 J. 435.

25. **Abandonment — Multiplepoinding — Competency.**—*Campbell's Trs.* v. *Campbell*, 1863, 1 M. 1016; 35 J. 594.

26. **Abandonment—Necessity for Court Sustaining Minute.**—A process is not effectually vacated by a pursuer till the sanction of the court has been adhibited to the minute of abandonment. *Muir* v. *Barr*, 1849, 11 D. 487; 21 J. 139. *Cormack* v. *Waters*, 1846, 8 D. 889; 18 J. 285.

27. **Accounting—Accumulation of Principal and Interest—Conclusions.**—Terms of conclusions of a summons of accounting under which the court *held* it competent to accumulate the principal and interest found to be due at the date of citation, and to allow interest from that date on the accumulated sum. *Maclean* v. *Campbell*, 1856, 18 D. 609; 28 J. 256.

28. **Accounting — Condescendence of Errors in a Settled Account.**—A condescendence of errors in a settled account allowed in a process of accounting. *Wilson* v. *D. of Hamilton*, 1822, 1 S. 443.

29. **Accounting—Master and Servant.**—A summary petition to the sheriff, by the proprietor of a newspaper, against a clerk, concluding for immediate restitution of the amount of certain accounts as uplifted by the clerk without authority, *held* incompetent, as the matters in dispute formed a proper subject for an ordinary action of count and reckoning. *Macallan* v. *Cockburn*, 1837, 15 S. 956.

30. **Accounting — Partnership — Inspection of Books.**—In an accounting between partners, the defender having been the managing partner and custodier of the company's books, *held* that the pursuer was entitled to the assistance of his law agent in inspecting the books. *Cameron* v. *M'Murray*, 1855, 17 D. 1142; 27 J. 597.

31. **Accounting — One Partner against Another—Conclusions.**—An action of count and reckoning at the instance of one of two partners of a firm against the other, concluded for payment to the firm, and to the pursuer and defender as the individual partners of the same, of the balance which the defender should be found to be due. *Held* that the conclusions were for an accounting between the defender and the firm, and the individual partners of the firm, and that there were no *termini habiles* for pronouncing interim decree in favour of the pursuer individually. *Cameron* v. *M'Murray*, 1855, 17 D. 870; 27 J. 464.

32. **Accounting — Partnership — Action at Instance of Deceased Partner's Representatives.**—An action of count and reckoning, at the instance of R. F.'s representatives, concluded *inter alia* for decree against a company and partners, ordaining them to hold count and reckoning with the pursuers "for the whole sums due and indebted by the said company to the said deceased R. F. at the period of his death." R. F. died in 1802. The action was raised in 1827. In the accounting, the company claimed and obtained credit for payments made by them subsequent to R. F.'s death, as diminishing the sum due; and they were charged, on the other hand, by the accountant, with sums paid to the company

by R. F.'s representatives. An objection by the company, that this was beyond the scope of the action, and unauthorised by the summons, *repelled*. *Donaldson* v. *Findlay, Bannatyne, & Co.*, 1860, 22 D. 937; 32 J. 398.

33. Accounting — Deceased Partner — Bar.—Count and reckoning by representative of deceased partner as to his interest in the firm. Plea in bar of accounting founded on alleged agreement *repelled*, and production of the balance-sheets of the firm and of the deceased partner's account with the firm *ordered*. *Lawson* v. *Lawson's Trs.*, 1872, 11 M. 168; 45 J. 100.

34. Accounting — Trust — Trust Fund Used in Partnership—Conclusions.—Beneficiaries under a trust deed brought an action of count and reckoning against the trustees. Terms of conclusions under which *held* competent to maintain that the trustees must account for the actual profits realised by the employment of the trust funds, contrary to the truster's direction, in a mercantile firm of which they were partners. *Cochrane* v. *Black*, 1855, 17 D. 321; 27 J. 139.

35. Accounting — Necessity for — Suspension of Trustees—No Trust Funds—Accounts.—Where in a suspension of a charge against them trustees pleaded that they had no trust funds, and by order of the court lodged a state of their accounts in process, *held* that it was competent to entertain such objections for the charger to the correctness of this state, as were easily verifiable or appeared *ex facie* of the accounts, without an accounting. *Dick's Trs.* v. *Hannah*, 1870, 8 S. L. R. 137.

36. Accounting — Against Trustee in Sequestration.—Count and reckoning by discharged bankrupt against trustee in his sequestration, also discharged, *held* incompetent. *Burns* v. *Craig*, 1869, 7 M. 476; 41 J. 257.

37. Accounting—"Such Sum as Should be Found Due to the Pursuer."—A summons concluded for payment of "£350, or such other sum" as should be found due to the pursuer. *Held* that this covered the full amount found due, although that sum exceeded £350. *Spottiswoode* v. *Hopkirk*, 1853, 16 D. 59; 26 J. 39.

38. Adherence—Statute—Transmission of Process.—An action of adherence depending before the Commissary Court, transmitted of consent to the Lord Ordinary, before whom another action between the parties depended, in terms of the Acts 11 Geo. IV. and 1 Will. IV. c. 69, and 13 and 14 Vict. c. 36. *Lang* v. *Lang*, 1850, 13 D. 145; 23 J. 47.

39. Adjudication—Reduction—Expiry of the Legal.—*Held* incompetent to reduce a decree of expiry of the legal of an adjudication, to which the objection of *pluris petitio* was stated, to the effect of redeeming the lands from a purchaser, but that it was competent to open up the same, to the effect of making the adjudger and seller of the lands account for the price received. *Hutchison* v. *Young, etc.*, 1768, 6 Pat. 783.

40. Admiralty Cause — Caution. — A defender in a maritime cause is bound to find caution *de judicio sisti et judicatum solvi*; and the court has no power to dispense with it under the provisions of the Act transferring the jurisdiction of the Admiralty Court to the Court of Session. *Grey* v. *Sutherland*, 1847, 10 D. 154; 20 J. 41. Cf. *Grey* v. *Sutherland*, 1848, 10 D. 721; 20 J. 247.

41. Advocation—Additional Plea.—In an advocation, a plea stated at the bar for the first time, and raised neither in the inferior court nor in a note of additional pleas in law lodged in the Court of Session, *held* to be excluded. *Ralston, Goodwin, & Co.* v. *M'Lean*, 1857, 19 D. 878; 29 J. 455. Cf. *Cook* v. *Duncan*, 1857, 20 D. 180; 30 J. 99. *Smith* v. *Lamont*, 1858, 20 D. 912; 30 J. 539.

42. Advocation—Additional Pleas.—The respondent in an advocation is entitled to see the advocator's pleas; and it is open to either party to object to closing till he has seen and considered his opponent's pleas. *Fairley* v. *Thomsons, etc.*, 1861, 24 D. 149.

43. Advocation—Agreement Barring.—Circumstances in which the court, although no plea to that effect was stated, *held* that a minute between the parties to a sheriff court process, agreeing to divide the difference on the only point remaining undecided, barred advocation. *Campbell* v. *M'Gillivray*, 1864, 2 M. 399; 36 J. 194.

44. Advocation — Plea not Stated in Sheriff Court.—A defender in an action for payment of a bill, deponed, on a reference to oath, that he had signed the bill as cautioner for another acceptor. The sheriff decerned against him. *Question*, whether it was competent to him to plead the septennial limitation in the advocation, that plea not having been stated in the sheriff court. *Boyd* v. *Fraser & Others*, 1853, 15 D. 342; 25 J. 204; 2 Stuart 178.

45. Advocation—Alternative Prayer—Decree of Sheriff in Terms of Prayer without Stating which of the Alternatives.—A landlord of a house presented a petition to a sheriff, praying to appoint the alleged tenant to furnish the house; failing which, to find security for the rent; failing which, to pay the rent; and the sheriff having decerned in terms of the prayer without stating which of the alternatives, and the tenant having presented a note of advocation, *held* that the correct course to extricate the case was to advocate the cause. *Sim* v. *Watson*, 1852, 1 Stuart 748.

46. Advocation—Answers—Failure to Lodge Answers—Decree against Respondent.—In an advocation, the advocators were ordered to lodge a condescendence (which was done), and the respondent to lodge answers; and after repeated orders he failed to do so, and decree was, in respect thereof, pronounced against him. *Held* that it was *in foro*. *Handyside* v. *M'Intosh & M'Indoe*, 1805, Hume 651.

47. Advocation—Closing Record.—*Held* not to be necessary or expedient, in advocations where a record has been made up in the inferior court, and additional pleas have been lodged in the Court of Session, that the record be closed at the first calling of the cause. *Brown* v. *Shaw*, 1864, 2 M. 893 ; 36 J. 447.

48. Advocation—Counter Advocation—Competency—Time.—A counter advocation *held* competent, though brought after a cause had come to depend in the Inner House. *Lyall* v. *Commrs. of Supply for Lanarkshire*, 1859, 21 D. 1136 ; 31 J. 631.

49. Advocation—Court of Session Act, 1850, s. 32—Is an Oath on Reference "a Proof."—*Held* that an oath on reference is not "a proof" within the meaning of the 13 and 14 Vict. c. 36, s. 32, which empowers the Lord Ordinary to report to the court an advocation or suspension, in which a record had been made up and closed, and a proof led and concluded in the inferior court. *Sidey* v. *Smith*, 1851, 13 D. 543 ; 23 J. 237.

50. Advocation—Dean of Guild Court—Inner or Outer House.—Advocations from the dean of guild court cannot be taken direct to the Inner House, under s. 25 of the Sheriff Court Act. *Young or Black* v. *Blackie, etc.*, 1859, 21 D. 928 ; 31 J. 510.

51. Advocation — Delay in Raising Question of Procedure in Sheriff Court.—In an advocation, the original petitioner before the sheriff, when the case was put out for advising in the Inner House on the merits, for the first time objected that it was incompetent to call parties liable in relief to the respondents by a supplementary petition. *Held* that the objection came too late. *Wishart* v. *Motherwell's Trs.*, 1851, 13 D. 1100 ; 23 J. 521.

52. Advocation — Decree for Expenses in Sheriff Court in Agent's Name—Withdrawal of Agents as Respondents.—In an advocation of a decree, in which the expenses were decerned for in name of the agent, who, as well as the opposite party, was called as a respondent, the court, on the agent's motion, *allowed* his name to be withdrawn, reserving all questions of expenses. *M'Lauchlan* v. *Baxter*, 1848, 10 D. 1265.

53. Advocation — Effect of — Previous Interlocutors.—An advocation of an interlocutor as to the mode of proof, brings up for review all the other interlocutors. *Campbell* v. *Campbell*, 1846, 9 D. 135 ; 19 J. 35.

54. Advocation—Previous Interlocutors Submitted to Review.—A party who, in advocating, had not done so generally, but limited his advocation to an interlocutor refusing expenses, the others being generally in his favour, *held* foreclosed from discussing a point arising on another interlocutor not specially complained of by him, although the other party had brought up the whole interlocutors by a counter advocation. *Teacher* v. *Galloway & Anderson*, 1844, 17 J. 55.

55. Advocation—Caution—Expenses in Action Relating to same Matter.—The cautioner in an advocation *held* not liable both for the expenses of the advocation and for those of an ordinary action regarding the same matter. *Henderson* v. *Mags. of Glasgow*, 1824, 3 S. 133.

56. Advocation—Caution—Termination—Death of Principal — Expenses Subsequently Incurred.—*Held* that a cautioner in an advocation under the Judicature Act, 1826, s. 41, is not liberated by the death of the advocator, and is liable for expenses incurred in the process after the advocator's representative is sisted. *Wilson* v. *Ewing & Co.*, 1836, 14 S. 262 ; 11 Fac. 181.

57. Advocation—Competency — Caution—Cautioner Becoming Bankrupt.—A note of advocation was presented on the statutory certificate by the sheriff-clerk, that caution had been found; but the cautioner became bankrupt before the case was enrolled. *Held* that the advocator was not bound to find new caution, as a preliminary to the advocation being enrolled and proceeded with. *Brown* v. *Scotland*, 1849, 11 D. 1418 ; 21 J. 539.

58. Advocation—Competency—Caution—Pauper.—An advocation by a pauper of a finding of the kirk-session *held* incompetent, in respect that a certificate of caution was not lodged with the note of advocation when received and marked by the clerk, in terms of the Act 1 and 2 Vict. c. 81, s. 2. *Weir* v. *Kirk-Session of Kilmodon*, 1845, 7 D. 638 ; 17 J. 358.

59. Advocation — Competency — Party on Poor's Roll — Decree as to Expenses—Refusal of Agent to Sist himself. — An advocation by a party on the poor's roll in the sheriff court against an interlocutor as to expenses, *dismissed* in respect his agent did not sist himself as party. *M'Dougall* v. *Clark*, 1852, 1 Stuart 796.

60. Advocation—Competency—Deliverance of a Kirk-Session on a Pauper's Claim for Relief. — *Held* that an advocation of a deliverance of a kirk-session on a pauper's claim for relief before the Poor-Law Act came into operation, was competent, though brought after the passing of the statute, without a previous declaration by the Board of Supervision, in terms of the 74th section, that there was a just cause of action. *Gunn* v. *Kirk-Session of St. Cuthberts*, 1847, 9 D. 865 ; 19 J. 390.

61. Advocation — Competency — Presentation in Bill Chamber. — Objection *sustained* to a note of advocation, that, being against a final sentence of the sheriff, it ought to have been lodged with a depute-clerk of session, or his assistant, in terms of the 1st section of stat. 1 and 2 Vict. c. 86, instead of being presented (as was done) in the Bill Chamber. *Hamilton* v. *Caledonian Rly. Co.*, 1848, 10 D. 678 ; 20 J. 223.

62. Advocation — Competency — Interlocutor Allowing a Proof.—An advocation of an interlocutor allowing a proof, which

became final, *held* incompetent, although presented within fifteen days after an interlocutor renewing the order for proof. *Archer* v. *Stewart*, 1844, 17 J. 86.

63. Advocation — Competency — Interlocutory Judgment.—An advocation from an interlocutory judgment of the sheriff, finding that the pursuer of an action of filiation had established a *semiplena probatio*, and allowing her oath in supplement, *held* incompetent, there being no legal objection with respect to the mode of proof. *Murdoch* v. *Munro*, 1844, 7 D. 155; 17 J. 75.

64. Advocation — Competency — Interlocutory Judgment.—A firm sold certain goods to another firm, who became bankrupt before delivery. The purchasers had previously indorsed the bill of lading to a third firm, accompanied with an acknowledgment of an advance made by that firm on the security of the goods contained in the bill of lading. On the bankruptcy of the purchasers, the sellers presented a petition to the sheriff for warrant to stop the goods *in transitu*, and for redelivery. The holders of the bill of lading, as indorsees for value, also presented a petition for delivery of the goods to them. The sellers denied that any advance had been made by the indorsees. The sheriff allowed a proof by both parties of their averments, and in the meantime, on consignation by the sellers of the amount alleged by the indorsees to have been advanced by them, he ordered delivery of the goods to the sellers. The indorsees advocated this judgment. *Held* that the real contention between the parties was the disputed advance by the indorsees, to which the proof was directed, and which the interlocutor ordering delivery did not decide: therefore that the judgment advocated was an interlocutory judgment, which did not exhaust the whole merits of the cause; and therefore that the advocation was incompetent. *Mackenzie* v. *Boutelleau*, 1855, 17 D. 943; 27 J. 481.

65. Advocation — Competency — Interlocutor Repelling Objection to the Mother's Oath in an Action of Affiliation.—In an action for aliment to an illegitimate child, a proof *prout de jure* was allowed, and taken; and the mother having tendered her oath in supplement, this was objected to as incompetent, on the ground that no *semiplena probatio* had been established; and the objection having been repelled by the sheriff, and an advocation brought, *held*, such was incompetent, as the judgment was not final, nor one of those interlocutory sentences which could be advocated with leave of the inferior judge. *Fraser* v. *Mellis*, 1834, 6 J. 189.

66. Advocation — Competency — Interlocutor by Sheriff Recalling Interim Interdict Pronounced by Sheriff-Substitute.—A landlord presented a petition in the sheriff court, praying (1) for interim interdict against a proposed sale of stock by a tenant; and (2) for a finding that the tenant was not entitled to displenish the farm of its present and proper stock as a tillage and dairy-stock farm, and for perpetual interdict. The sheriff-substitute having heard parties on a caveat, granted interim interdict. *Held* that an advocation of an interlocutor by which the sheriff recalled the interim interdict, and remitted the cause *quoad ultra* to the sheriff-substitute to do therein as to him should seem just, was incompetent. *Cathcart* v. *Sloss*, 1865, 3 M. 521; 37 J. 261.

67. Advocation — Competency — Interdict, etc. — Advocation without Sheriff's Leave.—A party having petitioned the sheriff to interdict the defenders from disposing of the appurtenances of a vessel, and to ordain them to restore her rudder and sails, of which she had been dismantled by them; and the sheriff having granted interdict, and allowed a proof, *held*, that advocation, without leave from the sheriff, was incompetent, in respect the claim did not appear to be simply pecuniary, or above £40. *Matheson* v. *M'Kenzie & Co.*, 1832, 4 J. 512.

68. Advocation — Competency of Party not Advocating Using Opponent's Advocation.—The defender in an action before the sheriff having obtained a judgment without expenses, brought an advocation, with the view of having expenses awarded to him, but the pursuer did not bring any counter advocation. *Held* by the whole court, that he was not entitled to crave that the judgment should be reviewed, to the effect of having the prayer of the original action granted. *Mutrie* v. *Haldane's Trs.*, 1844, 6 D. 1045; 16 J. 506. Cf. *Zeacher* v. *Galloway & Anderson*, 1844, 17 J. 55. *Rose, Graham, & Wilson* v. *M'Dougall & Marshall*, 1864, 3 M. 324; 37 J. 298.

69. Advocation — Right of Party not Advocating to Use Advocation of Adversary to have Finding as to Expenses Altered.—In an advocation in which one party sought review of the whole inferior court judgments, both on the merits and expenses, so far as adverse to him, *held* that it was competent, without a counter advocation, to alter in favour of the respondent a decerniture as to expenses. *Stavert* v. *N. B. Rly. Co.*, 1865, 3 M. 819; 37 J. 423.

70. Advocation — Competency — Necessity of Stating Objection in limine.—In an advocation from the sheriff court new pleas were lodged, the record closed, and the case ordered for debate. In the course of the debate it was objected that the advocation was incompetent, in respect that the note of advocation had not prefixed thereto a copy of the sheriff's note to the interlocutor complained of. Without deciding whether or not the objection was well founded on the merits, it was *repelled*, because not taken *in limine*. *Mackay* v. *Gordon*, 1855, 17 D. 1073; 27 J. 545.

71. Advocation — Competency — Judicature Act, s. 40 — Allowance of Proof scripto vel juramento.—Where a sheriff's interlocutor allowed a proof merely *scripto vel juramento*, an advocation under 6 Geo. IV.

c. 120, s. 40, is incompetent. *Primrose* v. *M'Kenzie & Co.*, 1859, 22 D. 1; 32 J. 2.

72. Advocation — Competency — Judgment of Quarter Sessions—Review.—A bill of advocation for review of a judgment of the justices in quarter sessions sustaining the competency of an appeal from the petty sessions, against a conviction under the Act 13 and 14 Vict. c. 92, *refused* as incompetent. *List* v. *Pirrie*, 1867, 6 M. 185; 40 J. 109, 556.

73. Advocation — Jury Trial — Competency — Renewal of Order for Proof — Judicature Act, s. 40 — A. S. 12 Nov. 1825, 11 July 1828, 10 July 1839.—An advocation under the 40th section of the 6th Geo. IV. c. 120, and relative Act of Sederunt, *held* incompetent, where the party bringing the advocation had allowed an interlocutor ordering a proof to become final, and no proof having proceeded, had moved for a renewal of the order for proving, and, within fifteen days after the interlocutor renewing the proof was pronounced, had presented a note of advocation of both interlocutors. *Archer* v. *Stewart*, 1844, 17 J. 86.

74. Advocation — Competency — Road Acts — Appeal from Quarter Session to Court of Session—"Summary Complaint."—Penalties being imposed by a Road Act for evasion of tolls, on conviction "before one or more justices of the peace," with leave to parties considering themselves aggrieved to apply by summary complaint to the Court of Session for redress, *held* that an advocation was a competent form of complaint. *Mitchell* v. *Morrison*, 1832, 10 S. 230; 7 Fac. 180. Cf. *Merry* v. *Dallas*, 1828, 7 S. 90; 4 Fac. 82.

75. Advocation — Competency — Removing.—An action of removing having been conjoined with a process of interdict, *held*, in an advocation of the conjoined processes, that the advocation was incompetent *quoad* the action of removing, but was competent as to the process of interdict, and therefore sustained as to it; but without prejudice to the landlord obtaining an extract of the decree of removing, pronounced in the process of removing. *M'Nair* v. *Lord Blantyre's Tutors*, 1833, 11 S. 651 and 935.

76. Advocation — Jury Trial — Judicature Act, s. 40 — Sheriff Court Act, 1853, s. 24. — *Held* competent to advocate, under s. 40 of the Judicature Act, an interlocutor ordering proof in a sheriff court process above £40, notwithstanding the provisions in s. 24 of 16 and 17 Vict. c. 80, declaring it incompetent to take to review any interlocutor, judgment, or decree of the sheriff, not being an interlocutor sisting process, or giving interim decree for payment of money, or disposing of the whole merits of the cause. *Harrington* v. *Richardson*, 1854, 16 D. 368; 26 J. 174.

77. Advocation — Jury Trial — Sheriff Court Act, 1853, s. 25. — In an advocation for jury trial under s. 40 of the Judicature Act, after the note was passed in the Bill Chamber, the Lord Ordinary made avizandum to the Inner House under the provisions of 16 and 17 Vict. c. 80, s. 25. *Lawrie* v. *Mooney*, 1864, 36 J. 611.

78. Advocation — Jury Trial — Partial Proof before Answer.—*Held* that it was no objection to the competency of an advocation for jury trial, under the 40th section of the Judicature Act—(1) that the proof allowed in the inferior court was of a part only of the averments in the cause; and (2) that it had been allowed before answer. *Stewart* v. *Rutherfurd*, 1862, 24 D. 1442; 34 J. 713.

79. Advocation — Juratory Caution — Extract.—A sheriff-substitute having refused a petition for leave to advocate on juratory caution a sheriff court judgment of absolvitor and decree for expenses, the petitioner appealed to the sheriff. Pending this appeal (which was ultimately sustained) the decree was extracted. A note of suspension of a threatened charge for the expenses, on the ground that it was incompetent to extract the decree during the dependence of the appeal against the sheriff-substitute's judgment refusing the petition for leave to advocate, *refused*. *Gilchrist* v. *Sutherland*, 1865, 3 M. 843; 37 J. 432.

80. Advocation — Note of—Form.—The interlocutors prefixed to a note of advocation form part of the note, and must be printed with a reclaiming note against the interlocutor of the Lord Ordinary. *Waddel* v. *Cunninghame*, 1850, 13 D. 53.

81. Advocation — No Appearance for the Respondent — Intimation. — On the calling of an advocation, the advocator moved to have the cause advocated, in respect that no appearance was made for the respondent. The court *refused* the motion, and appointed intimation to be made to the respondent. *Murphy* v. *M'Keand*, 1866, 4 M. 444; 38 J. 207.

82. Advocation — Ob contingentiam — Sheriff Court Act, 1853, s. 24 — Competency.—Circumstances in which an advocation *ob contingentiam* of an interlocutor pronounced in the sheriff court *held* incompetent. *Sommerville* v. *Mags. of Lanark*, 1866, 1 S. L. R. 155.

83. Advocation—Removing.—A tenant, against whom decree of removing had been pronounced in the sheriff court, brought a note of advocation, which was passed, whereupon the respondent pleaded that advocation was incompetent; and after the Lord Ordinary, on the motion of the advocator's counsel, had continued the cause, and being repeatedly called without any appearance for the advocator, continued for one day further, with certification that if no appearance was then made for the advocator, the objection of incompetency would be sustained, and notice of this interlocutor was immediately sent to the advocator's agent, and on the day following, no appearance being made, the Lord

Ordinary found the advocation incompetent. A reclaiming note praying to be reponed as against a decree in absence, *refused*. *Roy* v. *E. of Wemyss*, 1840, 2 D. 1345.

84. Advocation—Report to Inner House—Making up of Record.—In an advocation additional pleas had been lodged, and the advocation had been reported direct to the Inner House. At calling of the cause in the single bills, the advocator moved the court to close the record; but the case was sent to the summar roll, the Lord President observing, "We shall then consider the question of closing." *Maitland* v. *M'Lelland*, 1854, 16 D. 612.

85. Advocation—Respondent's Right to Move the Lord Ordinary to Report the Case to the Inner House.—The 25th section of the Sheriff Court Act, 16 and 17 Vict. c. 80, extends to all advocations the provisions in the 32nd section of the Court of Session Act, 13 and 14 Vict. c. 36, applicable to advocations in which a record has been made up and closed, and a proof led and concluded; and therefore, in an advocation of a judgment pronounced in a sheriff court, where no proof has been led before the inferior judge, either party may move the Lord Ordinary to report the case at once to the Inner House. *Dobbie* v. *Halbert*, 1862, 1 M. 198; 35 J. 150.

86. Advocation—Procedure in—Sheriff Court Act, 1853, s. 25—Court of Session Act, 1850, s. 32.—In an advocation of a sheriff court judgment pronounced upon a closed record and concluded proof, there are three courses open: (1) under 13 and 14 Vict. c. 36, on the motion of either party, the case may be taken at once before either Division; (2) under 16 and 17 Vict. c. 86, the case may go on before the Lord Ordinary, and with consent of both parties, his judgment will be final; (3) if neither of these courses be adopted, the case goes on according to the form in use before either of the above statutes was passed. *Balfour* v. *Paton*, 1854, 16 D. 413; 26 J. 196.

87. Advocation—Sheriff of Chancery—Necessity of Making up Record in Appeal—Service of Heirs Act, s. 17.—Two competing claimants before the Sheriff of Chancery for service to a party deceased, lodged mutual objections to each other's claims. Proof was *allowed*, and an advocation thereafter brought by one of the claimants with a view to a jury trial under s. 17 of the Service of Heirs Act. *Held* that it was necessary to make up a record to prepare the case in usual form for trial. *Fenton* v. *Livingstone*, 1853, 16 D. 104; 26 J. 58.

88. Advocation—Second Note of Advocation—Competency of.—The pursuers of an action having lodged a note of advocation, and allowed protestation to be obtained, and paid the expenses decerned for against them in the sheriff court, *held* that it was competent for them to present a second note of advocation. *Benn & Co.* v. *Porret*, 1868, 6 M. 577; 40 J. 278.

89. Advocation—Service—Procedure.—*Opinion* intimated, that in an advocation of brieves, where various objections were proposed to be stated to a service, the Lord Ordinary was not bound to proceed as in an ordinary advocation under the Judicature Act, but that he had a certain discretion in the matter of the preparation of the case, so that he might order condescendences or informations upon points occurring, and report to the court, as he should judge expedient. *Tennant* v. *Pollok*, 1841, 4 D. 269.

90. Advocation—Service—Procedure.—In a question whether a note of advocation of brieves, under the stat. 1 and 2 Vict. c. 86, should abide the ordinary course of the rolls, or be enrolled at once in the hand-roll of the Lord Ordinary, *held* that the first step was to advocate the cause; and remit made accordingly to the Lord Ordinary to advocate the cause, and proceed further in terms of the statute. *Tennant* v. *Pollok*, 1841, 4 D. 50.

91. Advocation—Service—Procedure.—When the sheriff's judgment in competing claims for service is adhered to by the Court of Session, but not on the grounds on which that judgment proceeds, the proper course is to advocate the cause, pronounce special findings, and remit to the sheriff with instructions. *Walker* v. *Walker*, 1857, 19 D. 290; 29 J. 140.

92. Advocation—Service.—A motion to alter a date in a closed record in an advocation of competing petitions for service, after proof led and concluded by the party making the motion, *granted*; the court being of *opinion* that s. 10 of the Judicature Act, foreclosing parties from further statements after closing a record, did not apply to the case of an advocation of competing petitions for service. *Campbell* v. *Campbell*, 1865, 3 M. 501; 37 J. 238.

93. Advocation—Ob contingentiam.—A landlord raised a process of sequestration against a tenant, and the sheriff decerned for a certain amount, and for another for which if not paid warrant would be issued. No final judgment was pronounced, and the tenant brought a process of advocation *ob contingentiam* of a declarator which he had raised but not executed. The Court having advocated the cause, "sustained the reasons of advocation and assoilzied from the conclusions of the action." The House of Lords affirmed so far as advocating the cause, and remitted to the sheriff. *Cameron* v. *Macdonell*, 1827, 2 W. & S. 595. Affg. 3 S. 341.

94. Advocation—Service.—In a process of competition of brieves, advocated to the Court of Session, a question of law having occurred as to the construction of a deed of entail, under which the competitors severally claimed to be served, *held* that it was expedient to have it decided before the brieves went to the jury. *Grant* v. *Shepherd*, 1836, 14 S. 1096.

95. Advocation—Service—Competency.—Where competing brieves have been advocated, under 1 and 2 Geo. IV. c. 38, s. 11, and

one of the competitors desists from competition, but refuses to consent to a remit to the sheriff to proceed with the other brief, it is incompetent to remit. *Burder* v. *M'Gruther*, 1835, 13 S. 1045.

96. Advocation—Service—Competency.—It is competent, under 1 and 2 Geo. IV. c. 38, to pass a bill of advocation of a brief of service presented by a party not competing, and whose title to appear is disputed, under reservation of objections to the title to appear. *Oliphant* v. *Robertson*, 1830, 8 S. 898; 5 Fac. 738.

97. Advocation—Service—Judgment.—A bill of advocation from a judgment of the sheriff of Edinburgh, dismissing a claim of service, must be passed *de plano*, as advocations from other inferior judges. *Johnstone* v. *Greig*, 1828, 6 S. 977; 3 Fac. 1007.

98. Advocation — Service — Brief. — In an advocation of a competing brief from a sheriff to a Court of Session, an objection to the form of the letters, that they contained no regular conclusion for an advocation, *repelled*, as the will of the letters contained a warrant for advocation, and so supplied this defect. *Grant* v. *Shepherd*, 1836, 14 S. 975.

99. Advocation—Service.—An objection to the competency of a note of advocation of brieves, on which the Lord Ordinary had appointed a day for the service, that it did not bear the name of the Lord Ordinary in the body, but only on the back, *repelled*. *Lord Lovat* v. *Fraser*, 1842, 5 D. 131.

100. Advocation—Competency—Time.—*Held* that a note of advocation under s. 40 of the Judicature Act was incompetent, where no effectual step for presenting it had been taken within fifteen days after the date of the interlocutor. *Thomson* v. *Mags. of Inverness*, 1845, 8 D. 303; 18 J. 132.

101. Affiliation and Aliment — Failure of Defender, who was Alleged to be Hiding from his Creditors, to Appear — Pursuer the Sole Witness — Defender Held as Confessed. — In an action of filiation and aliment, the defender was appointed to "appear personally for examination," but repeatedly failed to do so, alleging afterwards as a reason that he was at the time in hiding from his creditors. At last the pursuer was examined as the sole witness on her own behalf; and the agent of the defender being present, and having cross-examined her, she renounced further probation. The sheriff found the case proved. *Held* that the appointment upon the defender to appear for examination was an appointment to appear for judicial examination, and that the proceedings had been regular. *M'Kellar* v. *Scott*, 1862, 24 D. 499; 34 J. 245.

102. Aliment — Proof — Proof on Commission — Conjugal Rights (Scotland) Amendment Act, 1861, ss. 14 and 15.—In an action of aliment by a wife against her husband in dependence at the date of the Conjugal Rights (Scotland) Amendment Act, 1861, coming into operation, the proof must be taken by commission in the same way as before the Act, the cause remaining in the Inner House. *Donald* v. *Donald*, 1861, 24 D. 93.

103. Aliment — Defender Resident Abroad — Personal Intimation. — In an action of aliment against a husband alleged to have deserted, and to be in England, although arrestments had been used *jurisdictionis fundandæ causa*, the court required evidence of personal intimation of the action. *Cowper* v. *Cowper*, 1860, 23 D. 68; 33 J. 32.

104. Appeal—Colonial Court.—Circumstances in which the court refused to open up proceedings *in foro contentioso*, which had taken place in a colonial court, reserving to the party to apply to the colonial court for redress against its own proceedings if wrong. *Findlater* v. *Dunmore & Co.*, 10 Feb. 1809 F. C. Note to *Leith* v. *Hay*, 17 Jan. 1811.

105. Appeal—Constitution of Court—Lord Ordinary in Exchequer being also Senior Lord Ordinary.—The County Voters Registration Act, 1861, 24 and 25 Vict. c. 83, having provided that certain appeals might be taken from the sheriff to the senior Lord Ordinary and the Lord Ordinary in Exchequer, *held* that appeals taken at a time when the Lord Ordinary in Exchequer was the senior Lord Ordinary were not incompetent. *Wilson, etc.* v. *Millar, etc.*, 1862, 1 M. 206; 1863, 1 M. 307; 35 J. 154 and 230.

106. Appeal — Competency — Circuit Court — Expenses not Determined.—It is no objection to an appeal to the circuit court, that expenses have not been decerned for, the judgment on the merits being final. *Fulton* v. *M'Lellan*, 1826, S. (Just.) 172.

107. Appeal — Competency — Interim Decree for Payment of Money — Leave.—*Held* that it is competent to appeal against an interlocutor of the sheriff giving interim decree for payment of money without obtaining his leave. *Erskine* v. *Lang*, 1872, 11 M. 229; 45 J. 153.

108. Appeal—Competency—Interlocutor Allowing Proof "before Answer," by Writ or Oath.—An interlocutor by a sheriff-substitute repelled the defences in an action as irrelevant. The sheriff on appeal recalled the interlocutor, and allowed the defender a proof before answer of certain averments by the writ or oath of the pursuer. The pursuer having appealed to the Court of Session, *held* that the sheriff's interlocutor was not appealable. *Opinion*, that the interlocutor was not appealable under the 40th section of the Judicature Act. *Shirra* v. *Robertson*, 1873, 11 M. 660; 45 J. 412.

109. Appeal — Competency — Objection to—When Objection Ought to be Stated.—Objection to the competency of an appeal should be taken when it appears in the single bills. *Shirra* v. *Robertson*, 1873, 11 M. 660; 45 J. 412.

110. Appeal — Competency — Appeal Virtually Sisting Process.—An appeal is competent against an interlocutor of the sheriff which merely recalls *in hoc statu* a final interlocutor of the sheriff-substitute, where it appears that it is equivalent to an interlocutor sisting process. *Watson* v. *Stewart*, 1872, 10 M. 494; 44 J. 269.

111. Appeal — Interim Execution.—A widow in indigent circumstances was found entitled, in an action against her husband's trustee, notwithstanding a contract of separation, to her legal provisions, amounting to £3594, 1s. 4d., and allowed £500 *ad interim* to account of them, and more recently her expenses, except a very small part; and the trustee appealed. Interim execution *granted* to the extent of £250 against the trust funds, without caution. *Dickson* v. *Hunter*, 1830, 8 S. 1054.

112. Appeal—Interlocutors Subjected to Review—Interlocutor Restricting Proof—A. S. 10 July 1839, s. 83.—*Held* competent to recall a sheriff-substitute's interlocutor allowing and fixing the mode of proof, which had not been appealed from, after a final judgment in the sheriff court. *Gray* v. *Scott*, 1868, 6 M. 197; 40 J. 112.

113. Appeal—Interlocutors Pronounced after Cause Exhausted—Recall of Incompetent Interlocutors.—On 1st December 1868 a sheriff dismissed a petition without any finding as to expenses. The respondent enrolled the case before the sheriff-substitute, and moved for expenses. The sheriff-substitute made avizandum to the sheriff, who on 27th February 1869 found the respondent liable in the expenses of the proof. The latter on 19th August 1869 appealed against the two judgments of the sheriff. *Held* (1) that the interlocutors subsequent to that dismissing the petition were incompetently pronounced, as the cause was exhausted; (2) that the appeal was competent only to the effect of recalling these interlocutors, but incompetent against the interlocutor of 1st December 1868. *Drummond* v. *Bryden*, 1869, 8 M. 277; 42 J. 125.

114. Appeal for Jury Trial—Proof or Jury—Question as to Fishings.—An appeal was taken with a view to jury trial in a case raising the question of the character and extent of the public right of white fishery in competition with a grantee of the Crown in salmon-fishings. *Held* that it was inexpedient, that the case should be sent to a jury, and proof appointed to proceed before the court. *Watson* v. *E. of Seafield*, 1870, 7 S. L. R. 327.

115. Appeal for Jury Trial—Competency—Appeal against Interlocutor Allowing Proof by Writ or Oath.—*Opinion*, that an interlocutor allowing the defender a proof before answer of certain averments by writ or oath of the pursuer was not appealable under the 40th section of the Judicature Act, 1825. *Shirra* v. *Robertson*, 1873, 11 M. 660; 45 J. 412.

116. Appeal for Jury Trial—Proof before Judge—Remit to Sheriff.—When case not suited for trial by jury, whether proof to be taken in Court of Session or case remitted to sheriff. *Dennistoun Rainey, Knox & Co.*, 1871, 9 M. 739; 43 J. 408.

117. Appeal for Jury Trial—Appeal by Defenders—No Appearance for Pursuers—Dismissal—Judicature Act, 1825, s. 40.—A sheriff allowed a proof before answer. The defenders appealed to the Court of Session under the 40th section of the Judicature Act. The action was *dismissed* in respect of no appearance for the respondent. *N. B. Rly. Co.* v. *Bexfield*, 1871, 9 S. L. R. 17.

118. Appeal for Jury Trial—Proof or Jury — Competency of Taking Proof in Court of Session.—Where an interlocutor allowing a proof had been pronounced in the sheriff court, and an appeal taken under s. 40 of the Judicature Act with a view to jury trial, the court *refused* a motion by the appellant for trial of the cause before a judge without a jury. *Dennistoun* v. *Rainey, Knox, & Co.*, 1871, 9 M. 739; 43 J. 408.

119. Appeal—Cancellation of Proof Led in Sheriff Court—Jury Trial.—Where in an action of damages in the sheriff court for breach of contract the breach was proved but there was no satisfactory evidence as to the amount of damages, the court, under s. 40 of the Judicature Act, cancelled the evidence and *ordered* issues with a view to jury trial. *Meek's Tr.* v. *Russel's Trs.*, 1869, 6 S. L. R. 640.

120. Appeal—Lodging—Borrowing Up.—The process in an appeal having been borrowed up by the agent for the appellant within the fourteen days after its transmission from the inferior court, *held*, on the appeal appearing in the single bills, that it was not necessary to return the process within fourteen days after the appeal was received, and (2) that the transmission of the process by the clerk of the inferior court to the clerk of the Division effected the lodging of the process. *Howard* v. *Muir*, 1870, 7 S. L. R. 520.

121. Appeal—Minor—Tutor ad litem.—A process having been taken to appeal, the House of Lords allowed a child born after the date of the judgment appealed against to be sisted as a respondent, and remitted the case to the court to appoint a tutor *ad litem* to the pupil. *Hamilton*, 1861, 24 D. 31; 34 J. 16.

122. Appeal — No Appearance for Respondent.—On an appeal from the sheriff court being called on the 13th May no appearance was made for the respondent, and the court directed the appellant to ascertain whether the sheriff-clerk had given the intimation required by the Court of Session Act, 1868, s. 70, and continued the case. On 16th May the appellant produced (1) letter from the sheriff-clerk stating that intimation was duly made; (2) copy letter of intimation, and certificate of posting; (3) letter from the respondent's agents in the sheriff court, acknowledging receipt of the intimation. The

court, in respect of no appearance for the respondent, and of the letters produced, *sustained* the appeal, with expenses. *Stewart* v. *Stewart*, 1871, 9 M. 740; 43 J. 409. *Macdonald* v. *Malcolm*, 1870, 8 M. 419. *Chisholm* v. *Marshall*, 1874, 1 R. 388.

123. Appeal—Failure of Appellant to Proceed—Motion for Dismissal—Intimation to Appellant—Court of Session Act, 1868, s. 71.—Under s. 71 of the Court of Session Act, 1868, when an appellant does not move in his appeal, and the other party, after intimation to the appellant's agent, moves that the appeal be dismissed, the court will not in general grant the motion, except on certificate that a registered letter containing notice of the motion has been posted to the appellant at his known residence. *Monteith* v. *Wands*, 1869, 6 S. L. R. 243.

124. Appeal—Proof—Where both Parties Renounced Probation before Sheriff.—Proof having been allowed by a sheriff, both parties afterwards renounced probation. In an appeal one of the parties moved to be allowed to lead additional proof. Motion *refused*, on the ground that the parties by their actings had entered into a contract to renounce probation. *Picken* v. *Arundale & Co.*, 1872, 10 M. 987; 44 J. 568.

125. Appeal—Proof.—An appeal against a sheriff disallowing a question may be competent; but *question*: What relief can the court of appeal give if they hold his decision to be wrong? *Miller* v. *Fisher, Ferrier, etc.*, 1863, 2 M. 192; 36 J. 87.

126. Appeal — Proof — Where Defender Declined to Lead Proof in Sheriff Court.—A defender who had declined to lead proof, on the ground that the judge was corrupt, and had been decerned against, *allowed*, after the declinature had been repelled and on payment of expenses, to lead his proof before further answer, under s. 72 of the Court of Session Act, 1868. *D. of Athole* v. *Robertson*, 1869, 8 M. 299; 42 J. 135.

127. Appeal—Remit—Justiciary Court.—The court *refused* to remit to the Court of Justiciary a note of advocation of proceedings of a criminal nature erroneously presented to the Court of Session. *Lang* v. *Allan & Mann*, 1869, 7 M. 473; 41 J. 255.

128. Appeal — Special Case. — Appeals both by an objector and by a claimant may be embodied in one special case. *Haldane* v. *Nichol*, 1863, 2 M. 174; 36 J. 78.

129. Appeal—Election—Special Case.—An appellant is bound to see that all the questions of law which he wishes to raise are stated by the sheriff, and he will not be allowed to argue any question not stated by the sheriff, though it arises upon the facts set forth in the Special Case. *Maitland* v. *M'Credie*, 1868, 7 M. 288; 41 J. 172.

130. Appeal—Special Case.—A Special Case is not in the statutory form when it does not state the question of law for the decision of the Court of Appeal, and where in place of a statement of fact by the sheriff it contains a narrative of evidence led before him. *Hilson* v. *Otto*, 1870, 9 M. 18; 43 J. 13.

131. Appeal — Question of Law not Stated.—Appeal *dismissed*, in respect that the special case did not state the question of law. *Cameron* v. *Hilton*, 1866, 5 M. 73; 39 J. 28.

132. Appeal—Special Case.—*Observed*, that a special case ought to be prepared by the sheriffs with reference to each appeal taken, and that it was incorrect in point of form for the sheriff to state several appeals arising out of different circumstances in one case; and that each case should state the name of the objector as well as the claimant, and contain an enumeration of the facts found to be proved, and the points of law decided, and not merely notes of the evidence adduced and judgment given. *Melville & Others* v. *Paton & Others*, 1863, 1 M. 306.

133. Appeal — Special Case — Voters Registration.—In stating a special case for the appeal court, facts, and not evidence, ought to be given. In stating the question of law, the precise question raised, and not merely the general question, such as whether the voter's name should be retained on the register, ought to be stated. *Jardine* v. *M'Culloch*, 1865, 4 M. 138; 38 J. 80.

134. Appeal — Voters Registration.—Terms of special case *held* not to be in compliance with s. 34 of the County Voters Registration (Scotland) Act, and therefore appeal upon such special case *dismissed* as incompetent. *Millar* v. *Wilson & Others*, 1863, 1 M. 206 and 306; 35 J. 230.

135. Appeal — Voters Registration — Special Case Defective.—An appeal against a sheriff's decision on a claim under the County Voters Registration Act, *dismissed*, in respect the special case prepared by the sheriff was defective, and not framed in terms of the statute. *Observed*, that it is the appellant's duty to see that a proper statement of the case is laid before the court. *Pringle, etc.* v. *Hilson*, 1865, 3 M. 420; 37 J. 208.

136. Appeal — Voters Registration. — The County Voters Registration Act, 1861, 24 and 25 Vict. c. 83, having provided that certain appeals might be taken from the sheriff to the senior Lord Ordinary and the Lord Ordinary in Exchequer, *held* that appeals taken at a time when the Lord Ordinary in Exchequer was also the senior Lord Ordinary were not incompetent. *Millar* v. *Wilson & Others*, 1863, 1 M. 206 and 306; 35 J. 230.

137. Appeal — House of Lords — All Parties Interested not Made Respondents. — Appeal *dismissed* where all the parties interested were not made parties to the appeal. *Short* v. *Short*, 1779, 2 Pat. 495.

138. Appeal—House of Lords—Amendment of Judgment. — *M'Gavin* v. *Stewart*, 1831, 5 W. & S. 807.

139. Appeal—House of Lords—Appellant's Case—Respondent's Pleas—Appellant's Statement of Facts.—The omission of the respondent's pleas in law in the appellant's case is not a ground for suspending the hearing, but the insertion of the respondent's statement of facts will not be dispensed with. *Brown* v. *Goldie*, 1855, 18 D. (H. L.) 42; 27 J. 533.

140. Appeal—House of Lords—Appeal for Delay—Interest.—Where an appeal was made for the purpose of delay, the appellant was *found* liable in the interest the respondent might have recovered but for the appeal. *Sinclair* v. *Sinclair*, 1713, Robert. 59.

141. Appeal—House of Lords—Petition to Apply Judgment—Action as to Crown Rights in Dunfermline Palace.—*Held* (applying judgment of the House of Lords) that the proprietor of Pittencrieff had no right or title to the royal palace of Dunfermline, or ruins thereof, or adjacent grounds, including such ground in the vicinity as was necessary for access. Terms of judgment fixing the bounds of the ground, in respect of which the Crown was held entitled to decree in an action at its instance claiming right to the said ground and ruins. *The Lord Advocate* v. *Hunt*, 1871, 43 J. 594; 8 S. L. R. 682.

142. Appeal—House of Lords—Applying the Judgment—Affirmance—Incompetency of Petition.—Where the House of Lords had simply affirmed a judgment of the Court of Session, *held* (1) that a petition to apply the judgment of the House of Lords was incompetent; and (2) that a petition to deliver to the petitioner his bond of caution for repayment, in the event of a reversal, of the expenses in the Court of Session, was unnecessary and incompetent. *Morris*, 1866, 5 M. 112; 39 J. 57.

143. Appeal—House of Lords—Applying the Judgment—Affirmance.—A petition to apply a judgment of affirmance *simpliciter* of an absolvitor is unnecessary. *Montgomerie* v. *E. of Wemyss*, 1824, 3 S. 9.

144. Appeal—House of Lords—Applying the Judgment—Affirmance—Costs against Appellant—Whether to be Enforced by Petition or Plack Bill.—*Held* that a respondent found entitled to costs is entitled to obtain a decree for the same by petition. *Whitehead & Morton* v. *Cullen*, 1861, 23 D. (H. L.) 13; 33 J. 700.

145. Appeal—House of Lords—Applying the Judgment—Affirmance—No Remit to Court of Session.—A party whom the Court of Session decerned against and found liable in expenses, appealed to the House of Lords, but died before the case was heard. The appeal was revived by his widow as confirmed executrix, *in forma pauperis*. There was accordingly no decerniture against her for expenses, although the House of Lords dismissed the appeal, and affirmed the interlocutors complained of. A petition to apply the judgment of the House of Lords, though there was no remit, *held* competent. *Anderson or Gill* v. *Russell or Anderson*, 1859, 21 D. 723; 31 J. 386.

146. Appeal—House of Lords—Applying the Judgment—Affirmance—Incompetency of Petition.—Where the House of Lords simply affirm a judgment of the Court of Session, the court apply the judgment of the House of Lords on mere production of the judgment. A petition is incompetent. *Ricketts*, 1861, 23 D. 1014; 33 J. 518.

147. Appeal—House of Lords—Applying the Judgment—Alteration and Issue thereafter.—Where the court had applied a judgment of the House of Lords (in an appeal taken in a bill of exceptions) allowing the defenders a new trial, and the pursuer had given notice of trial for the next sittings, a motion by the defenders to have the record opened up, in order to introduce new averments, or for the purpose of remodelling the issues which had been originally adjusted in the cause, and on which the verdict had proceeded, *refused* as incompetent. *Neilson* v. *Househill Coal Co.*, 1843, 15 J. 546.

148. Appeal—House of Lords—Petition to Apply Judgment—Lease Compromised after House of Lords' Decision—Joint Minute.—After a judgment had been pronounced by the House of Lords containing a remit to the Court of Session, the parties compromised the case, and the court upon a joint minute in manuscript applied the judgment and assoilzied the defenders. *Smith Cuninghame, etc.* v. *Anstruther's Trs.*, 1873, 11 M. 955; 45 J. 107.

149. Appeal—House of Lords—Applying the Judgment—Clerical Error in Judgment.—The Court of Session having refused a suspension, an appeal was taken, and the House of Lords dismissed the appeal, but remitted back to the Court of Session "to make such order by way of interdict or otherwise as may be just." *Held* that although there was a clerical error in the judgment, the court were bound to overlook it, and to pronounce an interlocutor in terms of the remit. *Aberdeen Rly. Co.* v. *Blaikie Brothers*, 1854, 16 D. 470; 26 J. 220. *Geddes* v. *Wilkie*, 16 Feb. 1816, F. C.

150. Appeal—House of Lords—Applying the Judgment—Construction of the Judgment.—The Court of Session having held, that under an arbitration the arbiter was empowered to judge of a claim and assess the amount of damages, the House of Lords found that he was not empowered to assess the damages, and with a declaration to that effect, remitted to the Court of Session "to do therein as shall be just." *Held* that, except as varied, the judgment of the Court of Session must stand, and that the finding that the arbiter was entitled to "judge" of the claim was affirmed. *Aberdeen Rly. Co.* v. *Blaikie Brothers*, 1854, 16 D. 470; 26 J. 220.

151. Appeal—House of Lords—Applying the Judgment—Construction of Judgment.

—The Court of Session, of consent, pronounced an interlocutor allowing a debtor deduction of property tax on the interest of a debt from 1808 to 1813, but refusing it prior to 1808; this interlocutor was appealed, with other adverse interlocutors, by the debtor, but not by the creditor. The House of Lords found the debtor liable in certain sums accumulated in 1813, with reduction of property tax from and after 1813, and remitted with these findings. *Held* that the debtor could not claim deduction prior to 1813. *Keble* v. *Graham's Trs.*, 1830, 4 W. & S. 166.

152. Appeal—House of Lords—Applying the Judgment—Construction of Judgment.—A party made a deed of settlement, conveying his whole heritage, and particularly two pieces of land. The House of Lords found that although he was facile, yet he had a capacity to dispone, provided he were sufficiently informed as to the nature of the deed, but that he had not been so as to the lands, and set aside the deed *quoad* "the lands." *Held* not competent to extend the judgment to an heritable bond and a servitude. *Whyte* v. *Ballantyne*, 1826, 5 S. 22.

153. Appeal—House of Lords—Applying the Judgment—Costs—Right of London Solicitor to Appear in the Process by Minute.—A judgment of the House of Lords affirming an interlocutor, with costs, ordered that, unless the costs should be paid to the party entitled thereto within a certain time, the cause should be remitted to the Court of Session, to issue such summary diligence for the recovery thereof as should be necessary. *Held* competent for the London solicitor, on expiration of the time, to apply summarily to the Court of Session, by lodging a minute in process for decree, and warrant to extract it. *Clyne* v. *Clyne's Trs.*, 1839, 2 D. 242; 15 Fac. 237.

154. Appeal—House of Lords—Applying the Judgment—Dismissal of Appeal—No Express Remit—Respondents' Costs.—An appellant not having complied with the standing orders of the House of Lords, his appeal stood dismissed. On a petition to be restored, the House refused to do so, and ordered the appellant to pay costs as the same might be certified. After they were certified, the appellant delayed to pay. The respondents presented a petition praying the court to apply the said judgment, and to decern in favour of the present petitioners for payment of the sum of the costs mentioned in the certificate, and the court *decerned*. *M'Dougall*, 1863, 1 M. 1139.

155. Appeal—House of Lords—Applying the Judgment—Duty of Court of Session to Execute Remit.—The Court of Session suspended a charge on a bill and found the holder liable in expenses, which he was compelled to pay, and then appealed: pending the appeal, a decree of reduction of the bill was obtained by the drawer; and the House of Lords having reversed the interlocutor, and remitted to the Court of Session to make certain investigations, and that court, in respect of the decree of reduction, refused to order the expenses to be repaid, and found it unnecessary to proceed with the remit—*held* that the Court of Session was bound to have carried the remit into execution, and that the holder was entitled to repetition of the expenses. *Davidson* v. *Lockwood & Co.*, 1824, 2 Shaw's App. 357.

156. Appeal—House of Lords—Applying the Judgment—Form of Decerniture for Expenses.—A judgment of the Court of Session having been affirmed on appeal, with £200 costs, the court, in applying the judgment, *refused* to give a special decerniture for these costs, other than by repeating the judgment of the House of Lords in common form. *E. of Minto* v. *Sir W. F. Elliot's Trs.*, 1833, 11 S. 770.

157. Appeal—House of Lords—Applying the Judgment—Inquiry Ordered.—Under a special remit by the House of Lords, directing inquiry as to certain defences, which, if verified, were to be sustained, *held* that the proper course was first to make that inquiry, and then, if necessary, to hear parties on other pleas in defence. *Swan* v. *Bank of Scotland*, 1838, 16 S. 446.

158. Appeal—House of Lords—Applying the Judgment—Interim Decree—Proceedings in Court of Chancery.—Interim decree *awarded* under a judgment affirming that of the Court of Session, although it was alleged there were certain proceedings depending in the English Court of Chancery which might deprive the party of the right under the judgment. *M. of Chandos* v. *M. of Breadalbane*, 1836, 15 S. 48; 12 Fac. 50.

159. Appeal—House of Lords—Applying the Judgment — Note or Petition. — An application to apply a judgment of the House of Lords must be, not by note, but by petition. *Russel* v. *E. of Breadalbane*, 1825, 4 S. 335. *Ferrie* v. *Ferrie*, 1853, 15 D. 766; 2 Stuart 469.

160. Appeal—House of Lords—Applying the Judgment of.—*Observations* on the duty of the Court of Session in applying the judgment of the House of Lords. *Stewart* v. *Agnew*, 1823, 1 Shaw's App. 413. *Stuart* v. *Moore*, 1861, 23 D. 902; 33 J. 474. *Davidson* v. *Robertson*, 1827, 5 S. 751. *Robarts* v. *Court*, 1839, 1 D. 1150. *Lord Fraser* v. *Lovat*, 1843, 5 D. 1200; 15 J. 494; 22 J. 614.

161. Appeal—House of Lords—Petition to Apply Judgment—Object thereof being only to Obtain Decree for the Certified Costs in the House of Lords.—The Lord Ordinary and Inner House having both assoilzied the defender though on different grounds, the House of Lords recalled the judgment of the Inner House and affirmed that of the Lord Ordinary, ordering the appellant (pursuer) to pay the costs of the appeal, and remitting back to the Court of Session "to do therein as shall be just and

consistent with this judgment." *Held* that a petition to apply the judgment of the House of Lords was competent although the only object was to obtain decree for the certified costs in the House of Lords, and the appellant found liable in the expense of the petition. *Catton* v. *Mackenzie*, 1872, 9 S. L. R. 546.

162. Appeal—House of Lords—Applying the Judgment—Plea of no Jurisdiction Sustained—Remit to "Assoilzie"—Dismissal.—The House of Lords *held* that the Court of Session had no jurisdiction to entertain an action, and ordered that the appellant should be "assoilzied" from the conclusions of the summons, and remitted the cause back to the Court of Session "to do therein as should be just, and consistent with this judgment." *Held* that, as it had no jurisdiction, the Court of Session could not assoilzie the appellant, but that, under the remit, the action should be dismissed. *Pitt* v. *Pitt*, 1864, 2 M. 1153; 36 J. 578.

163. Appeal—House of Lords—Petition to Apply Judgment—No Remit.—*Held* competent for the Court of Session to apply the judgment of the House of Lords although there was no express remit. *Anderson* v. *Gill*, 1859, 21 D. 723.

164. Appeal—House of Lords—Applying the Judgment—Remit to the Sheriff.—The House of Lords, in an advocation by a defender, affirmed a judgment of the Court of Session advocating the cause, and assoilzieing the defender; but ordered the cause to be remitted to the sheriff, to proceed in terms of an interlocutor, whereby he found a sum due by the defender. The court *remitted* to the sheriff. *Macdonnell* v. *Cameron's Reps.*, 1827, 6 S. 85.

165. Appeal—House of Lords—Applying the Judgment—Repayment of Expenses.—The House of Lords reversed a judgment of the Court of Session, and ordered the respondent to repay the expenses in which the appellant had been found liable in the Court of Session, which had been paid. *Held* on a petition to apply the judgment, that the respondent was not liable to pay interest on the sum of expenses which he had received. *Ewart* v. *Latta*, 1865, 3 M. 1167.

166. Appeal—House of Lords—Applying the Judgment—Suspension and Interdict.—The Lord Ordinary on the Bills passed a bill of suspension and interdict against a tenant taking an away-going crop, but the court altered and remitted to remove the interdict; and the House of Lords having found the tenant not entitled to an away-going crop, *held* that any further discussion of the merits was superseded; and judgment pronounced on a summary discussion of the bill. *Scott* v. *Brodie*, 1803, 13 F. C. 203; M. "Tack" App. No. 8.

167. Appeal—House of Lords—Applying the Judgment—Verdict Set Aside as Uncertain—Competency of Amending.—A verdict had been applied by the court of Session, after which the House of Lords declared it to be uncertain, and ordered "that, with this declaration, the cause be remitted back to the Court of Session, to do therein as shall be just and consistent with this declaration and judgment." *Held* that the proper course was to grant a new trial. *Morgan* v. *Morris*, 1858, 20 D. (H. L.) 18; 30 J. 686; 3 Macq. 323.

168. Appeal—House of Lords—Competency.—When an appeal to the House of Lords is not prohibited, it is allowed. *Johnston* v. *Johnston*, 1860, 22 D. (H. L.) 3; 3 Macq. 619; 32 J. 286.

169. Appeal—Competency—House of Lords.—*Held*, that an appeal against an interlocutor, which finally disposed of an action as regarded one of several parties, could competently be brought when the whole case was brought up, though more than two years had then elapsed since the date of the interlocutor affecting that single party. *Kerr* v. *Cochrane*, 1842, 1 Bell 386. Affg. 13 S. 652; 14 S. 458; 10 Fac. 423; 11 Fac. 376.

170. Appeal—House of Lords—Competency—Acquiescence.—A reclaiming note against an interlocutor of a Lord Ordinary having been refused, in respect that it was not insisted in, *held* by House of Lords that the interlocutors were to be held as acquiesced in by the reclaimer, and that an appeal thereagainst was incompetent. *Lord Lovat, etc.* v. *Fraser*, 1866, 4 M. (H. L.) 32; 38 J. 372; L. R., 1 Sc. App. 24. *Jenkins*, 1867, 5 M. (H. L.) 27.

171. Appeal—House of Lords—Competency—Action against a Town Council—Appeal by Individual Councillor.—In an action against a town council and the councillors *nominatim* as such, and for themselves, a councillor may appeal, although the council decline to do so. *Gray* v. *Forbes*, 1838, 3 S. & M'L. 381.

172. Appeal—House of Lords—Competency—Action by Assignee in Security—Appeal by Cedent.—An assignee having declined to proceed in an action, the cedent (who had not been retrocessed) presented a petition of appeal to the House of Lords, who remitted to inquire whether the cedent had such a title as entitled him to be sisted as a party. *Held* that, as the assignation was not absolute, but in security, the cedent had a title to be sisted. *Manson* v. *Sir Wm. Baillie*, 1850, 12 D. 775; 22 J. 331.

173. Appeal—House of Lords—Competency—Appeal from Justiciary Court.—In this case the House of Lords considered an appeal against a sentence of the Justiciary Court imposing fines for an intrusion on church premises. *Mags. of Elgin* v. *Ministers of Elgin*, 1713, Robert. 69.

174. Appeal—House of Lords—Competency—Court of Justiciary.—Appeal is not competent to the House of Lords from the sentence of the High Court of Justiciary in Scotland pronounced in a criminal case. *Bywater* v. *Lord Advocate*, 1781, 2 Pat. 563.

175. Appeal—House of Lords—Competency—Appeal against Repulsion of Dilatory Plea—"Dilatory"—Judicature Act, 1825, s. 5.—In an action of divorce by a wife against a husband, he pleaded that she was barred by certain proceedings in Doctors' Commons from insisting in the action; and this being dealt with by the Court of Session as a preliminary or dilatory plea, and having been repelled, *held* that an appeal was competent, in respect the plea was peremptory. *Geils* v. *Geils*, 1851, 13 D. 31; 1 Macq. 36; 23 J. 435.

176. Appeal—House of Lords—Competency—Appeal Dismissed in Respect of Appellants' Non-Appearance — Second Appeal.—An appeal was set down for hearing; but the appellants not appearing, the interlocutors were, on the respondent's motion, affirmed. Upon an amended petition of appeal, and after hearing parties thereon, *held* that, by the judgment of the House affirming the interlocutors and dismissing the appeal, the interlocutor had become absolute and final, and the appellants were precluded from the ground of objection now insisted in by them. *Bank of England* v. *Pulteney*, 1787, 3 Pat. 92.

177. Appeal—House of Lords—Competency — Appeal Withdrawn — Second Appeal Forty Years Afterwards. — An appeal brought against a judgment of the Court of Session was withdrawn, and the judgment affirmed. A second appeal, brought against the same judgment more than thirty years afterwards, *held* incompetent. *Fraser* v. *Lord Advocate, etc.*, 1795, 3 Pat. 425.

178. Appeal—House of Lords—Competency—Application of Verdict—Judgment on Bill of Exceptions.—By 55 Geo. III. c. 42, s. 7, no appeal can be brought against judgments on bills of exceptions, unless presented within fifteen days. *Held* that an appeal of an interlocutor applying a verdict does not bring under review an interlocutor on a bill of exceptions which had not been appealed within fifteen days of being pronounced, but that it is competent to review the interlocutor applying the verdict. *Melrose* v. *Hastie*, 1854, 17 D. (H. L.) 4; 1 Macq. 698; 26 J. 319.

179. Appeal—House of Lords—Competency—Circumduction.—A pursuer having judicially passed from the defender's oath, and an interlocutor being in consequence pronounced circumducing the term, it was found to be incompetent to appeal from previous interlocutors relating to the defender's deponing upon and exhibiting the writings called for. *Scott* v. *Lord Napier*, 1749, 1 Pat. 441.

180. Appeal—House of Lords—Competency—Court of Exchequer Acting Ministerially.—*Held* that an appeal to the House of Lords was incompetent from a sentence of the Court of Exchequer acting ministerially as a Board of Treasury, under the special directions of the Act 1 Geo. II. c. 21. *Haldane* v. *The Earl Marischal*, 1778, 2 Pat. 443.

181. Appeal—House of Lords—Competency—Court of Session Final by Agreement.—Where an interdict is granted upon a bond of caution undertaking, in the event of the interdict proving wrong, to pay such sum as the court may award, there cannot be an appeal against the sentence ordering the payment. *Buchanan* v. *Douglas*, 1855, 18 D. (H. L.) 11; 2 Macq. 48; 27 J. 328.

182. Appeal—House of Lords—Competency—Costs.—It is competent to sustain an appeal to the effect of altering a judgment on the point of expenses, although the judgments complained of be affirmed on the merits, provided the appeal on the merits be not merely colourable. *Hunter* v. *Duff*, 1832, 6 W. & S. 206.

183. Appeal—House of Lords—Competency—Costs.—If a statute ordain costs to be given to the successful party, and they are not allowed, an appeal in regard to these costs is competent. *Tod* v. *Tod*, 1827, 2 W. & S. 542.

184. Appeal—House of Lords—Competency—Costs.—*Question* whether, where no objections are lodged to an auditor's report as to taxation of accounts, and an appeal is entered against the judgment of the court approving of that report, it be competent to enter on the merits in the House of Lords; and if not so, whether, the only other question being one of costs, an appeal be competent. *M'Aulay* v. *Adam & Brown*, 1835, 1 S. & M'L. 665.

185. Appeal—House of Lords—Competency—Failure to Make Party to the Case a Respondent.—Where the Lord Advocate, who had an interest in the cause, and who had been a party in the Court of Session, was not made a party to the appeal, and the cause had not been fully determined in the Court of Session, appeal *dismissed*, reserving right to the parties to appeal afterwards. *Mags. of Montrose* v. *Don*, 1738, 1 Pat. 222.

186. Appeal—House of Lords—Competency—Interlocutor Applying Verdict.—An interlocutor applying a verdict is appealable. *Morgan* v. *Morris*, 1855, 18 D. (H. L.) 46; 2 Macq. 342; 27 J. 602.

187. Appeal—House of Lords—Competency—Interlocutor Approving of Issues—Difference of Opinion—Court of Session Act, 1808, s. 15.—An interlocutor approving issues, and finding that they shall be the issues to try the case, is appealable when there is difference of opinion among the judges at pronouncing such interlocutor. *Johnstone* v. *Johnstone*, 1859, 21 D. (H. L.) 17; 3 Macq. 619; 32 J. 286.

188. Appeal—House of Lords—Competency—Interlocutor not Final—Unanimity—Leave.—An appeal to the House of Lords against an interlocutor which was pronounced unanimously, and was not final, *dismissed* as incompetent, as leave to appeal had not been obtained. *Ferrier* v. *Moubray*, 1834, 7 W. & S. 147.

189. Appeal—House of Lords—Competency—Interlocutor of Lord Ordinary.—An appeal against an interlocutor of a Lord Ordinary, not reviewed by the Inner House, is incompetent. *Jeffrey* v. *Brown*, 1824, 2 Shaw's App. 349.

190. Appeal—House of Lords—Competency—Interlocutors of Lord Ordinary not Reclaimed to Inner House.—Where, after judgment on the merits in the Inner House, an appeal is taken, it is competent to submit to the review of the House of Lords interlocutors of the Lord Ordinary which had not been reclaimed against to the Inner House. *Opinion* (*per* Lord Westbury, C.), that it is not competent for the House of Lords to reverse such an interlocutor, unless it be found necessary to reverse some of the subsequent interlocutors. *Gemmill* v. *M'Alister*, 1863, 1 M. (H. L.) 1; 35 J. 263; 4 Macq. 449.

191. Appeal—House of Lords—Competency—Interlocutory Judgment—Court of Session Act, 1808, s. 15.—An appeal is competent against an interlocutor of the Inner House passing a bill of suspension, although the letters have been expede before intimation of the appeal. *Fleming* v. *Dunlop*, 1839, M'L. & R. 547.

192. Appeal—House of Lords—Competency—Interlocutory Judgment—No Difference of Opinion—No Leave—Court of Session Act, 1808, s. 15.—An appeal without leave against an interlocutor which was not a final judgment, and was pronounced unanimously, *held* incompetent. *White's Trs.* v. *Wood's Trs.*, 1834, 7 W. & S. 147.

193. Appeal—House of Lords—Competency—Interlocutory Judgment of Jury Court.—It is incompetent, under the statutes 55 Geo. III. c. 42, and 59 Geo. III. c. 35, to appeal against an order of the Jury Court to frame issues, and refusing to remit the case to the Court of Session on a point of law arising subsequent to a remit from that court. *Rae* v. *Craig*, 1823, 1 Shaw's App. 459.

194. Appeal—House of Lords—Competency—Interlocutory Judgments in Petitions as to Custody.—Appeal is competent against interlocutory judgments in petitions regarding the custody of pupils. *Stuart* v. *Moore* (H. L.), 1861, 23 D. 902; 33 J. 445; 4 Macq. 1.

195. Appeal—House of Lords—Competency—Interlocutory Judgment—No Difference of Opinion—No Leave—Court of Session Act, 1808, s. 15.—An interlocutor remitting to an accountant to investigate *ante omnia* the books of a bank averred to be dissolved, in terms of the contract, owing to losses, *held* to be an interlocutor on the merits, and appeal therefore competent against a unanimous judgment, without leave. *North British Bank* v. *Collins*, 1852, 1 Macq. 369; 15 D. (H. L.) 29; 25 J. 119; 2 Stuart 26.

196. Appeal—House of Lords—Competency—Interlocutory Judgment—No Difference of Opinion—No Leave—Court of Session Act, 1808, s. 15.—An appeal against an interlocutory judgment of the Court of Session *dismissed* as incompetent, in respect that the judgment was unanimous, and that leave to appeal had not been granted. *Western Bank of Scotland* v. *Baird & Baird's Trs.*, 1867, 5 M. (H. L.) 93; 39 J. 453; L. R., 1 Sc. App. 170.

197. Appeal—House of Lords—Competency—Interlocutory Judgment—Certificate as to Difference of Opinion.—The court will not grant a certificate as to whether they agreed or differed in opinion in pronouncing an interlocutor, on the mere motion of one of the parties, with a view to an appeal. *Inglis* v. *Douglas*, 1861, 23 D. 561; 33 J. 344.

198. Appeal—House of Lords—Competency—Motion for a New Trial—The Jury Trials Act, 1815, s. 4.—After a verdict against a defender, and the refusal of a rule to show cause why a new trial should not be granted, the court applied the verdict, and decerned. *Held* that, although it was not competent to appeal against the refusal of the rule, it was competent to appeal against the decree. *Campbell* v. *Campbell*, 1839, M'L. & R. 387.

199. Appeal—House of Lords—Competency—Personal Bar.—In one of the class of actions specially appropriated by statute for trial by jury, the Lord Ordinary, with consent of parties, granted a proof by commission. After proof, the Lord Ordinary pronounced a judgment in favour of the defender. The pursuer having reclaimed, the Inner House reversed the Lord Ordinary's judgment. The defender having appealed, the pursuer objected to the competency of the appeal on the ground that, after the interlocutor improperly allowing a proof by commission, the cause had departed from the *cursus curiæ*, and that the judgments thereafter pronounced depended for validity upon the consent of parties, and were not appealable. *Held* that the pursuer was personally barred from stating the objection. *Bicket* v. *Morris*, 1866, 4 M. (H. L.) 44; 38 J. 547; L. R., 1 Sc. App. 47.

200. Appeal—House of Lords—Competency—Questions of Fact—Case Originating in Burgh Court—Judicature Act, s. 40.—A proof was taken before the bailies of a burgh, and in an advocation the Lord Ordinary pronounced a final judgment on the facts; a relative action of declarator was brought by the advocator, and of consent of parties, the proof was held as repeated in the declarator; and the processes were conjoined, and the respondent assoilzied. An appeal *held* incompetent, in so far as it related to the matters of fact. *Jack* v. *Lyall*, 1835, 1 S. & M'L. 77.

201. Appeal—House of Lords—Competency—Refusal to Conjoin Actions.—*Held* that an interlocutor refusing to conjoin two actions, the second of which was supplementary to the first, was a judgment on a matter for the judicial discretion of the court below, and not a proper subject of appeal to the House of Lords; and, therefore, an appeal by the pur-

suer against an interlocutor refusing a motion for conjunction *dismissed*. *N. B. Rly. Co.* v. *Wauchope*, 1862, 24 D. (H. L.) 4; 4 Macq. 348, 352; 34 J. 362.

202. Appeal—House of Lords—Competency—Refusal to Grant New Trial on Objection to Viewers.—Appeal is incompetent against the refusal of a motion for a new trial, on an objection to viewers. *M'Kenzie* v. *Ross*, 1822, 1 Shaw's App. 109.

203. Appeal—House of Lords—Competency—Remit to Jury Trial.—How far in a case not enumerated as appropriate for jury trial will an appeal lie against an interlocutor sending it to such trial? *Walker* v. *Stewart*, 1855, 18 D. (H. L.) 9; 2 Macq. 424; 27 J. 323.

204. Appeal—House of Lords—Competency—Remit to Jury Court—Reremit to Court of Session—Court of Session Acting qua Arbiter.—The Court of Session having remitted an action of damages for breach of contract to be tried by a jury, and the parties having, on the suggestion of the judge at the trial, consented that it should be remitted back to the Court of Session to take the proof on commission, this was done, and a judgment was pronounced by the court on the proof. *Held* that an appeal against that judgment was incompetent, in respect that all proceedings after the remit to the jury were to be regarded as in the same position as if the case had been referred to an arbiter. *Craig* v. *Duffy & Co.*, 1849, 6 Bell 308; 21 J. 205. *Dudgeon* v. *Thomson*, 1854, 17 D. (H. L.) 22; 1 Macq. 714; 26 J. 626. *Hoby* v. *Mags. of Renfrew*, 1856, 19 D. (H. L.) 2; 2 Macq. 478; 28 J. 470. Cf. *Dixon* v. *Bovill*, 1856, 19 D. (H. L.) 9; 3 Macq. 1; 28 J. 684.

205. Appeal—House of Lords—Competency—Remit to Jury Court—Judicature Act, 1825, s. 33.—An appeal against a remit to the Jury Court (which was objected to on the ground of irrelevancy), in a case which it was not imperative to remit, is competent without leave. *M. of Breadalbane* v. *M'Gregor*, 1848, 7 Bell 43.

206. Appeal—House of Lords—Competency—Sentence of Court of Session on Prevaricating Witness.—The sentence of the Court of Session, in its criminal capacity, is subject to appeal, and an appeal at the instance of a witness sustained. *Carse* v. *Lord Advocate, etc.*, 1784, 3 Pat. 1.

207. Appeal—House of Lords—Competency — Separate Actions — Separate Appeals.—A reduction of a decree of declarator having been brought, and a judgment pronounced, an appeal was entered both against the decree and the judgment, and no objection was then taken; but in a subsequent appeal it was objected that there should have been separate appeals in the declarator and in the reduction. The House, under the particular circumstances, so far repelled the objection as to allow separate appeals still to be entered. *Duncan* v. *Grahame*, 1817, 5 Dow 266.

208. Appeal—House of Lords—Competency—Smallness of Amount.—Appeal received, and costs awarded, on affirming the judgments complained of, where the interest of the appellant amounted to twenty-four shillings, and £30, 5s. 8d. (of expenses of process), although doubts were entertained as to the soundness of part of the judgments,—the appellant having limited his appeal to the part affirmed. *Cooper* v. *Hamilton*, 1826, 2 W. & S. 59.

209. Appeal—House of Lords—Competency — Teind Court. — *Held* competent to appeal to the House of Lords from a sentence of the Court of Session as a Commission of Teinds in an augmentation. *Ministers of Kirkden* v. *The Heritors of Kirkden*, 1784, 2 Pat. 621.

210. Appeal—House of Lords—Competency—Time for Appealing.—Under an Act of Parliament, certain properties were sold by judicial sale. No reduction of the proceedings was raised, but an appeal was brought against the whole interlocutors in the cause. *Held*, in the circumstances, that the appeal was incompetent. *Agnew or Dunlop* v. *Dunlop & Others*, 1814, 6 Pat. 62.

211. Appeal—House of Lords—Competency—Trial by Jury.—An appeal is incompetent against an interlocutor finding the court has no power to take proof by commission, or *in præsentia*, in cases specially enumerated in the Act of Parliament as fit for jury trial, but must remit them to be tried by jury. *Bald* v. *Kerr*, 1837, 3 S. & M'L. 1.

212. Appeal — House of Lords — Competency — Unincorporated Company — Individual Partners. — Appeal by an unincorporated commercial banking company, and several of the individual partners, sustained as competent against a judgment of the Court of Session, in a process in which they were defenders. *Commercial Bank* v. *Pollock's Trs.*, 1828, 3 W. & S. 365.

213. Appeal—House of Lords—"Competent and Omitted."—*Opinion* that, where the pleadings in the court below entitle a party to insist in an objection, the House of Lords are not barred from deciding the appeal upon that objection, though it may not have been pressed in the court below, and formed no part of the consideration of that court in pronouncing the interlocutors appealed from. *Luke* v. *Mags. of Edinburgh*, 1832, 6 W. & S. 241.

214. Appeal—House of Lords—"Competent and Omitted."—An appellant *held* not entitled to raise in the House of Lords a question of vesting, which he had raised, but departed from, in the Court of Session. *Pursell* v. *Elder*, 1865, 3 M. (H. L.) 59; 37 J. 394; 4 Macq. 992.

215. Appeal—House of Lords—Concurrent Judgments in Fact—Judicature Act, 1825, s. 49.—If an interlocutor of the Court of Session in an advocation be a remit *sim-*

pliciter, and do not contain findings in fact and law (as it ought to do), the House will not entertain the merits in an appeal. *Wemyss* v. *Wilson*, 1849, 6 Bell 394; 21 J. 379.

216. Appeals—House of Lords—Cross Appeals.—Remarks by the Lord Chancellor as to the time limited for bringing cross appeals to the House of Lords. *Clark* v. *City of Glasgow Assurance Co.*, 1854, 17 D. (H. L.) 27; 1 Macq. 668; 26 J. 638.

217. Appeal—House of Lords—Effect of—Appeal on one Point Only.—One point in a cause being under appeal, it is incompetent to proceed in discussing other points not appealed. *M'Nab* v. *Martin*, 24 Dec. 1803, F. C.; M. "Appeal" App. No. 2. Cf. *Grieve* v. *Cunningham*, 28 Nov. 1807, F. C.; M. No. 9 App. *Craigie* v. *Kerrs*, 19 Jan. 1808, F. C.; M. "Adjudication" App. No. 16, and "Appeal" App. No. 3. *Brodie* v. *Ferrier*, 1832, 11 S. 211. *A. B.*, 1838, 16 S. 1378; 13 Fac. 888.

218. Appeal—House of Lords—Effect of—Appeal against an Interlocutor Granting Warrant for Interim Execution.—Although a party had appealed against an interlocutor granting warrant for interim execution pending appeal, and obtained an order of service from the House of Lords, which was intimated to all concerned, a bill of suspension *refused* of a charge under the warrant for execution. *Clyne's Trs.* v. *Clyne*, 1837, 16 S. 191; 13 Fac. 194.

219. Appeal—House of Lords—Effect of Appeal as Affecting Interdict already Granted.—After a bill of suspension and interdict against the exercise of powers of sale in a trust deed had been refused, and the certificate of refusal issued, and an appeal to the House of Lords taken, the court *passed* a new bill of suspension and interdict against a sale during the dependence of the appeal. *Innes* v. *Innes*, 1829, 7 S. 762; 4 Fac. 1034.

220. Appeal—House of Lords—Effect of—Appointment of Curator ad litem.—Incompetent, pending an appeal to the House of Lords, to name a curator *ad litem* to a party in the cause. *Mackenzie*, 1822, 1 S. 396.

221. Appeal—House of Lords—Effect of—Bill of Exceptions Disallowed and Interlocutor Appealed — Competency of thereafter Considering Motion for a new Trial of which Notice had been Given.—A party tendered a bill of exceptions, and gave notice of a motion for a new trial, on the ground that the verdict was contrary to evidence; and after the exceptions were disallowed, he intimated an intention to appeal; and the court having been then asked to proceed with the motion for a new trial, *observed* that, although it was competent to proceed with that motion pending the appeal, yet in the circumstances it would be inexpedient to do so. *Hastie & Co.* v. *Johnston* (*Harden's Tr.*), 1848, 11 D. 247.

222. Appeal—House of Lords—Effect of—Competition of Brieves—Repetition of Judgment pro forma.—Judgment repeated *pro forma*, in a competition of brieves with the heir of a party, against whom a decision had been pronounced, and taken to appeal. *Sir M. S. Stewart* v. *Porterfield*, 1826, 4 S. 503.

223. Appeal—House of Lords—Effect of—Competition for an Estate—Sequestration—Sequestration Recalled before Appeal.—Pending a competition for an estate, it was sequestrated, and, on a judgment being pronounced in favour of one of the competitors, the other entered and served an appeal, and subsequently the sequestration was recalled. *Held* that the appeal was no bar to that recall; that a notification of an intention to appeal against it was irrelevant; and that an appeal after extract did not warrant the court in sisting effect being given to the recall. *Macadam* v. *Sir W. Cuninghame*, 14 June 1807, F. C.

224. Appeal—House of Lords—Effect of—Declarator and Reduction—Sequestration which had been Sisted.—*Held* that, notwithstanding an appeal of a decree in an action of declarator and reduction, it was competent to proceed in a relative petition of sequestration, which had been superseded till the determination of the cause. *Smith* v. *Graham*, 25 Nov. 1809, F. C.

225. Appeal—House of Lords—Effect of—Decree in Terms of a Referee's Award — Action to Enforce Award. — Mutual actions were made the subject of judicial reference, and an award was pronounced, to which the court interponed its authority; an appeal was entered to the House of Lords, during the dependence of which one of the parties raised an action to compel implement of the award. *Held* competent, and in the circumstances expedient, to decern for implement, without waiting the issue of the appeal. *Edinburgh Oil Gas Light Co.* v. *Sir W. Baillie*, 1835, 13 S. 413. Cf. *Gordon* v. *Fraser*, 1838, 16 S. 1380. *Bailie* v. *M'Gibbon*, 1846, 8 D. 1129; 18 J. 561. *Renton* v. *N. B. Rly. Co.*, 1847, 9 D. 1465; 19 J. 642.

226. Appeal—House of Lords—Effect of—Appeal in an Action for Payment of Feu-Duty in an Action for Implement.—A vassal, who resisted payment of feu-duty of a house, in respect of the non-completion by the superior of a street, and removal of old buildings, having been assoilzied from a declarator of forfeiture, *ob non solutum canonem*, *held* entitled, notwithstanding an appeal, to insist in an action brought, pending the other, against the superior, to complete the street and remove the old buildings. *Gibson* v. *Heriot's Hospital*, 18 May 1811, Hume 15.

227. Appeal—House of Lords—Effect of—Expenses Found Due but not Decerned for.—Where expenses were reserved till the issue of the cause, *held* that, although the defender was assoilzied and found entitled to expenses, yet, as an appeal was served before they were decerned for, no decree could be

granted till the issue of the appeal. *Clyne* v. *Manson*, 1841, 16 Fac. 1320. Cf. *Cochrane* v. *Bogle & Co.*, 1849, 12 D. 302.

228. Appeal—House of Lords—Effect of—Interlocutor Approving of Issues Reclaimed—Motion for Diligence for the Recovery of Documents—Court of Session Act, 1850, s. 13.—Interlocutors sustaining the competency of an action, and approving issues, were appealed to the House of Lords; *held* that the court was not thereby precluded from granting a diligence for recovery of documents to prepare the case for trial, in case the competency of the action was sustained. *Forbes* v. *Campbell*, 1857, 20 D. 287; 30 J. 143.

229. Appeal—House of Lords—Effect of—Interlocutor Making a Remit to an Accountant Appealed and Affirmed—Appeal against Second Remit thereafter.—A remit was made to an accountant to examine certain accounts, and to report. An appeal against this was taken to the House of Lords, which affirmed the judgment. Thereafter a new remit was made to the accountant to examine certain other documents, and a second appeal was taken. Pending this appeal, the court authorised the accountant to proceed with the execution of the remit in so far as concerned the documents remitted to him by the first interlocutor, but to preserve under seal the documents as to which the second appeal was taken. *Collins* v. *Drew*, 1854, 16 D. 434; 20 J. 211.

230. Appeal—House of Lords—Effect of—Interlocutor Refusing to Delay a Sale Appealed—Warrant of Sale not Appealed.—The court *refused* a note of suspension and interdict against the execution of a warrant of sale, which was not brought under appeal, although an interlocutor refusing to delay the sale was under appeal. *Renton* v. *Murdoch*, 1840, 2 D. 1249; 15 Fac. 1351.

231. Appeal—House of Lords—Effect of—Interlocutor Refusing Interdict Appealed—Second Note for Interdict Presented.—A note of suspension and interdict having been passed but interdict refused against a railway company proceeding with certain operations, and the complainers having appealed, they presented a second note for interdict, on the ground that the existing state of possession ought to be preserved until the appeal was disposed of. The court *refused* the note. *Edinburgh & Glasgow Rly. Co.* v. *Monkland Rly. Co.*, 1850, 13 D. 145; 23 J. 46.

232. Appeal—House of Lords—Effect of—Order for Service.—The defenders appealed against an interlocutor ordering access to the pursuers, preparatory to a jury trial, to certain works, etc., the property of the defenders, upon the ground that there was difference of opinion on the bench: the pursuers presented a counter petition that the appeal should not be received, denying that there was such difference of opinion, and maintaining that the appeal was incompetent. Both petitions were referred to the Appeal Committee, and no order of service of the appeal was granted. The defenders then moved the Court of Session to suspend the carrying into effect of their interlocutor ordering access until the competency of the appeal should be decided. Motion *refused*. *Jardine's Trs.* v. *Carron Co.*, 1864, 2 M. 1372; 36 J. 690.

233. Appeal—House of Lords—Order for Service—Effect of—Nothing Short of an Order for Service Stops Procedure in the Court of Session.—*Glasgow & Londonderry Steam Packet Co.* v. *Clyde Shipping Co.*, 1859, 22 D. 2; 32 J. 2.

234. Appeal—House of Lords—Effect—Order for Service.—A certificate from the clerk of the journals of the House of Lords, that an appeal had been lodged in his office, and would be presented to the House on its meeting (after an adjournment), *held* not sufficient to stop execution of diligence on a decree, which can be done only by order for service. *Henderson*, 28 Jan. 1802, F. C.; M. "Appeal," App. No. 1. Cf. *Sibbald*, 17th Nov. 1809, F. C. *Lindsay*, 11 July 1811, F. C. *Scrutton* v. *Catto*, 1822, 3 Mur. 72. *Sutherland* v. *Mackenzie*, 1825, 4 S. 230. *Court* v. *Turney*, 1833, 11 S. 684. *Fleming* v. *Robertson*, 1861, 23 D. (H. L.) 8, 4 Macq. 167; 33 J. 69. *National Exchange Co.* v. *Drew & Dick*, 1858, 20 D. 837; 30 J. 484; 22 D. (H. L.) 9; 32 J. 482. *Tulloch* v. *Davidson*, 1860; 22 D. (H. L.) 7; 3 Macq. 783; 32 J. 363.

235. Appeal—House of Lords—Effect of—Prior Interlocutors (Acquiesced in) Repelling Preliminary Defences—Act 48 Geo. III. c. 151, s. 15.—*Held* that the provision of the above Act, that when a judgment is appealed from it shall be competent for either party to appeal from all the interlocutors in the cause, "so that the whole, so far as is necessary, may be brought under review of the House of Lords," did not apply to an interlocutor of a Lord Ordinary repelling a preliminary defence which had been acquiesced in. *Alexander* v. *Officers of State*, 1868, 6 M. (H. L.) 54; 40 J. 470; L. R., 1 Sc. App. 276.

236. Appeal—House of Lords—Effect of—Ranking and Sale—Sequestration for Rent.—*Question*, whether an appeal from an interlocutor in a ranking and sale, or an appeal from a warrant obtained by a creditor in a relative sequestration of rents, renders a petition by another creditor for a similar warrant in the sequestration incompetent. *Howden* v. *Ferrier*, 1833, 12 S. 230; 9 Fac. 148.

237. Appeal—House of Lords—Effect of—Action for Reduction of Bill in which Defender Assoilzied—Subsequent Action for Payment.—After a party had been assoilzied from an action of reduction of a bill, he brought an action for payment of the bill against the pursuer of the reduction, who then appealed against the absolvitor. *Held* that the party was nevertheless entitled to insist in the action for payment. *Philips* v. *Johnstone, Sharpe, & Co.*, 30 Nov. 1820, Hume 17.

238. Appeal—House of Lords—Effect of—Subsequent Action Raising same Question as the Appealed Action.—Although a legal question at issue is identical with that raised in an appeal in another case, pending before the House of Lords, the court will not, upon the application of one of the parties, grant a sist of the process, as matter of right, till the determination of the appeal. *Purves* v. *N. B. Rly. Co.*, 1848, 10 D. 853; 20 J. 299.

239. Appeal—House of Lords—Effect of—Whether Appeal Restores an Interdict Granted "till the Case Should be Advised."—An interim interdict having been granted on ordering answers, and till the case should be advised, and being called on advising, *held* that an appeal against the recall had not the effect to keep the interim interdict in operation, as its duration was limited to the advising. *Laird* v. *Miln*, 1833, 12 S. 54; 9 Fac. 43.

240. Appeal—House of Lords—Execution Pending—Act 48 Geo. III. c. 151, s. 17, Held not Retrospective.—The Act of Parliament 48 Geo. III. c. 151, s. 17, authorising the court to give interim possession and execution pending appeals to the House of Lords, has not a retrospective effect so as to apply to appeals lodged before the passing of the Act. *Ladies M. & E. Kerr*, 21 Nov. 1811, F. C.

241. Appeal—House of Lords—Execution Pending — Action of Removal. — Interim execution, pending appeal on a decree of removing against an agricultural tenant, *refused*. *Gray* v. *Low, etc.*, 1859, 21 D. 723; 31 J. 385.

242. Appeal — House of Lords — Execution Pending — Action of Separation — Aliment and Expenses to the Wife.—Under a petition for interim execution pending an appeal of a decree of separation of husband and wife, the court *awarded* to her a sum in name of aliment, and to defray the expenses of opposing the appeal, although no decree had been pronounced for aliment. *Paterson* v. *Paterson*, 1849, 11 D. 905; 21 J. 317.

243. Appeal — House of Lords — Execution Pending — Aliment. — Interim aliment having been awarded to a son, fiar of a property, against his mother, the liferentrix, and she having appealed, interim execution *granted*. *Maidment* v. *Maidment*, 5 July 1816, F. C.

244. Appeal — House of Lords — Execution Pending — Amendment of Petition—Liability of Trustee for Expenses. — The prayer of a petition for interim execution against a trustee *qua* such for expenses, not allowed to be amended after answers had been lodged, so as to crave decree against him personally. *Kirkland & Sharpe* v. *Gibson*, 1831, 10 S. 167.

245. Appeal — House of Lords — Execution Pending—Answers to Petition.—Circumstances in which the court *granted* interim execution pending appeal, to a certain extent, without allowing the appellant to answer in writing the petition for execution. *Brown* v. *Syme*, 1835, 13 S. 682.

246. Appeal — House of Lords — Execution Pending—Appeal to House of Lords against Interlocutor Allowing Interim Execution — Execution not Stopped. — *Countess of Haddington* v. *Stein*, 20 Nov. 1811, F. C. *Milne* v. *Imlay*, 1822, 1 S. 268.

247. Appeal — Execution Pending. — In granting execution pending appeal of a judgment decerning for the removal of a stake-net fishing, the court *allowed* the stakes to remain. *M'Whir* v. *Oswald*, 1833, 12 S. 272.

248. Appeal — House of Lords — Execution Pending—Appellants' Offer to Consign or Find Caution. — *Held* that a successful pursuer's right to execution pending appeal, on finding caution for payment in case of a reversal, could not, in the absence of any specialty, be taken away by the appellants' offer to consign, or to find caution for implement of the decree, if affirmed. *Ross* v. *Mathieson & Son*, 1847, 10 D. 222; 20 J. 63.

249. Appeal — House of Lords — Execution Pending — Bank Interest — Legal Interest. — Warrant *granted* to consign in a bank a sum decerned for, pending appeal, on caution by the party (who was on the poor's roll) for the difference between bank and legal interest in the event of a reversal. *Reid* v. *Hope's Trs.*, 1826, 4 S. 531. *Black & Co.* v. *M'Call & Co.*, 1821, 1 S. 73.

250. Appeal — House of Lords — Execution Pending—Bond of Caution.—Warrant being granted for interim execution, pending appeal, on caution, and a bond of caution lodged, the warrant thereafter extracted, and a charge given, a bill of suspension, on the allegation that the bond was irregular, *refused*. *Clyne* v. *Sclater*, 1831, 9 S. 729; 6 Fac. 480.

251. Appeal — House of Lords — Execution Pending—Case in Jury Court—Competency of Applying to Court of Session.—The Court of Session cannot grant execution pending appeal of a verdict in an action of damages, or of the decree of the Jury Court awarding expenses, although part of these expenses have been incurred in the Court of Session. *Robertson* v. *Allardyce*, 1829, 7 S. 813; 4 Fac. 1112.

252. Appeal — House of Lords — Execution Pending—Caution—Extent of.—The unsuccessful party in a litigation as to the obligations under a contract, appealed, and also brought a reduction of the contract; the successful litigant having moved for interim execution, pending appeal, on the usual caution, it was objected, that if interim execution was granted, at least caution should be found to repeat, in case the other party succeeded in his reduction. Interim execution *granted* on the usual caution. *Question*, whether it would have been competent to have ordered the further caution demanded. *Russell* v. *Kirkland*, 1858, 20 D. 772; 30 J. 413.

253. Appeal — House of Lords — Execution Pending—Cessio.—Interim execution as to a decree awarding *cessio allowed* by libera-

tion, on the party finding caution for £1000. *Glass* v. *Pentland*, 1823, 2 S. 268. *Murray* v. *His Crs.*, 23 Nov. 1811, F. C.

254. Appeal — House of Lords — Execution Pending — Competency of Appeal Objected to.—Interim execution *refused* as to a decree of reduction of titles to an estate, an objection to the competency of the appeal being under discussion in the House of Lords. *Clouston* v. *Anderson*, 1825, 3 S. 437.

255. Appeal — House of Lords — Execution Pending—Competition for the Office of Trustee.—In a competition for the office of trustee, warrant *granted* to the preferred competitor to act pending an appeal by his opponent. *Fairley* v. *M'Nair*, 1 Feb. 1809, F. C.

256. Appeal — House of Lords — Execution Pending—Consigned Money.—It is incompetent, after an appeal, in place of applying for interim execution, to present a petition for warrant to uplift money consigned by the defender. *Jolly* v. *Grahame*, 1834, 13 S. 236.

257. Appeal—House of Lords—Execution Pending—Declarator of Marriage—Aliment.—Interim execution pending appeal to the House of Lords in an action of declarator of marriage and for aliment (1) *granted* for arrears of aliment when defender abroad and address not known, but (2) *refused* for expenses, decree for which was in name of agent-disburser and not appealed against. *Forster* v. *Forster*, 1871, 9 M. 829; 43 J. 460.

258. Appeal—House of Lords—Execution Pending—Declarator.—In an action for having it declared that parliamentary commissioners had no power to take possession of a quarry (which they had done), to ordain them to remove, and to pay an adequate remuneration during their possession, decree was pronounced finding that although they had no power to take possession, yet, under the circumstances, they were not bound to remove; and an appeal having been entered, *held* that the court could not grant execution, pending appeal, to the effect of ordaining the commissioners to pay a rent till the issue of the appeal. *Grant* v. *Commrs. of the Caledonian Canal*, 13 Feb. 1813, F. C.

259. Appeal—House of Lords—Execution Pending—Declarator of Marriage and for Aliment.—In an action by a woman concluding for declarator of marriage and for aliment, the court in May 1869 found the marriage proved, and decerned against the defender for £60 of yearly aliment from Whitsunday 1866, as concluded for. On a petition for execution pending appeal, the court, in respect that the defender was out of the kingdom, and that his address was unknown, and that he had not paid any aliment under the decree, *granted* interim execution, to the effect of enabling the pursuer to recover the arrears of aliment due, but *refused* interim execution of the decree for expenses. *Forster* v. *Forster*, 1871, 9 M. 829; 43 J. 460.

260. Appeal—House of Lords—Execution Pending—Divorce.—Although a wife had got a judgment in an action of divorce, finding adultery proved, which was appealed by the trustee on her husband's sequestrated estate, yet interim execution *refused*, to the effect of enabling her to claim a dividend on provisions due to her on dissolution of the marriage, her right to which was *sub judice* of another Division. *Aitken* v. *Greenhill*, 1823, 2 S. 282.

261. Appeal—House of Lords—Execution Pending—Executor.—In a process at the instance of the curator of a lunatic, he obtained decree for interim execution pending appeal, and the lunatic thereafter died; *held* that the executor of the lunatic was entitled to have the decree repeated in his own name, superseding extract till production of confirmation. *Kerr* v. *Bremner*, 1840, 2 D. 832.

262. Appeal—House of Lords—Execution Pending — Incompetency of Obtaining Interim Execution otherwise than by Petition.—The Writers to the Signet having obtained decree finding them entitled to prohibit a member from doing certain acts, against which he appealed, *found* that a bill of suspension and interdict against his doing these acts was incompetent, being an indirect mode of obtaining interim execution. *Writers to the Signet* v. *Grahame*, 1823, 2 S. 456; and see 2 S. 764.

263. Appeal—House of Lords—Execution Pending — Inner or Outer House.—An Inner House interlocutor, which disposed of part of a case, remitted the account of expenses to the auditor, with directions to report to the Lord Ordinary. Before the report was approved of, notice of appeal was served. *Held*, in a petition for interim execution, that the auditor's report could be approved of, and decree for expenses pronounced, only in the Inner House. *Aberdeen Arctic Co.* v. *Sutter*, 1861, 23 D. 1299; 33 J. 658.

264. Appeal—House of Lords—Execution Pending — Interim Execution. — A sheriff court action having been advocated, and remitted by the court to the sheriff *simpliciter*, the court *refused* an application for interim execution pending appeal to the House of Lords except as regarded the expenses in the advocation. *Dewar* v. *Pearson*, 1866, 2 S. L. R. 156.

265. Appeal—House of Lords—Execution Pending—Interim Management—Lord Ordinary on the Bills.—The court may grant interim management pending appeal where they would refuse interim execution. They cannot remit to the Lord Ordinary on the bills during vacation to dispose of a question of interim execution, which can only be granted in the Inner House, and by four judges. *Granger* v. *Geils*, 1857, 19 D. 1010; 29 J. 479.

266. Appeal—House of Lords—Execution Pending — Quorum of Court. — A quorum of four judges is necessary to award

interim execution; but it is competent to call in a judge from the Outer House to make up the number. *Paterson's Trs.*, 1828, 6 S. 1086. *Campbell*, 1854, 17 D. 61.

267. Appeal—House of Lords—Execution Pending — Interlocutor Appealed against Fixing Appellant's Liability but no Decree against Him.—In an action for payment or relief of certain law expenses, an interlocutor had been pronounced which fixed the defender's liability for them, but without going further; the court *refused* to grant interim execution on this judgment pending appeal. *Brodie* v. *Brodie*, 22 Nov. 1814, F. C. *Stevenson's Trs.* v. *Tweeddale*, 1823, 2 S. 447.

268. Appeal—House of Lords—Execution Pending—Jury Court—Court of Session.—The Court of Session cannot grant execution, pending appeal, of a verdict in an action of damages, or of the decree of the Jury Court awarding expenses, although part of these expenses have been incurred in the Court of Session. *Robertson* v. *Allardyce*, 1829, 7 S. 813; 4 Fac. 1112.

269. Appeal—House of Lords—Execution Pending—Landlord's Sequestration.—After decree against a tenant for rent has been appealed against, and interim execution granted, the landlord may recover the rent by means of sequestration, on finding caution in terms of the judgment awarding execution. *Pentland* v. *Booth*, 1831, 9 S. 510.

270. Appeal—House of Lords—Execution Pending — Multiplepoinding — Payment Made to Successful Claimant—Judgment Reversed—Consignation.—A claimant preferred in a multiplepoinding, received payment of the fund *in medio* from the holder, under a warrant for execution pending an appeal entered by a competing claimant, on granting bond to the holder to repeat in case of a reversal. The judgment having been reversed, and further proceedings ordered, the competing claimant *held* entitled to demand consignation, although no appearance was made by the holder. *Lockwood & Co.* v. *Davidson*, 1825, 4 S. 28.

271. Appeal—House of Lords—Execution Pending—Order for Consignation.—Interim execution *granted* of an order for consignation, the party demanding it finding caution, in the event of reversal, for any loss of interest. *Paterson's Trs.* v. *Brown*, 1828, 6 S. 1086.

272. Appeal—House of Lords—Execution Pending — Petition — Amendment — Expenses.—The prayer of a petition for interim execution against a trustee *qua* such for expenses, not allowed to be amended after answers had been lodged, so as to crave decree against him personally. *Kirkland & Sharpe* v. *Gibson*, 1831, 10 S. 167. Cf. *Kirkland & Sharpe* v. *Wilson's Crs.*, 1832, 10 S. 377.

273. Appeal—House of Lords—Execution Pending—Question as to Commuted Dues of Thirlage.—A party having been found entitled to certain commuted dues of thirlage, and an appeal entered, interim execution *granted*. *Johnstone* v. *Brown*, 17 May 1815, F. C.

274. Appeal—House of Lords—Execution Pending—Question as to the Elective Franchise.—Interim execution pending appeal *allowed* in a question as to the elective franchise, and *observed* that it would be so in all such cases. *Alexander*, 25 Feb. 1820, F. C.

275. Appeal—House of Lords—Execution—Pending Questions as to Expenses.—If expenses have been found due, but not taxed, and an appeal entered, it is competent, under a petition for interim execution, to remit to the auditor, to decern for them, and allow interim execution. *Smith* v. *Pease*, 1822, 1 S. 534. See also as to interim execution for expenses, *Gordon* v. *Hyslop & Co.*, 1821, 1 S. 120. *Dunlop* v. *Speir*, 1825, 4 S. 179. *Hogarth* v. *Palmer*, 1830, 8 S. 1017; 5 Fac. 828. *Oswald* v. *M'Whir*, 1835, 14 S. 82.

276. Appeal—House of Lords—Execution Pending—Question of Legitimacy.—The legitimacy of an heir-apparent was challenged on the death of the ancestor, and a judicial factor appointed on the estate. The court having given decree in favour of the heir-apparent, gave him interim possession pending an appeal to the House of Lords. *Aikman*, 1859, 21 D. 1374; 31 J. 755.

277. Appeal—House of Lords—Execution Pending — Question as to Salmon-Fishing.—*Question* as to the interim possession of two salmon pools during an appeal. *Mackenzie* v. *Mags. of Dingwall*, 1833, 11 S. 248. See also *M'Whir* v. *Oswald*, 1833, 12 S. 272. *Mags. of Dumbarton*, 10 March 1813, F. C.

278. Appeal—House of Lords—Execution Pending—Question as to the Validity of an Entail—Custody of Titles.—Warrant *granted*, pending an appeal against a judgment of the court sustaining the validity of an entail, to the heir in possession against the trustee on the last proprietor's sequestrated estate (who, in the event of a reversal, would be entitled to the lands), to deliver up the title deeds and other writs of the estate, on caution to make the titles forthcoming, so far as necessary for the discussion of the appeal. *Farquharson* v. *Adam*, 1841, 4 D. 7.

279. Appeal—House of Lords—Execution Pending—Reduction of Sale of Land—Removal and Delivery of Title Deeds.—Where a summons contained conclusions of reduction only of a sale of land, and decree was pronounced, *held* incompetent to allow interim execution pending appeal, to the effect of removing the defender from the lands, and giving up the title deeds. *Ker* v. *Dunbar*, 1817, Hume 17.

280. Appeal—House of Lords—Execution Pending—Remit to Lord Ordinary.—It is competent for the court, in regulating

matters relative to interim possession or execution, to remit to the Lord Ordinary to proceed as he shall see cause. *Scougall & Co.* v. *Douglas*, 8 Dec. 1814, F. C.

281. Appeal—House of Lords—Execution Pending—Removal of Erections in a River. — Interim execution *refused* as to erections in a river ordered to be removed, caution for damage being found. *Smith* v. *Forbes*, 1824, 3 S. 230. See *Bailie* v. *Saltoun*, 1823, 2 S. 128.

282. Appeal—House of Lords—Execution Pending — Removing, Decree of. — Although a landlord obtained a decree of removing against his tenant, the court did not award interim execution pending appeal. *E. of Mansfield* v. *Henderson*, 2 Mar. 1815, F. C.

283. Appeal—House of Lords—Execution Pending—Sequestration of Estate in Dispute and Appointment of a Judicial Factor.—A party possessed a colliery for several years, under a trust conveyance which was reduced, and the judgment was taken to appeal; the court, under a petition for interim execution, with the assent of the parties, sequestrated the estate, and named a judicial factor. *Freen* v. *Beveridge*, 1832, 11 S. 161. Cf. *Moffat* v. *Moffat*, 7th July 1813, F. C.

284. Appeal—House of Lords—Execution Pending—Sequestration of Appellant's Estates and Appointment of—Factor.—Where a party appealed against sequestration of his estates and the election of an interim factor, the court *superseded* consideration of a petition for interim execution, reserving to the factor to apply during vacation to the Lord Ordinary on the Bills. *Ker* v. *Scot*, 1829, 7 S. 893. Cf. *Grant*, 1830, 8 S. 1028; 5 Fac. 834.

285. Appeal—House of Lords—Execution Pending—Sequestration of Respondents.—After a party got decree and became bankrupt, he and his trustees applied for interim execution; an objection, that the trustees could not divide the fund till the issue of the appeal, *superseded*. Thereafter the bankrupt having been retrocessed, execution awarded; and *observed*, that the objection was not well founded. *Whitson* v. *Neilson & Co.*, 1828, 6 S. 1087.

286. Appeal—House of Lords—Execution Pending—Supplementary Petition.—A party having succeeded in an action against a trustee on a sequestrated estate, obtained execution pending appeal against him *qua* trustee for expenses, but not as to the principal sum. A supplementary petition, praying for execution for the principal, interest, and expenses, against creditors on the estate, as the trustee's constituents, *dismissed* as incompetent. *Kirkland & Sharpe* v. *Wilson's Crs.*, 1832, 10 S. 377.

287. Appeal—House of Lords—Execution Pending — Two Petitions. — Circumstances in which the court, after granting interim execution, pending an appeal, to the extent of £250, without caution, entertained a second petition, and granted execution to the further extent of £50, without caution. *Melrose* v. *Hunter*, 1831, 9 S. 902. See also *Brown* v. *Jeffrey*, 1822, 2 S. 104. *Berry* v. *Anderson*, 1823, 2 S. 261.

288. Appeal—House of Lords—Execution Pending — Town-Clerk Sentenced to Pay a Penalty and to be Imprisoned.—A town-clerk accused of violation of the statute 16 Geo. II. c. 11, having been found liable in a penalty to the complainer, and ordered to be imprisoned for six months, and declared incapable of holding his office, and having appealed, *found* that the complainer was not entitled to interim execution of the imprisonment and forfeiture. *Campbell* v. *Black*, 1814, Hume 16.

289. Appeal—House of Lords—Execution Pending — Trust Funds. — Interim execution *awarded* for payment to a widow of £250 out of trust funds without caution, she being in poverty, and having got interim decree for £500, and been found entitled to £3600. *Dickson* v. *Hunter*, 1830, 8 S. 1054.

290. Appeal—House of Lords—Execution Pending—Warrant of Incarceration.—Interim execution *allowed* of a warrant of incarceration against a party carrying off sequestrated effects, till he should restore them, or find caution to pay the rent. *Norval* v. *Smith*, 1828, 6 S. 1017.

291. Appeal—House of Lords—Interlocutor not Appealed against Held to be Incompetent—Effect quoad Later Interlocutors.—In an action of right of way, an issue was adjusted whether there existed a public right of way "by or near the broad red line as shown" on a plan. The defender subsequently consented "to judgment in the same way as if a verdict had been found for the pursuer." The court *remitted* to a surveyor to lay off a footpath in such manner as to be least burdensome to the defender, "and at the same time so as fully to answer the right of a footpath between the places mentioned in the issue, and without interference with that right of way." Subsequent interlocutors fixing a line of footpath were appealed against by the pursuer, but not this. *Held* (1) that a remit in the above terms was *ultra vires* of the court; and (2) that the interlocutor containing the remit not having been appealed against, the subsequent interlocutors proceeding thereupon being beyond the ordinary *cursus curiæ*, could neither be affirmed or reversed. *White* v. *Lord Morton's Trs.*, 1866, 4 M. (H. L.) 53; 38 J. 543; L. R., 1 Sc. App. 70.

292. Appeal—House of Lords—Interlocutor of Court of Session—Order of a Presbytery.—In an appeal to the House of Lords from a sentence of imprisonment for breach of an order of a Presbytery pronounced by the Magistrates of Edinburgh, and an interlocutor of the Court of Session refusing a suspension of the same, an objection to the competency of the appeal, in respect that it was in reality a direct appeal from the Presbytery's

order, *repelled*. *Greenshields* v. *Mags. of Edinburgh*, 1710, Robert. 12.

293. Appeal—House of Lords—Issues.—The House of Lords does not frame issues ; it only declares what point the issue ought to have been framed to raise. *Robertson* v. *Fleming*, 1861, 23 D. (H. L.) 8 ; 4 Macq. 167 ; 33 J. 691.

294. Appeal—House of Lords—Leave.—Circumstances in which leave to appeal *refused*. *D. of Buccleuch, etc.* v. *Cowan, etc.*, 1866, 4 M. 475 ; 38 J. 217. *Western Bank* v. *Baird's Trs.*, 1866, 4 M. 1071 ; 38 J. 557.

295. Appeal—House of Lords—Leave.—Explanation of the grounds on which the court had at a previous stage of the case refused leave to appeal. *Kennedy* v. *Bell*, 1868, 6 M. 1062.

296. Appeal—House of Lords—Leave.—Circumstances in which leave to appeal was refused. *East of Fife Rly. Co. & Baird* v. *Tulloch & Others*, 1859, 32 J. 2.

297. Appeal—House of Lords—Leave.—Leave to appeal against an interlocutory judgment *refused*. *Stirling & Sons* v. *Stirling & Robertson*, 1822, 1 S. 555.

298. Appeal—House of Lords—Leave.—Circumstances in which the court *refused* to grant authority to bring an interlocutory judgment under review of the House of Lords. *Fraser* v. *Fraser*, 1836, 14 S. 582.

299. Appeal—House of Lords—Leave.—Leave to appeal *refused*, other points remaining for decision, which might give rise to other appeals. *Miller* v. *Morison*, 1827, 5 S. 671.

300. Appeal—House of Lords—Leave.—One of several dilatory defences having been repelled, and the others not disposed of, leave to appeal *refused*. *Tutors of E. of Eglinton* v. *Walker*, 1827, 5 S. 418.

301. Appeal—House of Lords—Leave.—Leave to appeal *refused*, where the case might be exhausted by a motion before the Lord Ordinary. *Hunter* v. *Dickson*, 1827, 5 S. 417.

302. Appeal—House of Lords—Leave—Interlocutory Judgment—Judicature Act, 1825 (6 Geo. IV. c. 120), s. 5.—Leave to appeal against an interlocutor repelling certain pleas as preliminary, but reserving their effect to be considered along with the merits, *refused*. *Opinion* (*per* Lord Deas), that the difference of opinion among the judges giving right to an appeal in certain cases must be a substantial difference. *Hamilton & Co., Petitioners*, 1868, 5 S. L. R. 371.

303. Appeal—House of Lords—Leave—Action of Accounting. — An action was raised by the trustees of a deceased partner for count and reckoning as to his interest in the firm. The remaining partners averred that by certain letters an agreement had been entered into between the firm and the partner, by which he ceased to be a partner, and became entitled only to an annuity from the firm. The court *held* that the letters did not form a concluded agreement, and ordered production of the balance-sheets of the firm and refused leave to appeal from this order. *Lawson* v. *Lawson's Trs.*, 1872, 11 M. 168 ; 45 J. 100.

304. Appeal—House of Lords—Leave—Action for Agent's Account—Allowance of Proof as to Employment.—In an action by a law agent for recovery of a business account, petition *refused* for leave to appeal against an interlocutor allowing an investigation into matter of fact before the Lord Ordinary as to employment of the law agent, and the nature of such employment. *Ranken* v. *Drew*, 1855, 17 D. 484 ; 27 J. 204.

305. Appeal—House of Lords—Leave—Allowance of Proof.—A petition for leave to appeal against an interlocutor allowing a proof before answer, *refused*. *Cullen* v. *Buchanan*, 1862, 24 D. 1132 ; 34 J. 564.

306. Appeal—House of Lords—Leave—Approval of Issues—Judicature Act, 1828, ss. 33 and 34.—In a question on an issue as to defamation, whether malice should be inserted, the court having found in the negative, *held* (subject to the judgment of the House of Lords as to the competency of an appeal) that it was not incompetent for the court to grant leave to appeal, and leave granted. *Adam* v. *Allan*, 1841, 3 D. 1147 ; 16 Fac. 1246. Cf. *Dundee & Perth Rly. Co.* v. *M'Glashan*, 1848, 10 D. 1401 ; 20 J. 508. *Cullen* v. *Black*, 1851, 13 D. 1184 ; 23 J. 559.

307. Appeal—House of Lords—Leave—Interlocutor Granting Diligence for Recovery of Documents.—In an action for defamation, no issue in justification having been taken, the court refused the defender a diligence to enable him to prove facts in mitigation of damages. Petition for leave to appeal against that judgment *refused*. *Duncan* v. *Blackie*, 1857, 19 D. 1095 ; 29 J. 535.

308. Appeal—House of Lords—Leave—Conditions as to Time within which Appeal must be Presented.—Issues having been adjusted in a case, and notice of trial given by the defenders, leave to appeal *granted* to the pursuers under a limitation as to time, and notice of trial discharged. *Losh, Wilson, & Bell* v. *Martin*, 1858, 20 D. 721 ; 30 J. 381.

309. Appeal—House of Lords—Leave—Conjoined Actions. — *Observed*, that where three declarators were conjoined, and a unanimous judgment was pronounced, which disposed of the whole merits of one of them, it was competent to appeal, without leave, although a remit was made to the Lord Ordinary to proceed with the other two declarators. *Sir N. M. Lockhart*, 1837, 15 S. 417.

310. Appeal—House of Lords—Leave—Declarator of Public Right of Way — Conditions on which Leave Granted.—In an action of declarator of a right of public

road, the court *granted* a petition by the defender for leave to appeal against a unanimous interlocutory judgment, sustaining the pursuer's title to sue, but on condition (1) that the right to use the road should be reserved to the pursuers pending the appeal; (2) that the defender should consent that the depositions of aged witnesses should be immediately taken on commission to lie *in retentis*; and (3) that the petition of appeal should be presented within fourteen days. *D. of Atholl* v. *Torrie*, 1850, 12 D. 691; 22 J. 248.

311. Appeal—House of Lords—Leave—Declarator as to Servitude.—Leave given to the defender, in an action for declaring a servitude, to appeal against a judgment on a remit from the Jury Court, deciding certain points of law preparatory to trial, on his allowing the pursuer to exercise the right claimed in the meantime. *D. of Hamilton* v. *Aikman*, 1831, 9 S. 594.

312. Appeal—House of Lords—Leave—Delay—Judicature Act, 1825, s. 25.—Although a petition for leave to appeal against an interlocutory judgment is, after two years from its date, incompetent, yet if one interlocutory order (such as for answers to objections) be pronounced and adhered to, a petition for leave to appeal is competent within two years from its date. *Horne* v. *M. of Breadalbane's Trs.*, 1839, 1 D. 436; 14 Fac. 486. See also *Paul* v. *Malcolm*, 1849, 11 D. 1193; 21 J. 473.

313. Appeal—House of Lords—Leave—Findings of Fact Involving Law.—Petition for leave to appeal against an interlocutor consisting of findings of fact, on the ground that certain of the findings involved matter of law, *refused*. *Kerr* v. *Pattison*, 1855, 17 D. 786; 27 J. 407.

314. Appeal—House of Lords—Leave—Interim Interdict.—Leave given to appeal a decision sustaining a party's title to pursue an action to prohibit the use of a yair for salmon fishing, but only on the defender consenting to an interdict in the meantime. *Duff* v. *Fraser*, 1829, 8 S. 283.

315. Appeal—House of Lords—Leave—Interlocutor Repelling a Plea of no Jurisdiction—Action of Divorce.—A co-defender in an action of divorce stated a plea of no jurisdiction, which was repelled. Leave to appeal against the interlocutor repelling the plea *refused*. *Fraser* v. *Hibbert*, 1870, 7 S. L. R. 266.

316. Appeal—House of Lords—Leave—Interlocutor Sustaining Pursuer's Title.—Petition for leave to appeal against a judgment sustaining a pursuer's title, *refused*. *Morison* v. *Fleshers of Edinburgh*, 1854, 16 D. 377; 26 J. 178.

317. Appeal—House of Lords—Leave—Lease Separated in two Parts by Consent of Parties.—Leave to appeal *granted* where the parties had consented to have a particular branch of the case first disposed of, and where an affirmance would end the case. *Losh, Wilson, & Bell* v. *Martin*, 1857, 19 D. 267; 29 J. 132.

318. Appeal—House of Lords—Leave—Motion or Petition.—Petition for leave to appeal allowed to be received and lodged immediately on judgment being pronounced, on the last day of the session; but, in the circumstances, leave to appeal *refused*. *Question*, whether leave to appeal can be granted on a mere motion, or whether a petition is necessary. *Her Majesty's Advocate* v. *Fleming & Others*, 1864, 2 M. 1032; 36 J. 497.

319. Appeal—House of Lords—Leave—Observations on the Granting of Leave.—A petition for leave to appeal *refused*, and *observed* that the meaning of the statutes as to granting leave to appeal is, that it should be given only when the court had difficulty, or when the judges came to the same conclusion on different grounds. *Liquidators of Western Bank* v. *Douglas, etc.*, 1860, 22 D. 447; 32 J. 212. Cf. *Skinner* v. *Dunbar*, 1849, 11 D. 1014; 21 J. 322.

320. Appeal—House of Lords—Leave—Plea of no Jurisdiction Repelled.—Leave to appeal against an interlocutor sustaining jurisdiction in an action of damages against two Englishmen for a libel in an English newspaper *refused*. *Longworth* v. *Hope, etc.*, 1865, 3 M. 1049; 37 J. 552.

321. Appeal—House of Lords—Leave—Preliminary Plea which if Sustained would Obviate Jury Trial.—Leave to appeal *refused*, although asked for on the ground that, in the event of reversal, a jury trial would be obviated, as the case would be decided upon a preliminary point. *Leadhills Mining Co.* v. *Scots Mining Co.*, 1856, 18 D. 594; 28 J. 107.

322. Appeal—House of Lords—Leave—Preliminary Defence.—Leave to appeal against a judgment repelling a preliminary defence, the effect of which was merely to allow the cause to begin, *refused*. *Mags. of Wigton* v. *M'Clymont*, 1834, 12 S. 459.

323. Appeal—House of Lords—Leave—Question of Law—Ascertainment of Facts.—The court *refused* leave to appeal a judgment, by which they found that a title of port and harbour could be explained by possession, and that immunity might be obtained from a right of port and harbour by dereliction of the right for forty years. *Dundee Harbour Trs.* v. *Dougall*, 1848, 11 D. 181; 21 J. 35.

324. Appeal—House of Lords—Leave—Question as to the Construction of a Statute.—The court having repelled a defence in an action for implement of a contract by a railway company (who alleged that it was illegal under the Companies Clauses Act), and approved of an issue, gave leave to appeal. *Blaikie Bros.* v. *Aberdeen Rly. Co.*, 1851, 1 Stuart 142.

325. Appeal—House of Lords—Leave—Question of Procedure.—The court having found that a trial before a Lord Ordinary,

which was in dependence when the Lord Ordinary was removed to the Inner House, must begin *de novo* before his successor, and that the consent to the Lord Ordinary trying the case without a jury was still operative, a petition for leave to appeal *refused*. *M'Murray* v. *Allan*, 1855, 17 D. 1098; 27 J. 555.

326. **Appeal—House of Lords—Leave—Question as to the Construction of a Statute.**—In an action concluding to have it declared that the defenders had no right of ferry upon a river, and for interdict, leave to appeal against an interlocutor approving of issues was *refused*, although the pursuers maintained that, by Acts of Parliament, the right of ferry had been conferred on them, and that an allegation of forty years' possession by the defenders was irrelevant. *Tay Ferry Trs.* v. *Dougall*, 1851, 14 D. 103; 24 J. 27; 1 Stuart 52.

327. **Appeal—House of Lords—Leave—Question as to Interest and Expenses.**—The principal sum found due by an interlocutory judgment having been paid by the defender, a diet fixed for the taxation of the pursuer's account, and a question as to the amount of the interest due upon the principal sum being in dependence before the Lord Ordinary, a petition by the defender for leave to appeal was *refused*. *Laidlaw* v. *Wotherspoon*, 1844, 16 J. 593.

328. **Appeal—House of Lords—Leave—Question as to Title and Relevancy.**—Circumstances in which leave to appeal against a judgment disposing both of a question of title to sue and of one as to relevancy, *refused*. *Gordon* v. *Davidson, etc.*, 1864, 2 M. 758; 36 J. 437.

329. **Appeal—House of Lords—Leave—Right of Married Woman to Sue with a Curator ad litem.**—Leave *refused* to appeal from an interlocutory judgment finding a married woman, living separately from her husband, entitled to pursue an action of damages along with a curator *ad litem*. *Ewing* v. *Mackenzie*, 1831, 9 S. 289.

330. **Appeal—House of Lords—Leave—Relevancy.**—Leave to appeal *granted* against an interlocutory judgment, finding an action of reparation relevant against a law agent, alleged to have been employed by the party in certain proceedings through which he had suffered loss and damage. *Landell* v. *Purves*, 1842, 4 D. 1543; 14 J. 653.

331. **Appeal—House of Lords—Leave—Relevancy.**—Petition for leave to appeal against a judgment on the relevancy, *refused*. *Barr* v. *Stirling & Dunfermline Rly.*, 1855, 17 D. 681; 27 J. 289.

332. **Appeal—House of Lords—Leave—Right of Way across a Railway.**—In an action of right of way across a railway, defenders pleaded that the pursuers had no title or interest to sue, and that the railway having been constructed as authorised by the statute, the action was excluded. These defences were repelled, and issues were subsequently adjusted. The court, in respect the jury trial might be concluded before Parliament met, *refused* leave to appeal. *East of Fife Rly. Co. & Others* v. *Tulloch & Others*, 1859, 32 J. 2.

333. **Appeal—House of Lords—Leave—Substance of Action Disposed of.**—A unanimous judgment was pronounced, find that an action could not proceed till the pursuer should pay certain expenses—leave was granted to him to appeal against this interlocutor, in respect that, from his inability to pay these expenses, and from the defender's refusal to proceed further with the cause it was in substance finally disposed of. *Walker* v. *Kelty's Trs.*, 1841, 3 D. 967.

334. **Appeal—House of Lords—Leave—Sisting a Mandatory.**—After a decision that a defender could not appear in a process without a mandatory, he petitioned for leave to appeal against that decision; *held* that the petition could not be received without a mandatory, and on one being sisted, leave *refused*. *Sir W. F. Elliot* v. *Fairley*, 1839, 1 D. 1146; 14 Fac. 1164.

335. **Appeal—House of Lords—Leave—Writing on Petition.**—*Observed* that a party who presents a petition for leave to appeal has a right to insist for a written deliverance on his petition. *Graham* v. *Bontine*, 1835, 13 S. 1032.

336. **Appeal—House of Lords—Petition of Appeal — Signature — Disclaimer by Counsel—Procedure.**—Order on an agent to exhibit the authority for putting the name of a counsel to an appeal petition, which was disclaimed by the counsel. *Graham* v. *Graham*, 1831, 5 W. & S. 759.

337. **Appeal—House of Lords—Question as to English Law.**—In an appeal from Scotland the House of Lords will not apply the rules of English law; but, where the question raised in the Scots courts was What is the law of England? then the House of Lords in deciding the case may apply what it knows to be English law. *Stein's Assignees* v. *Gibson-Craig*, 1831, 5 W. & S. 47. Revg. 7 S. 686.

338. **Appeal—House of Lords—Recall of Judgment.**—Circumstances in which the House of Lords recalled a judgment, embodying an agreement of the parties in the cause. *Sir W. Baillie* v. *Edinburgh Oil Gas Co.*, 1836, 2 S. & M'L. 243.

339. **Appeal—House of Lords—Recognisances—Lord Advocate.**—The Lord Advocate, suing on behalf of the crown, or of officers in whom the revenue of the crown is vested, is not bound to enter into recognisances. *Lord Advocate* v. *Lord Dunglas*, 1842, 1 Bell 93.

340. **Appeal—House of Lords—Refusal of House to Deal with Question of Procedure not Raised in Court of Session.**—A railway company raised a summons against a shareholder for calls, to which defences

were lodged, and thereafter a supplementary summons, to which also defences were lodged; and the actions having been conjoined, the record was closed by a minute referring only to the first summons and defences; and after verdict, and in the House of Lords, it was objected that the record was irregularly closed—(1) by the second summons and defences being omitted in the minute; and (2) by the judge having closed it on a separate interlocutor sheet without authenticating by his signature the summons and defences. The House disregarded both objections, and decided on the merits. *Bain* v. *Whitehaven Rly. Co.*, 1850, 7 Bell 79.

341. Appeal—House of Lords—Reference to Charter not Produced in Court of Session.—A charter not produced or founded on in the Court of Session not permitted to be referred to in the House of Lords. *Heriot's Hospital* v. *M'Donald*, 1830, 4 W. & S. 98.

342. Appeal—House of Lords—Rehearing—"Competent and Omitted."—It is incompetent to have an appeal, previously disposed of, reheard, on the ground that an interlocutor in the cause had been omitted to be appealed from; and a plea in law *held* barred, being competent, but omitted. *Scot* v. *Ker*, 1832, 6 W. & S. 214.

343. Appeal — House of Lords — Rehearing.—A party who has had an opportunity of being heard in the House of Lords on points incidentally noticed in his printed case, and on which judgment has been given, without being heard on them (as he alleged), is not entitled to a rehearing. *Sir A. Cathcart* v. *E. of Cassillis*, 1825, 1 W. & S. 239.

344. Appeal—House of Lords—Remit.—When the House of Lords remits a cause to the court below in order to have something done, the power of the court below to do that thing cannot be disputed.

And if the House retains an appeal but remits for additional procedure, it will, on receipt of the report of the remit, resume consideration of the cause and take cognizance both of the matter under the appeal and the proceedings under the remit. *Cairns* v. *Marianski*, 1854, 1 Macq. 766.

345. Appeal—House of Lords—Remit—Procedure after Remit—Action for Reduction of Decree-Arbitral.—After judgment in a reduction of a decree-arbitral, under which titles were made up to an estate, and an appeal was entered and judgment of reversal pronounced, with a remit to proceed in the cause, the court *refused* to allow the pursuer to repeat a supplementary process of reduction of the titles to the estate. *Maule* v. *Maule*, 4 Mar. 1817, F. C.

346. Appeal—House of Lords—Respondents—Persons whom the Court of Session had Refused to Make Parties.—The Court of Session having (by an interlocutor not appealed from) *refused* to make certain persons parties to a depending action, it was found to be incompetent to call them as parties in the House of Lords in an appeal from the final judgment in the action. *Cunningham* v. *Chalmer*, 1740, 1 Pat. 267.

347. Appeal—House of Lords—Sist of Party by Court of Session.—A process having been taken to appeal, the House of Lords allowed a child born after the date of the judgment appealed against to be sisted as a respondent, and remitted the case to the court to appoint a tutor *ad litem* to the pupil. *Hamilton*, 1861, 24 D. 31; 33 J. 16.

348. Appeal—House of Lords—Sist of Party.—A party cannot be sisted as pursuer in the House of Lords in place of another, when there is a personal objection against him, till it be decided by the court whose judgment is under review. *D. of Gordon* v. *Innes*, 1822, 1 Shaw's App. 169. Affg. 1 S. 150.

349. Appeal—House of Lords—Sisting Respondent.—After an appeal had been entered against a judgment reducing an election of magistrates, and the parties (as was alleged) came to an understanding, for political reasons, to allow it to be heard *ex parte*, *held* that it was competent for a burgess, although not a member of council, to be sisted and heard as a respondent, but that a candidate as member of Parliament was not so entitled. *Mags. of Dundee* v. *Lindsay*, 1831, 5 W. & S. 152.

350. Appeal—House of Lords—Time for Appealing—Devise to Obtain new Interlocutor.—After twenty days have elapsed from the date of a final judgment (after which no petition of appeal can be received during that session), the court will not sanction the devise for presenting a bill of suspension so as to get a new interlocutor to appeal from. *Sharp & M'Kenzie* v. *Bickerdike & Co.*, 1810, 15 F. C. 683.

351. Appearance—Whether Defender who had not Entered Appearance Entitled to Appear on all the other Parties Abandoning the Action.—After the record had been closed, and the cause reported upon cases, the pursuer and all who had entered appearance having craved leave to abandon the case, the court *refused* to allow a party who had been called as a defender, but had not appeared, to enter appearance. *Gordon* v. *Gordon*, 1845, 7 D. 357; 17 J. 174.

352. Arbiter—Appointment of, by Court—Power of Lord Ordinary to Recall Appointment where Arbiter under no Legal Disqualification.—The Lord Ordinary on the Bills having, in virtue of the powers contained in s. 27 of the Lands Clauses Consolidation (Scotland) Act, 1845, appointed an oversman in a submission as to the value of land taken by a railway company, is not entitled to recall that appointment, the person named not being legally disqualified. *Mackenzie* v. *Inverness & Ross-shire Rly. Co.*, 1861, 24 D. 251; 34 J. 125.

353. Arrestment—Competency—Furthcoming.—The titles to an heritable property were taken in name of A, and the property was

afterwards sold, and the price received by A, who paid part of it to B, after a creditor of B had arrested in his hands on the assumption that the property truly belonged to B. *Held* competent to try B's right to the price in a furthcoming before the sheriff, at the instance of the arrester, without any declarator of trust against A. *Adamson* v. *Adamson*, 1834, 12 S. 359.

354. Arrestment — Recall — Can Lord Ordinary Recall after Deciding Case?—*Question*, whether the Lord Ordinary can recall arrestments used on the dependence of an action after he has decided the cause, and it is no longer in dependence before him. *Latham* v. *Edinburgh & Glasgow Rly. Co.*, 1866, 4 M. 1084; 38 J. 564.

355. Arrestment—Recall—Inner or Outer House.—*Held* that a petition for recall of arrestments used on the dependence of an action still before a Lord Ordinary, was competently presented to the Inner House. *Hart*, 1864, 3 M. 336; 37 J. 149. Cf. *Latham* v. *Edinburgh* v. *Glasgow Rly. Co.*, No. 354; and *Gardner* v. *Blackwood*, 1866, 1 S. L. R. 136.

356. Arrestments—Recall—Lord Ordinary on Bills in Vacation.—An application to recall arrestments used upon a summons that has not been called or enrolled, may be made to the Lord Ordinary on the Bills, in vacation, under the 20th section of stat. 1 and 2 Vict. c. 114. *Morison* v. *Rennie*, 1847, 10 D. 146; 20 J. 33.

357. Bankruptcy—Expenses—Recall of Sequestration—Competency of thereafter Dealing with Expenses of a Competition for the Trusteeship.—*Crawford* v. *Grace*, 8 Dec. 1821, F. C.; 1 S. 189.

358. Bill Chamber — Note Passed on Caution.—A note *passed* in the Bill Chamber on caution remains in the Bill Chamber until caution is found. *M'Alister* v. *M'Clelland*, 1866, 38 J. 399.

359. Bill Chamber—Report to Inner House—By whom Should the Interlocutor be Signed.—Where a case is reported by a Lord Ordinary from the Bill Chamber, the interlocutor ought to be signed in the Inner House, instead of by the Lord Ordinary, on advising with the court. *Observed*, that an interlocutor by the Inner House remitting to the Lord Ordinary to pass a note of suspension would be an appealable interlocutor. *Tod* v. *N. B. Rly. Co.*, 1846, 8 D. 726; 18 J. 339.

360. Bill of Suspension—Decree.—A bill of suspension of a charge on a decree *in foro* for expenses was presented, on the allegation that in the original action the suspender had averred that he had made advances in money to the charger as a partner, but that as the court had found there was no partnership, he was still entitled to set off these advances against the expenses. The court, both in respect of the decree *in foro*, and that the counter claims were illiquid, and apparently unfounded, *refused* the bill. *Dickson* v. *Dickson*, 1826, 5 S. 43.

361. Bill of Suspension—Forgery.—Bill of suspension of a charge on a regularly tested bond alleged to be forged, *refused*, on comparing the signature with admitted genuine subscriptions, and the case remitted to the Lord Advocate. *Paterson* v. *Eccles*, 1822, 1 S. 550.

362. Bill of Suspension—Forgery—Bar.—A party who presented a bill of suspension of a charge on a bond of caution, and did not plead forgery specifically till a second reclaiming petition, *held* barred from doing so. *Patterson* v. *Sparrow & Co.*, 1821, 1 S. 223.

363. Calumny, Oath of—Non-Consistorial Action—Stat. 1429, c. 125—A. S. 13 Jan. 1692. — *Question*, whether the oath of calumny still exists in law. *Paul* v. *Laing*, 1855, 17 D. 604; 27 J. 251.

364. Caption—Caveat.—The court will not stay the issuing of a process-caption merely upon a *caveat* being lodged, and a statement by counsel at the bar. *Patrick* v. *Gibson-Craig & Co.*, 1854, 26 J. 459.

365. Caption—Practice as to Borrowing Processes.—A law agent borrowed from the clerk part of a process, for which he gave a receipt, and redelivered only part, and paid the fee for scoring the receipt; but the clerk did not score it, nor the agent compare the process with the inventory, and a caption was issued against the agent. *Held* that the conduct both of the agent and the clerk was irregular; that the clerk ought to have scored the receipt, and the agent compared the process with the inventory, and seen the receipt scored. *Dunlop* v. *Hay*, 1822, 2 S. 11.

366. Bond of Caution—Delivery of — Alleged Forgery.—Warrant to deliver up a bond of caution, alleged to be forged, in an advocation, *refused* to be granted, without the concurrence of the Lord Advocate, to a procurator-fiscal who had acted as private agent of the party to whom it was granted. *Hutchison*, 1822, 1 S. 501.

367. Caution — 1 Will. IV. c. 69. — In maritime causes transferred from the Court of Admiralty under 1 Will. IV. c. 69, it is imperative on the court to ordain the pursuer to find caution *de damnis et impensis*, if required, though he have not insisted for caution *judicatum solvi* on the part of the defender. *Leitch* v. *Thomson*, 1834, 12 S. 677; 9 Fac. 259.

368. Caution—Bill Chamber—First Bond Unsatisfactory — Second Bond Presented after Certificate of no Caution Issued.—A bond of caution lodged in the Bill Chamber with the clerk being unsatisfactory, the party was desired to lodge another; but before it could be returned executed, the clerk had issued a certificate of no caution. Remit made to the Lord Ordinary on the Bills to authorise the clerk to receive the second bond. *Martin* v. *Barbour*, 1860, 32 J. 646.

369. Caution—Certificate by Agent as to Sufficiency of Cautioner. — *Held* that a

Principal Clerk of Session, before he receives a bond of caution for a judicial factor under the Pupils' Protection Act, 1849, is entitled to require that the agent in the application shall certify the cautioner to be sufficient. *Tosh* (*Anderson's Factor*), 1869, 6 S. L. R. 675.

370. Caution — Juratory Caution — Reduction.—The pursuer of an action of filiation in the sheriff court was unsuccessful, and was imprisoned on a decree for expenses. In an advocation on juratory caution, the reporters on the *probabilis causa litigandi* reported unfavourably. She raised a reduction of the sheriff's judgment. The court *passed* a note of suspension and liberation on juratory caution. *Rodger* v. *Young*, 1856, 19 D. 139; 29 J. 67.

371. Caution—Landlord and Tenant—Lease—Removing—Act of Sederunt, 1756.—A tenant raised an action of damages, for non-implement of a stipulation regarding improvements, against his landlord's heir, who alleged that, as he was an heir of entail, he did not represent his predecessor. Thereafter the heir raised an action against the tenant in the sheriff court, to compel him to find caution for arrears of rent, and for future rents, failing which to remove. The sheriff ordered the tenant to find caution, whereupon the tenant advocated. *Held* that it was not imperative on the tenant to find caution before the grounds of his defence were examined. *Mackenzie* v. *Sir K. Mackenzie*, 1848, 10 D. 1009; 20 J. 369.

372. Caution—New Cautioner—Suspension—Consent of Parties.—The cautioner in a suspension relieved on a joint minute by the parties in the Outer House, new and satisfactory caution being found. *Galloway* v. *Hood*, 1841, 3 D. 393.

373. Caution—Suspension—Bill of Suspension Passed without Caution.—Bill of suspension *passed* without caution of a charge by an insurance company against a cautioner in a bond in favour of the company, in security of which the company held an assignation to a policy of insurance on the life of the principal debtor granted by themselves and for the payment of the premium, of which it was alleged that the principal debtor blank indorsed a bill to the secretary of the company who kept the bill till after the death of the principal debtor, when the company refused to recognise it as a payment of the premium. *Barker* v. *North British Insurance Co.*, 1828, 6 S. 831. Question *remitted* for jury trial, 1831, 6 W. & S. 323; 12 S. 500.

374. Caution—Suspension—Forged Bill.—Suspension *refused*, except upon caution, of a charge upon a bill to which the suspender said his acceptance had been forged. *Beveridge* v. *Collies*, 1870, 7 S. L. R. 430.

375. Circumduction — Competency of Opening up after Delay.—A reference was made in an inferior court process by a pursuer to the oath of the defender, who was ordered to depone. He failed to do so, and circumduction passed against him. He thereafter led proof on a second defence inconsistent with that referred to his oath, and was subsequently allowed of new to depone. Having suffered circumduction again to pass against him, and decree to be pronounced, he advocated, but did not pray to have the circumduction opened up. *Held* (1) that it was not competent thereafter to open it up; and (2) that it was not relevant to allege, in a question with the pursuer, that his name had been made use of without his knowledge, and that he was not aware of the reference to his oath. *Buchan* v. *Boyd*, 1828, 6 S. 1025.

376. Citation — Admiralty Lease — Edictal Citation.—Edictal citation in an Admiralty case *sustained* in respect of long usage. *Houston* v. *Stirling*, 3 Feb. 1824, F. C.; 2 S. 672. 1825, 1 W. & S. 199.

377. Citation—Appeal to Circuit Court — Is Service of Appeal by Messenger Necessary?—Service of appeal to the circuit court does not imply the *actus legitimus* of an officer, and a probative attestation of the fact by delivery before or a notarial instrument is sufficient; but neither a certificate of the appellant's agent that he delivered the copy, nor the admission of the respondent's agent that he received it, is sufficient. *M'Millan* v. *Campbell*, 1832, 10 S. 220; 7 Fac. 170.

378. Citation—Clerical Error in Name of Party—Responsibility of Officer.—A constable, in executing a citation of a complaint by Alexander Thomson against Alexander Brodie, stated in the copy citation that the defender was called to answer "at the instance of the above-designed Alex. Brodie." The copy of the complaint (to which the copy citation was appended) correctly set forth the complainer's name and designation, and a correct execution of citation of Brodie was returned, who did not appear, and decree *passed* in absence, on which he was incarcerated. *Held*, in the circumstances, that both Thomson and the constable were entitled to be assoilzied from an action of reduction and damages, founded on the irregularity of the citation. *Brodie* v. *Smith*, 1836, 14 S. 983; 11 Fac. 825.

379. Citation — Company — Principal Office in England—Branch Office in Scotland — Individual Partners Resident in Scotland.—Citation *sustained* of a joint stock company for carrying goods between Liverpool and Greenock, whose chief seat was at Liverpool, but who had a branch of their establishment at Glasgow and Greenock, by leaving a copy for the company at the office of their agents in Scotland, and citing personally two of the individual partners resident in Scotland. *Bishop* v. *Mersey & Clyde Co.*, 1830, 8 S. 558; 5 Fac. 441.

380. Citation — Company — Companies Clause Act, 1835.—In a summons against a railway company and the directors *nominatim*, of which the conclusions were directed

against the "said defenders," and the warrant to cite was to summon "the said defenders personally, or at their dwelling-places"; and the company was cited by delivering a copy to the secretary personally within their place of business, *held* that this was a good citation of the company in terms of s. 137 of Companies Clauses Act, 1835. *Stewart* v. *Midland Rly. Co.*, 1852, 14 D. 594; 24 J. 296; 1 Stuart 538.

381. Citation—Company.—*Held* that the Great North of Scotland Railway Company might be validly cited at any station where they carried on business. *Dick* v. *G. N. of Scotland Rly. Co.*, 1860, 33 J. 2.

382. Citation—Company—Warrant to Cite "Personally or at their Dwelling-Places."—In a summons against a railway company and the directors *nominatim*, of which the conclusions were directed against the "said defenders," and the warrant to cite was to summon "the said defenders personally, or at their dwelling-places"; and the company was cited by delivering a copy to the secretary personally, within their place of business—*held* that this was a good citation of the company. *Stewart* v. *Midland Rly. Co.*, 1852, 14 D. 594; 24 J. 296; 1 Stuart 538.

383. Citation—Defender Furth of Scotland—House in Scotland.—A Scotsman who had gone abroad for a temporary purpose, and was absent for more than six months, *held* duly cited at his house in Scotland where his wife and part of his family continued to reside, and of which he designed himself. *Fraser* v. *Reid*, 21 June 1821, F. C.; 1 S. 77.

384. Citation—Diet of Compearance.—*Held* that the introduction of a parenthetical clause in a citation to appear on a certain day "(if a court day, or, if not, on the first court day thereafter)," though not contained in the will of the summons, did not render the citation bad. *Mackintosh* v. *Munro*, 1854, 17 D. 99; 27 J. 23.

385. Citation — Disconformity between Date of Citation and Summons.—An objection that a summons was dated in Jan. 1825, and the execution in Jan. 1824, *disregarded*. *Rankine* v. *Corson*, 1825, 4 S. 127.

386. Citation — Divorce — Desertion. — Procedure when the defender in an action of divorce on the ground of desertion cannot be found. *M'Callum* v. *M'Callum*, 1865, 3 M. 550; 37 J. 262.

387. Citation—Divorce—Defender Resident Abroad.—A domiciled Scotsman, married in England to an Englishwoman, brought an action of divorce against his wife. *Held* that an edictal citation of the wife, who was residing in France, accompanied by actual notice, was good citation. *Warrender* v. *Warrender*, 1835, 2 S. & M'L. 154. Affg. 12 S. 847; 9 Fac. 437.

388. Citation—Divorce.—A husband who had deserted his wife in England, came without her knowledge to this country, and, after being forty days here, raised an action of divorce against her, and gave her no other notice than the usual edictal citation. Both parties were natives of Ireland, and were never in Scotland except for a single day when they were married. *Held* that a decree of divorce obtained in absence was ineffectual. *Blake* v. *Blake*, 6 July 1826, F. C.; 4 S. 795.

389. Citation—Dwelling-House—Sailor.—*Held* that a debtor was well cited under the Bankrupt Act, by leaving a copy of the petition and deliverance thereon "within his said father's dwelling-house in Newburgh, with whom he lives and resides when not at sea." *Brown* v. *M'Callum*, 1845, 7 D. 423; 17 J. 217.

390. Citation — Dwelling-House. — A citation left at the dwelling-house of a party more than forty days after he had left it, but less than forty days after the expiration of his lease, and another left for him at his actual residence, and which he received, *sustained*. *Scott* v. *Carnegie*, 1826, 4 S. 667.

391. Citation — Edictal Citation. — A citation against a party, as furth of Scotland, is inept, if made at the office of the keeper of the records of the Court of Session, as it should be made at the office of the keeper of edictal citations. *Stevenson* v. *Dunlop*, 1840, 2 D. 1366; 15 Fac. 1471.

392. Citation—Edictal—Abandonment of Scots Dwelling-House.—A debtor left his Scots domicile on 10th March for London, and while there wrote to a creditor in Scotland that he intended to sell all his property there, and that he was on the eve of going abroad. In the beginning of June, advertisements appeared in the newspapers of a sale of his effects at his Scots domicile, "in consequence of the family having gone abroad"; and he went to the Continent on 10th June. Two female servants had been left in charge of the house, and of part of the furniture, which remained unsold. *Held* that an edictal citation on 15th June, as furth of the kingdom, was effectual, and that a citation at the dwelling-house on 11th July was ineffectual. *Observed* that, for the purpose of citation, it is not necessary to acquire a new domicile in order to lose the old one. *Brown* v. *Blaikie*, 1849, 11 D. 474; 21 J. 135.

393. Citation — Edictal — Citation of Father as Administrator-in-Law to his Son.—A father, as administrator-in-law to his son, may be cited edictally like tutors and curators. *Buchanan* v. *Gray*, 20 Jan. 1801, 12 F. C. App. No. 12; M. "Adjudication" App. No. 12.

394. Citation—Edictal—Divorce—Desertion.—*Held* that an action of divorce, on the ground of desertion, may competently proceed on edictal citation. *Smith* v. *Smith*, 1854, 16 D. 544; 26 J. 242.

395. Citation — Edictal — Englishman Resident in Scotland. — Circumstances in which it was *held* that although an Englishman had resided more than four months in

Scotland prior to the execution of a summons against him as furth of Scotland, he could not object to this as irregular. *Sandback & Co.* v. *Caldwell*, 1825, 4 S. 171. See *Robertson* v. *M'Culloch*, 1836, 14 S. 950 ; 4 S. 170.

396. Citation — Edictal — Induciæ — Motion to Shorten.—In a petition for the appointment of a judicial factor with special powers, in room of a deceased judicial factor, to whom the same powers had been granted, motion to shorten the usual *induciæ* of service on a beneficiary who was abroad, *refused*. *Stodart*, 1854, 16 D. 883 ; 26 J. 449.

397. Citation — Edictal — No Warrant Therefor.—A petition for recall of inhibition set forth that the respondent resided at Stranraer, and the court accordingly ordered it to be served upon him personally. It was afterwards discovered that he had removed to America, and the petition was served edictally. The court *held* that this service was inept, there being no authority for it in the interlocutor, and of new ordered the petition to be served edictally. *Miller*, 1853, 16 D. 109.

398. Citation — Entail Petition — Next Heirs, Service on—Deed of Consent Dispensing with Service.—In a petition for uplifting the price of entailed lands, and declaring it to belong in fee-simple to the petitioner, *held* that it was a sufficient compliance with an order for intimation and service on the three next heirs, one of whom was abroad, that a deed of consent bore that they dispensed with further intimation of the petition, and had subscribed a copy in reference thereto, which deed of consent was produced, and a copy of the petition docqueted and signed as relative to it. *Graham*, 1858, 20 D. 436 ; 30 J. 208.

399. Citation — Execution — Error — Amendment.—Clerical error in messenger's execution of a citation *allowed* to be amended. *Brown, Petitioner*, 1870, 7 S. L. R. 643.

400. Citation—Execution—Error—Companies.—Objection stated to the execution of a summons of *cessio*, that it bore companies to have been cited by leaving service copies with their wives. *Ainslie*, 1831, 9 S. 901.

401. Citation—Execution—Date Thereof Prior to Date of Summons. — Action *dismissed*, in respect the execution of citation was dated prior to the summons, although not pleaded by the party, who objected to the citation on a separate ground. *Hamilton* v. *Murray & Co.*, 1830, 9 S. 143.

402. Citation—Execution—Designation of Defenders — Date of Summons. — An objection to an execution written on a sheet of paper originally stitched to and forming part of the summons, that it did not set forth the designation of the defenders or the date of the summons, *repelled*. *Watt* v. *M'Intosh*, 1827, 5 S. 334. But see *Stewart* v. *M'Ra*, 1831, 9 S. 261 ; 6 Fac. 173. *Creightons* v. *Deans*, 1832, 11 S. 30. *Collier* v. *Paterson*, 1834, 12 S. 674 ; 9 Fac. 354. *Clason* v. *Campbell*, 1837, 16 S. 289 ; 15 Fac. 265.

403. Citation—Execution—Designation of Parties—Firm.—In a summons the pursuers were described as the Globe Insurance Co., and certain partners of that company, and also as trustees for that company. *Held* not necessary, in the execution of citation, which was separate from the summons, to state that these persons were trustees of the company. *Globe Insurance Co.* v. *Tytler*, 1842, 5 D. 294 ; 15 J. 113.

404. Citation—Execution—Finality of. —*Question*, whether a proof that a party was not personally cited could competently be adduced, without first producing the execution, and also the messenger and witnesses, if alive. *Kay* v. *Rodger*, 1832, 10 S. 831.

405. Citation — Execution — Form of Court of Session Act, 1850, Schedule B.—The provisions of the 20th section of the Court of Session Act, 13 and 14 Vict. c. 36, made no alteration in the formalities appropriate to the various modes of executing summonses, nor in the requisites of the messenger's execution now appended to the summons, so far as regards specification, in describing the mode of execution ; and therefore an execution *held* bad, and liable to challenge *ope exceptionis*, which bore that the summons was "executed by me" as "against A. B., defender, personally, before C. D.," etc., but did not set forth that a copy had been delivered. *Stewart* v. *Macdonald*, 1860, 22 D. 1514 ; 32 J. 701.

406. Citation—Execution of Service—Terms of.—The messenger's execution of a petition bore that he had "passed, and in Her Majesty's name and authority," etc., whereas the fact was that his warrant was only an order or interlocutor of court. The court commented on the irregularity, but *allowed* the execution to stand, on the ground that the real warrant was properly set forth, and that it was more or less true that the messenger did "pass in Her Majesty's name and authority," as he was a messenger-at-arms, and acted under the authority of the court to which that of Her Majesty was delegated. *M'Intosh, Petitioner*, 1870, 8 S. L. R. 50.

407. Citation — Execution — Names of Witnesses.—Bill of suspension *passed simpliciter* of a charge on a decree in absence proceeding on a summons, the execution of citation of which was neither subscribed by witnesses, nor did it express who they were. *Henderson* v. *Thomson*, 1828, 7 S. 51.

408. Citation — Execution — Objection Thereto — Personal Bar. — A party barred from objecting to the regularity of a citation, by having written to the messenger, acknowledging that he had duly received it. *Fraser* v. *Reid*, 1826, 4 S. 773.

409. Citation — Execution—Objection—Amendment — New Execution. — A new execution by a messenger received, *de recenti*, in correction of a former erroneous one. *Cullen's Trs.* v. *Watson*, 1825, 4 S. 133. See also *Jack* v. *Pearson*, 1824, 2 S. 691 ; 1 W. & S. 577. *May* v. *Malcolm*, 1825, 4 S. 76 ; 21 F. C. 838.

Stewart v. *M'Ra*, 1831, 9 S. 361; 6 Fac. 713. *Hamilton* v. *Monkland, Iron, & Steel Co.*, 1863, 1 M. 672; 35 J. 387.

410. Citation—Execution—Service on a Servant.—An execution of citation, under a summons, bearing that the messenger, not having personally found the defender, left a copy for him in the hands of a woman within his dwelling-house, *sustained*, although it did not specify her to be either the wife, daughter, or servant of the defender, it being held that *quoad hoc* she was his servant. *A.* v. *B.* (*Lord Kintore* v. *Low's Trs.*), 1834, 12 S. 347; 9 Fac. 209.

411. Citation — Execution — Timeous Objection Thereto.—It is incompetent, in a suspension of a decree *in foro* of an inferior court, to object for the first time, that the execution of citation was not signed by witnesses. *Limond* v. *Reid*, 1821, 1 S. 232.

412. Citation—Heritors—Magistrates of a Burgh.—In a presbyterial process for providing a manse in a parish partly landward and partly burghal, an edictal citation of "all heritors, feuars, and others liable in the expense of a manse and offices," is a sufficient citation of the magistrates of a burgh, as being heritors in the sense of the stat. 1663, c. 21. *Mags. of Elgin* v. *Hay*, 1841, 4 D. 25; 14 J. 7.

413. Citation—Intimation—Explanatory Letter.—When petitions are ordered to be intimated to persons furth of Scotland, *observed*, that it ought not to be considered sufficient intimation merely to send copies through the post office unaccompanied by any letter of explanation. *A. B.*, 1858, 20 D. 788, note; 30 J. 427.

414. Citation — Intimation — Tutorial Inventories, Petition for—Intimation to Next-of-Kin.—Personal intimation ordered to be made to the pupil's next-of-kin furth of the kingdom, in an application to dispense with their concurrence or citation in an action for making up tutorial inventories. *Thomson & Others*, 1855, 18 D. 193; 28 J. 77.

415. Citation — Induciæ — Arrest as in meditatione fugæ.—A citation of a foreigner, who, on being arrested as *in meditatione fugæ*, fixes a domicile within Scotland, does not require the long *induciæ*. *Horne* v. *Smith*, 18 Nov. 1823, F. C.; 2 S. 500.

416. Citation — Induciæ — Orkney and Shetland.—The *induciæ* of summonses of forty days against inhabitants of Orkney and Shetland, by the Act, 1685, c. 43, is not taken away by the Act 50 Geo. III. c. 112, s. 27. *Hume & Co.* v. *Fleet*, 9 July 1811, F. C.

417. Citation—Induciæ—Defender furth of Scotland.—An objection that the defender had left Scotland *animo remanendi*, and that the citation was executed at his dwelling-house on the short *induciæ*, and so that there was no process, *repelled*. *Mags. of Inverbervie*, 16 Feb. 1804, F. C.; M. 12097.

418. Citation — Induciæ — Foreigner — Personal Service in Scotland—Jurisdiction Founded by Arrestment.—*Held* that personal citation of a foreigner in Scotland, where he happened to be, and against whom jurisdiction had been previously established by arrestment *jurisdictionis fundandæ causa*, proceeds competently on *induciæ* of fourteen days. *Dickson & Co.* v. *Wilkin, etc.*, 1859, 31 J. 595.

419. Citation — Lunatic — Service on—Presence of Sheriff.—Where a petition for appointment of a *curator bonis* to a lunatic is served on the lunatic, the sheriff or his substitute ought to be present. *Scott*, 1855, 17 D. 362; 27 J. 151.

420. Citation—Multiplepoinding—Name of real Raiser in Service Copy.—In serving a copy of the summons upon the nominal raiser of a multiplepoinding, it is not necessary to set forth the name of the real raiser. *Miller* v. *Ure*, 1838, 16 S. 1204; 13 Fac. 818.

421. Citation — Note of Suspension — 1 and 2 Vict. c. 86, s. 6.—The direction in the Act 1 and 2 Vict. c. 86, s. 6, as to the mode of service of notes of suspension, is imperative; and it is requisite that a copy, both of the note and of the interlocutor ordering service, be served upon the respondents. *Anderson* v. *Drysdale*, 1862, 1 M. 46; 35 J. 33.

422. Citation—Nuisance Removal (Scotland) Act, 1856.—*Question* as to due service of an appeal under Nuisance Removal (Scotland) Act. *Macdougall* v. *D. of Argyll*, 1864, 3 M. 248; 37 S. 118.

423. Citation—Petition for Protection by Wife under the Conjugal Rights Act, 1861—Citation of Husband—Intimation.—On a petition by a wife for protection of her property under the Conjugal Rights Amendment Act, 1861, intimation on the walls and minute book is ordered. When the husband is abroad, edictal citation proceeds on *induciæ* of twenty-one days. When he is resident in Scotland, fourteen days' warning is required. *Walker*, 1862, 24 D. 300; 34 J. 714.

424. Citation—Petition for Removal of Absent Trustees — Intimation to their Agents.—Absent trustees removed at the instance of co-trustees after intimation through post-office and to last known agents. *Walker*, 1868, 6 M. 973.

425. Citation—Partnership — Individual Partners.—*Held* by all the judges, that a mercantile company carrying on business under a firm by which they grant obligations, may be cited under the name of the firm, without the name of any individual partner; and *question*, whether this rule applies to a mere descriptive firm, where the business is carried on by officers. *Forsyth* v. *Hare & Co.*, 1834, 13 S. 42; 10 Fac. 35.

426. Citation—Pupil—Administrator-in-Law—Edictal.—A father, as administrator-in-law to his son, may be cited edictally like tutors and curators. *Buchanan* v. *Grey*, 1801, 12 F. C. App. No. 12; M. "Adjudication" App. No. 12.

427. Citation — Service Copy — Action against Several Defenders — Names of Defenders other than Party Served Omitted.—In a summons against six defenders, as allottees of a projected railway, for payment of deposit money, or a proportional share each of a sum to pay expenses of surveys, and a copy served on one of the defenders, who was the last named in the summons, did not specify the names of the other defenders, and his name appeared as if it were the first in the summons — *held* that the citation was irregular. *Allardyce* v. *Blakey*, 1847, 9 D. 314; 19 J. 149.

428. Citation—Service on Agent—Dispensing with Citation. — Service on the known agent of a party even in an incidental application is not good service unless the agent expressly dispense with the citation of his client. *Cullen* v. *Campbell*, 1829, 8 S. 197.

429. Citation—Service Copy—Names of Witnesses. — *Question*, whether the service copy of a summons must contain the names of the witnesses present at the execution. *Connell, Wright, & Co.* v. *Sir W. C. Fairlie*, 1824, 2 S. 664. *Beattie* v. *Lee*, 1828, 2 S. 220.

430. Citation—Service Copy—Signature of by Messenger.—Where the copy citation attached to the service copy of the summons is signed by the messenger executor, it is not necessary that the copy of the summons be also signed. *Izatt* v. *Robertson*, 1840, 2 D. 476; 15 Fac. 522.

431. Citation—Service Copy—Signature of—Citation Attached to Service Copies —Signature of Citation.—A messenger, in executing a summons, having attached his citations to the service copies of the summons by wafers, and signed across the junction of the papers, the defenders, in their original defences, rested a plea of "no process," upon the ground that the citations were not written upon the service copies of the summons, and that the service copies were not signed or authenticated by the messenger, although each citation referred to the summons as one "whereof the above, and twelve preceding pages, contain a full double." *Held* that these objections were not well founded. *Hamilton* v. *Monkland Iron & Steel Co.*, 1863, 1 M. 672; 35 J. 387.

432. Citation — Sufficiency — Breach of Interdict.—In a petition and complaint for breach of interdict, citation was made upon the respondent by leaving a copy at his dwelling-place in Edinburgh, the address of which had been furnished by his known agent. The respondent was also cited edictally, and a copy of the petition and complaint was sent to his known agent, who stated that the respondent had gone to London, and that the copy had been forwarded to his last known address there. *Opinions* by the majority of the court that the citation was sufficient. *D. of Atholl* v. *Robertson*, 1872, 10 M. 298; 44 J. 136.

433. Citation—Suspension and Interdict —Service of Interlocutor Granting Interim Interdict—Service of Member of a Presbytery.—An objection that a copy of a bill of suspension and interdict was not served, but only a copy of the interlocutor granting interim interdict, *repelled*; and the knowledge of the party of the nature of the interdict being proved, *held* that he was answerable for a breach of the interdict. *Clark* v. *Stirling*, 1839, 1 D. 955; 14 Fac. 1049.

434. Citation—Two Defenders—Service on One only — Allegation that they were Partners. — In an action against "J. and W. W.," citation was executed by leaving a copy of the summons with J., who entered appearance for himself and W., but without any evidence of authority from W.; and J. died, whereupon decree was taken against W. individually. Decree suspended, in respect of the irregular citation; and *held* that it was not capable of being supported by proof that J. and W. were copartners. *Wordie* v. *Macdonald*, 1831, 10 S. 142; 7 Fac. 114.

435. Citation—Warrant to Serve—Duration.—On 7th March 1840 a party presented a petition to the court, under A. S. 6th Feb. 1806, to have his accounts as agent in a sequestration audited, and to have the trustee and creditors found liable in payment. Warrant of service was granted on 10th March 1840, but the petition was not served on the respondents till February 1842. The petition *dismissed*, as the warrant of service had fallen. *Allan* v. *Commercial Bank*, 1842, 4 D. 842.

436. Citation — Witness — Age. — A citation held good, though one of the subscribing witnesses was under fourteen years of age. *D. of Queensberry* v. *Barker*, 7 July 1810, F. C.

437. Commencement of Action—Court of Session Act, 1850—Court of Session Act, 1868.—*Held* that an action is in dependence whenever the summons is executed, and that accordingly an action called on 12th May 1868 was to be ruled by the old procedure. *Herriot* v. *Jenkinson*, 1868, 6 S. L. R. 27.

438. "Competent and Omitted"—Stamp Acts.—An objection to a bill and protest on the stamp laws is liable to the plea of competent and omitted. *Barbour* v. *Grierson*, 1828, 6 S. 860; 3 Fac. 920. *Napier* v. *Carson*, 1828, 6 S. 500.

439. Complaint—Competency—Circulating Summons Containing Slander against Defenders.—Complaint *sustained* for circulating a summons alleged to contain slanderous statements against the defenders. *Gilfillan* v. *Ure*, 1824, 3 S. 21.

440. Conjunction — Action against Superior for Damages Caused by Sewage from his Feus—Action by him against Feuars Responsible therefor.—Motion for conjunction of an action against a superior for a nuisance caused by sewage from his feus, with an action brought by him against parties whom he alleged to be responsible therefor, *refused*. *Mackay* v. *Greenhill*, 1858, 20 D. 1251; 30 J. 746.

441. Conjunction—Two Actions by a Company against Two Joint Shareholders for Calls—New Averments and New Pleas in Law in Second Action.—Two actions having been raised by a company against two joint shareholders for payment of calls upon the shares held by them, the defenders stated in the second action several new pleas, and made large additions to their allegations in point of fact. Motion for conjunction by the defenders *refused*. *National Exch. Co.* v. *Drew*, 1861, 23 D. 1278; 33 J. 641.

442. Consent to Judgment—Competency of Withdrawing before Interlocutor Signed.—It is incompetent to withdraw consent to a judgment being pronounced, after the court has stated what the terms of the judgment are to be, though the interlocutor has not been signed. *Young* v. *Gillespie*, 1861, 24 D. 30; 34 J. 16.

443. Consignation—Action by Executor-Nominate against Relative of Deceased for Repayment of a Loan—Defence that the Will had been Executed in Favour of the Pursuer ob turpem causam and was Void.—Circumstances in which, in an action by an executrix-nominate against a relative of the deceased for payment of sums of money lent to him by the deceased, and the loan of which to a certain extent was admitted by the defender, who pleaded, however, that the will had been executed in favour of the pursuer *ob turpem causam*, and was void, *held* that the pursuer, although not in a position to crave interim decree for the sum admitted to have been borrowed from the deceased, was entitled to an order upon the defender to consign that sum. *Rolfe* v. *Drummond*, 1862, 1 M. 39; 35 J. 36.

444. Consignation—Discretion of Court.—Circumstances in which the House of Lords, holding that the court had not exercised a sound discretion in ordering money to be consigned, reversed the order. *Donaldson* v. *Finlay, Bannatyne, & Co.*, 1846, 5 Bell 105.

445. Consignation—Money Consigned in Terms of an Arrangement—Right of Consigner to Obtain Payment in Terms thereof—Non-Arrestability.—Money consigned in the hands of the Clerk of Court in pursuance of a negotiation, and on the faith of a certain arrangement being carried out, *held* not to be subject to arrestment by the other party who had withdrawn from the arrangement. *Campbell* v. *Lothians & Finlay*, 1858, 21 D. 63; 31 J. 48. A motion for an order upon the defender in an action of count and reckoning, to consign a sum, over which he claimed a right of retention, *refused* (without deciding upon that right) on the ground that the sum was arrested on the dependence in bank, where it had been lodged by the defender in his own name. *Scott* v. *Douglas*, 1845, 7 D. 493; 17 J. 243. Cf. *Cowan* v. *Liquidators of Western Bank*, 1860, 22 D. 1260; 32 J. 564.

446. Consignation—Payment.—Where an executor sued for payment by the defender of sums lent to him by the deceased and the defender admitted that a sum was due, the court *ordered* that sum to be consigned by the defender in bank. *Rolfe* v. *Drummond*, 1862, 1 M. 39; 35 J. 36.

447. Consignation—Payment—Sum Consigned for Loosing of Arrestments—Decree in Action not Extracted—Appeal.—Application for warrant to uplift a sum of money, consigned in bank on the loosing of arrestments used on the dependence of an action, *refused* in respect the decree in the action had not been extracted. *M. of Breadalbane's Trs.* v. *Campbell*, 1866, 2 S. L. R. 87.

448. Constitution—Action of—Defenders—Heir or Executor.—An action of constitution of a debt due by a party deceased may proceed against his heir, without calling his executors. *British Linen Co.* v. *Lord Reay*, 1850, 12 D. 949; 22 J. 416.

449. Constitution cognitionis causa tantum—Defenders—Next-of-Kin—Executor.—*Held* that, in an action of constitution *cognitionis causa tantum*, it was sufficient to call the next-of-kin of the deceased debtor; and an objection to diligence on a decree in such an action, that the executors-nominate had not been called, *repelled*. *Smith's Trs.* v. *Grant, etc.*, 1862, 24 D. 1142; 34 J. 571.

450. Contingency — Advocation — Bill Chamber — Finality. — An interlocutor of the Lord Ordinary in the Bill Chamber passing a note of advocation *ob contingentiam* is not final on the question of contingency. *Dalmellington Iron Co.* v. *Macdonald*, 1856, 18 D. 851; 28 J. 387.

451. Contingency—Advocation—Process Depending before Lord Ordinary. — An advocation reported to the Inner House in terms of the latter statute, on the motion of the advocator, *remitted ob contingentiam* to a process depending before a Lord Ordinary, notwithstanding the opposition of the respondent—the court holding that they had no discretion. *M'Douall* v. *Caird*, 1868, 6 M. 222; 40 J. 136.

452. Contingency—Conjunction—River Pollution — Actions of Declarator and Interdict. — Circumstances in which two actions of declarator and interdict, raised by riparian proprietors for the purpose of putting a stop to the pollution of a river by paper-mills occupied by the defenders, were conjoined with a similar action raised several years before against other defenders. *D. of Buccleuch, etc.* v. *Cowan, etc.*, 1866, 4 M. 475; 38 J. 217.

453. Contingency—Cross Actions Regarding same Trust-Estate. — An action of count and reckoning was raised in 1857 by the daughters of a deceased testator against the trustees under their father's settlement, and also against their brother, to have the amount of the trust-estate fixed, and was marked to the Second Division. Thereafter, in 1872, the brother and the trustees respec-

tively raised actions against each other with respect to the trust-estate, in which the daughters were called; these actions were marked to the First Division. *Held* that the later actions fell to be remitted *ob contingentiam* to the Second Division. *Reid's Trs.* v. *Reid, etc.*, 1873, 45 J. 191.

454. Contingency — Own Actions of Divorce. — A husband raised an action of divorce, on the ground of adultery, against his wife and a co-defender. The wife thereafter raised an action of divorce, on the ground of adultery, against her husband. The last case was called and enrolled before a different Lord Ordinary from the first. The court *remitted* the second action to the Lord Ordinary before whom the first was depending, on the ground of contingency. *Powrie* v. *Powrie*, 1868, 6 M. 1111; 40 J. 624.

455. Contingency — Declarator that an Arbiter was Disqualified — Interdict against his Acting. — A party raised an action of declarator before the First Division, to have it found that an arbiter was disqualified from acting in a submission; and pending it, presented to the Second Division a note of suspension and interdict against the arbiter acting in the meantime, but it was refused. *Held* that a remit thereafter of the declarator to the Second Division was not competent. *Drew* v. *Drew*, 1851, 14 D. 212; 24 J. 97; 1 Stuart 184.

456. Contingency — Which Division Decides as to Contingency.—*Held* that the question of the existence of contingency was for the Division to which the motion was made to remit the cause to the other Division. *Blaikie* v. *Aberdeen Rly. Co.*, 1854, 16 D. 496; 26 J. 238.

457. Contingency—Interim Decree for Expenses in Case Appealed to House of Lords.—After an action had been decided in the Second Division, and an appeal was entered, interim execution was granted, in name of the agents, for expenses against the losing party, who presented a note of suspension to the First Division, by whom it was remitted *ob contingentiam* to the Second. *Held* by the House of Lords that the remit was competent. *Clelland* v. *Clason & Clarke*, 1850, 7 Bell 153; 22 J. 607.

458. Contingency — Petition to have Turnpike-Gate Restored and Declarator that Illegal to Levy Toll.—*Held* that there was no such contingency between a petition to have the respondent ordained to restore a turnpike-gate which had been thrown down and an action brought by the respondent against the petitioner for declarator that it was illegal to levy toll, as to make it the duty of the Division in which the petition depended to remit the cause to the other Division, where the declarator was pending. *D. of Athole* v. *Robertson*, 1869, 8 M. 304; 42 J. 138.

459. Contingency—Priority of Process—Cases Called before Different Lord Ordinaries on same Day.—If two processes, having a contingency, appear in the rolls of different Ordinaries on the same day, the cause enrolled before the junior Lord Ordinary will be remitted to the senior judge; and this rule applied in reference to an advocation which the respondent, under s. 33 of 13 and 14 Vict. c. 36, had marked for the junior judge. *Laing* v. *Park & Primrose*, 1853, 15 D. 663; 25 J. 403; 2 Stuart 361.

460. Contingency — Remit. — *Held* that the direction to remit only applied when of two causes relating to the same subject-matter the first was in dependence at the time of the institution of the second. *Forster* v. *Grigor or Forster*, 1871, 9 M. 397; 43 J. 204.

461. Contingency — Remit — Action of Sequestration for Rent in Sheriff Court—Action of Damages for Wrongous Use thereof in Court of Session.—A landlord having used a sequestration against his tenant, which the latter contended was unwarranted in the circumstances, and on account of which he raised an action of damages in the supreme court, *held* that there was no such contingency between the process of sequestration and action of damages as to entitle the landlord to have the former advocated *ob contingentiam* of the latter. *E. of Mansfield* v. *Aitchison*, 1829, 8 S. 243.

462. Contingency — Remit — Action by Shareholders and Liquidators against Bank Directors.—*Held* that there is statutory contingency between an action by the liquidators of a bank against the directors and manager, concluding for loss and damage through their neglect of duty, and certain actions against some of the defenders at the instance of individual shareholders of the bank, concluding (1) for relief from the consequences of purchases of shares said to have been entered into through fraudulent misrepresentation; and (2) for damages sustained by the said individuals through the said purchases, and in consequence of the same course of mismanagement and malversation. *Liquidators of Western Bank* v. *Douglas, etc.*, 1860, 22 D. 447; 32 J. 212.

463. Contingency — Remit — Division. — Where one Lord Ordinary remits an action to another *ob contingentiam* of a previously depending process, the second action belongs to the same Division as the first, although they have originally been marked for different Divisions, and the first reclaiming note lodged be against an interlocutor pronounced in the second action. *Buchanan* v. *Cullen*, 1861, 23 D. 606; 33 J. 293.

464. Contingency — Remit — Note of Suspension and Interdict—Interim Interdict Granted—Case Marked to Second Division—Petition and Complaint for Breach of Interdict Presented to First Division. — A note of suspension and interdict having been passed, and interim interdict granted in the Bill Chamber, the note was called as a Second Division cause. While the record was in

course of adjustment in the Outer House, a petition and complaint for breach of the interim interdict was presented to the First Division, which allowed a proof. During the dependence of the complaint in the First Division, the suspension was reported on issues to the Second Division, and was again remitted to the Lord Ordinary. A question having been thereafter raised in the First Division from the Bench, whether the provisions of the Act 48 Geo. III. c. 151, s. 9, did not render a remit *ob contingentiam* to the Second Division imperative, *held* that a remit was not imperative. *M'Neill* v. *Scott*, 1866, 4 M. 608; 38 J. 316.

465. Contingency—Remit—Petition for Warrant to Record an Instrument of Disentail—Declarator that Entail Invalid.—In a petition for warrant to record an instrument of disentail, which was opposed by the trustee on the sequestrated estate of the preceding heir, who maintained that the entail was invalid, and that the estate was vested in him, and was pursuer of an action of declarator to that effect in the other Division, a motion to have the case remitted to that Division, in terms of the 48 Geo. III. c. 151, s. 9, *refused*. *Glassford* v. *Borthwick*, 1862, 24 D. 1136; 34 J. 566.

466. Contingency — Remit — Priority of Process—Court of Session Act, 1808, s. 9—Court of Session Act, 1868—A. S. 14 Oct. 1868.—*Held* (by the whole court) that a process is brought before a Lord Ordinary when it is called, and that in a remit *ob contingentiam* under the Court of Session Act, 1808, the case first called, although no interlocutor has been pronounced, must be regarded as the leading cause. *British Linen Co.* v. *Stewart & Davidson*, 1871, 9 S. L. R. 101.

467. Contingency — Remit — Whether Prior Action still in Dependence—Court of Session Act, 1808, s. 9.—*Held* that the provision in 48 Geo. III. c. 151, s. 9, is imperative; and that of two processes of suspension, the latter, which had been brought to an end, excepting as to the expenses, by minute of abandonment, fell to be remitted *ob contingentiam* to the Lord Ordinary, before whom the first process depended, although in it decree disposing of the merits had been pronounced; but this was still unextracted, and a reference to oath had been lodged. *Bryce* v. *Chalmers*, 1859, 22 D. 213; 32 J. 84.

468. Contingency — Right of Way — Different Pursuers and Defenders.—Circumstances in which, where there were two actions of declarator of a right of way raised by two different sets of pursuers against different defenders, the first being before the Second Division, and the second before the First, the latter court *remitted* the second action to the Second Division *ob contingentiam* with the first, as both actions might be found to be identical. *Cuthbertson* v. *Young*, 1851, 13 D. 1308; 23 J. 587, 627.

469. Contingency — Sequestration for Rent—Damages for Wrongous Sequestration.—Where an advocation of a sequestration against a tenant as to expenses was in dependence before one Lord Ordinary, and the tenant raised an action of damages for wrongous sequestration, which he enrolled before another Lord Ordinary, *held* that there was contingency between them, and the latter *remitted* to the Lord Ordinary before whom the advocation was pending. *Cochrane* v. *Hamilton*, 1847, 9 D. 794; 19 J. 321.

470. Contingency—Suspension and Interdict—Damages for Wrongous Use Thereof.—There is no such contingency between an action against the cautioner in a suspension and interdict finally refused, concluding for the damage which the pursuer had suffered by wrongous interdicting, and the suspension, as to require that the action should be carried to the Division of the court which had decided the suspension. *Buchanan* v. *Douglas*, 1851, 13 D. 547; 23 J. 244.

471. Counsel — Absence of Counsel — Instruction of Counsel on the Spot.—Reclaiming note *refused* in respect of no appearance for reclaimer, whose counsel was alone in the case, it being no excuse that he was engaged in a proof before a Lord Ordinary in a case in which he was also the sole counsel. The court *refused* to hear a counsel instructed on the spot, observing that that was not professional instruction. *Cheyne* v. *Gray*, 1870, 8 S. L. R. 142.

472. Counsel—Necessity of Signature to Pleadings.—No pleading can be received not signed by counsel. *Faculty of Advocates* v. *Rae*, 1832, 4 J. 488.

473. Counsel — Necessity of Counsel's Signature to a Petition.—The court will not receive answers to a petition signed by the party, unless signed also by counsel. *Denny* v. *M'Nish*, 1863, 1 M. 268; 35 J. 183. Cf. *Rennie* v. *Murray*, 1856, 13 D. 36. *Davidson* v. *Paul*, 1849, 11 D. 703; 21 J. 234.

474. Counsel—Signature of Papers by.—Revised defences, not signed by counsel, but by the defender himself, cannot be received. *Jaffray* v. *Jaffray*, 1863, 2 M. 355; 36 J. 170. *Watt* v. *Johnston*, 1863, 1 M. 269.

475. Counsel — Fees — Recovery — Petition and Complaint.—*Bell* v. *Jameson*, 1848, 10 D. 1413; 20 J. 514. *Keay* v. *A. B.*, 1837, 9 J. 353; 15 S. 748 (note).

476. Curator bonis—Advocation.—In an action in the sheriff court against a party whose property was vested in trustees, the latter alleged that their ward could not appear, being of weak intellect, and proponed defences. The sheriff sustained an objection to their title to appear, and decerned against the defender in absence. *Held* that the objection to the trustees' title to appear was cured by the appearance, in an advocation, of a *curator bonis* to the defender. *Lindsay* v. *Watson*, 1843, 5 D. 1194; 15 J. 493.

477. Curator bonis — Interim Curator bonis — Refusal to Appoint Curator ad

litem.—Where a person, who was of imbecile mind, presented a petition for the removal of her *curator bonis*, the court *refused* to appoint a curator *ad litem*, intimating that the proper course was to present a petition for the appointment of an interim *curator bonis* for the purpose of insisting in the application. *Mackenzie*, 1845, 7 D. 283; 17 J. 144.

478. Curator bonis—Petition for—Procedure.—When the appointment of a *curator bonis* to minors or a factor *loco tutoris* to pupils is craved, the court appoints a curator *ad litem* to report as to the facts stated in the petition, and specially as to the amount of the estate, and fitness of the proposed curator or factor for the office. *Carter & Others*, 1857, 19 D. 286; 29 J. 141.

479. Curator bonis — Appointment — Petition at the Instance of a Husband and Wife—Death of Husband after Petition Boxed—Amendment.—A petition for the appointment of a *curator bonis* was presented by a husband and wife. After the petition was boxed, but before it appeared in the roll, the husband died. The court *allowed* the petition to be amended when it appeared in the single bills. *Shanklie*, 1854, 16 D. 898.

480. Curator ad litem.—In an advocation of a sheriff court judgment in an action of adherence in which the sheriff decided against the wife, she pleaded that the whole proceedings were null in respect no curator *ad litem* had been appointed to her. The court appointed a curator, advocated the cause, opened up the record and proof, and allowed the curator to report whether on consideration of the record and proof he desired to make any additions thereto. *Richmond* v. *Richmond*, 1853, 25 J. 257; 2 Stuart 244. See *A B* v. *C D*, 1855, 15 D. 431.

481. Curator ad litem—Father having Adverse Interest—Special Case.—On the motion of counsel for two pupils, parties to a special case, the court *appointed* a curator *ad litem* to them, the father of the pupils having an adverse interest. *Reid* v. *Reid*, 1871, 9 S. L. R. 156.

482. Curator ad litem—Incompetency of Appointing until Action Raised.—A petition in name of a minor and an infant to have a curator *ad litem* appointed in an action about to be raised, *refused*. *Youngs*, 1828, 7 S. 220; 4 Fac. 262.

483. Curator ad litem—Insanity.—A curator *ad litem* appointed to a party who became insane *pendente processu*. *Mitchell* v. *Whitelock*, 1864, 3 M. 229; 37 J. 162.

484. Curator ad litem—Jury Court.—The Jury Court has no power to appoint a curator *ad litem*. *Johnstone* v. *Lindsay*, 1830, 2 J. 464.

485. Curator ad litem—Action of Damages for Personal Injury at Instance of Married Woman—Husband's jus mariti and Right of Administration Excluded—Husband Bankrupt.—*Refused* as unnecessary in action of damages for personal injury raised at her instance, with concurrence of her husband as her administrator-at-law, where his *jus mariti* and right of administration were excluded, and he himself was bankrupt. *Horn* v. *Sanderson & Muirhead*, 1872, 10 M. 295; 44 J. 176.

486. Curator ad litem—Action at the Instance of a Woman who was at Same Time Suing a Defended Action of Declarator of Marriage.—A woman, during the dependence of an action of damages at her instance against a party for defamation, raised a declarator of marriage against another, who defended. The former party having moved that the latter should be sisted as a party to the action of damages, the court *appointed* the pursuer's agent her curator *ad litem*. *Hogg* v. *Landles*, 1845, 7 D. 594.

487. Curator ad litem—Married Woman Suing without Husband's Concurrence—Motion Made after Record Closed.—Objection to the appointment of a curator *ad litem* to a married woman pursuing in her own name without her husband's concurrence—that the record has been closed previous to the application, *repelled*. *Blair* v. *Burns*, 1829, 1 J. 269.

488. Curator ad litem—Married Woman.—In a petition by a married woman for a judicial factor to protect her rights under her marriage-contract, the trustees therein named having declined to act, the court *appointed* a curator *ad litem* before pronouncing the usual order for intimation and service. *Davidson*, 1857, 19 D. 862.

489. Curator ad litem—Minors—Power of Curator to Compromise Action.—*Held* that a curator *ad litem* of minors, pursuers of an action, had no power to enter into a transaction for a discharge of it on payment of a certain sum which the minors repudiated. *Stevenson* v. *Lorimer*, 1844, 6 D. 377.

490. Curator ad litem—Minor—Minor's Father having an Adverse Interest.—In a petition by an heir of entail to uplift money consigned on account of land compulsorily taken, one of the heirs was a minor and his father was a nearer heir. Service being necessary, the court *refused* to allow it to be made on the father as the minor's guardian, and appointed a curator *ad litem*. *Stirling* v. *Edinburgh & Glasgow Rly. Co.*, 1851, 24 J. 76.

491. Curator ad litem—No Appearance by Minor.—The court *refused* to appoint a curator *ad litem* to a minor to whom a petition had been intimated but who had not entered appearance. *Swan*, Petitioner, 1866, 1 S. L. R. 100.

492. Curator ad litem—No Appearance for Minor Defender—Competency of Appointing Curator.—Where no appearance was made for a minor defender, and the adverse party craved a curator *ad litem* should be appointed—such motion *held* incompetent. *M'Lagan* v. *Wallace*, 1829, 2 J. 96.

493. Curator ad litem—Party becoming Insane pendente processu.—A curator *ad litem* appointed to a party becoming insane *pendente processu*. *Mitchell* v. *Whitelock*, 3 M. 229 ; 37 J. 162.

494. Curator ad litem—Power to Grant Discharge for Damages—Necessity of Appointing a curator bonis.—In an action of damages at the instance of a widow and her children, a curator *ad litem* had been appointed to the children. A verdict was returned in favour of the pursuers, which was applied, and the damages decerned for. The defenders declined to pay, on the ground that the curator *ad litem* had no power to discharge. The curator lodged a note, craving the court to find that his discharge was sufficient, or otherwise to appoint him *curator bonis* to the children. Note *refused* ; the court observing that a petition was necessary. *Pratt* v. *Knox*, 1855, 17 D. 1006.

495. Custody of Children — Procedure where Custodiers Refused to Obey Orders of Court.—Procedure, in an application for removal of a child from the custody of the mother, in respect that she was teaching it improper habits, where the mother and stepfather refused to obtemper the court's orders and give information necessary for the ends of justice. *Muir* v. *Milligan*, 1868, 6 M. 1125 ; 40 J. 631.

496. Damages—Competency.—Breach of continuing contract for supply of coals. *Held* competent to raise an action of damages during contract and another after its expiry. *Jackson* v. *Cowie & Sons*, 1872, 9 S. L. R. 617.

497. Declarator—Competency.—It is not competent for one to bring a declarator that another is not the heir of a person deceased. *Officers of State* v. *Alexander*, 1866, 4 M. 741 ; 38 J. 389. See for other points in the case 6 M. (H. L.) 54 ; 40 J. 470 ; L. R. 1 Sc. Apps. 276.

498. Declarator ab ante—Competency.—A party entitled to a postponed and contingent provision under a marriage-contract, is entitled to have his rights ascertained by declarator, if the debtor in the obligation question their existence or their validity. *Mackenzie* v. *Lady Mary Hanbury*, 1846, 8 D. 964.

499. Declarator — Competency. — An action of declarator *dismissed*, the conclusions being either announcements of bare facts or inconsistent with the averments. *Steuart* v. *The E. of Seafield*, 1871, 8 S. L. R. 335.

500. Declarator—Competeney—Abstract Fact—No Right Deducible Therefrom.—The court *declined* to entertain declarator of an abstract fact where the pursuer could not show a consequent right which he has an interest to establish, as that Orkney and Shetland formed an undivided shire because no conclusions of right were deduced from it. *Gifford* v. *Trail*, 1829, 7 S. 854 ; 4 Fac. 1151.

501. Declarator—Construction of Final Decree.—A question as to the construction of a final decree can be competently tried in an action of declarator. *Park's Curator* v. *Black, etc.*, 1870, 8 M. 671 ; 42 J. 332.

502. Declarator — Competency — Construction of Statute.—An action of declarator as to the meaning of the terms of a public statute for the consumption of smoke, *held* incompetent. *Todd & Higginbotham* v. *Burnet*, 1854, 16 D. 794 ; 26 J. 374.

503. Declarator—Competency—Declarator that a Deceased had Died Intestate—Decree in Action of Multiplepoinding on the Footing of Testacy.—After decree of preference in a multiplepoinding in favour of the next-of-kin, on the footing that a deceased died intestate, *held* that parties who had been called in the multiplepoinding were entitled, without reducing the decree of preference, and without paying the expenses incurred in the multiplepoinding, to insist in declarator, that by certain testamentary writings a valid bequest was made in their favour. *Mags. of Dundee* v. *Morris*, 1856, 19 D. 168 ; 29 J. 87.

504. Declarator—Competency—Dispute as to the Construction of a Decree of the Court.—*Held* that a declarator that the defenders were bound to pay the sums contained in certain Court of Session decrees, "and that upon receiving from the pursuers a receipt or receipts in the terms tendered by them to the defenders," "or in such other terms as may be fixed" by the court, was competent. *Morton, Whitehead, & Greig* v. *Smith*, 1864, 3 M. 29 ; 37 J. 14.

505. Declarator — Competency — Jurisdiction of the Magistrates of a Royal Burgh under a Crown Charter.—It is competent for the magistrates of a royal burgh to pursue before the Court of Session a declarator of their jurisdiction under a Crown charter. *Mags. of Edinburgh* v. *Officers of State*, 1825, 4 S. 319.

506. Declarator—Competency—Legality of Assessment Challenged by a Single Ratepayer—Special Case—Interdict.—Declarator, not interdict, is the proper remedy for a ratepayer who wishes to try the question of the legality of magistrates imposing a larger assessment than is required for annual expenses in order to accumulate a fund for carrying out an extraordinary operation. *British Fisheries Society* v. *Mags. of Wick*, 1872, 10 M. 426 ; 44 J. 248. Cf. *Parochial Board of Bothwell* v. *Pearson*, 1873, 11 M. 399 ; 45 J. 264. *Parochial Board of Keith*, 1869, 8 M. 26 ; 42 J. 2.

507. Declarator ab ante—Competency—Method of Valuation of Railway. — A declarator by a railway company against the inspectors of the poor in all the parishes through which their line passed, *held* competent for the purpose of ascertaining the assessable value of the railway, and the proportions payable to each parish. *Edinburgh & Glasgow Rly. Co.* v. *Meek*, 1849, 12 D. 153 ; 22 J. 17.

508. Declarator—Competency—Remote and Contingent Rights. — The process of

declarator is not intended to declare remote and contingent rights, or rights which are clear and not attacked. *Mags. of Edinburgh* v. *Warrender*, 1863, 1 M. 887; 35 J. 526.

509. Declarator — Competency — Trust-Estate.—Where trustees were all dead a declarator brought by the beneficiary against the trustee's heir and a debtor to the trust that the trust had fallen, and that the beneficiary had right to the estate, *held* competent. *Crawford* v. *E. of Dundonald*, 1838, 16 S. 1017; 13 Fac. 703.

510. Declarator—Dismissal of Person Holding Office ad vitam aut culpam — Remedy.—*Observed* (*per* Lord President Inglis) that, assuming that he held office *ad vitam aut culpam*, the proper remedy for a session-clerk dismissed without *culpa* was not by action for reparation, but by declarator and reduction of the sentence. *Goldie* v. *Christie & Petrie*, 1868, 6 M. 541; 40 J. 274.

511. Declarator—Necessity for—Reduction of a Confirmation — Question as to Pursuer's Legitimacy—Of Consent a Proof by Commission before Answer Allowed on that Point.—In a reduction of a confirmation as executor dative *qua* nearest of kin to a defunct at the instance of a person alleging himself to be a nephew of the deceased, but whose legitimacy was denied, and who condescended on no celebration of marriage between his parents, but merely on their being, and living together as man and wife, *held* that the question of legitimacy ought not to be sent to trial by a jury under the issue whether the pursuer was the only son of the only brother of the defunct, and next-of-kin of the defunct; and the defender consenting, allowed a proof by commission before answer upon that point. *Swinton* v. *Swinton*, 1862, 24 D. 833; 34 J. 424.

512. Declarator — Necessity for. — The sublessee of a mineral lease claimed a joint right to the use of a branch railway, on condition of paying half the expense of forming it, in virtue of an alleged verbal agreement between his authors and the parties who actually constructed that branch line; and his claim being resisted, he brought an action of declarator, concluding that he acquired joint *pro indiviso* right on that condition. *Held* that, without a declarator that by previous agreement his authors had the right claimed by him, the action was without foundation. *Young* v. *Tennant & Co.*, 1860, 22 D. 1415; 32 J. 705.

513. Declarator—Necessity for—Question as to Legitimacy of Pursuer Raised in an Action of Assythment.—*Held* by the presiding judge, that in an action of assythment by persons alleging that they were respectively the widow and lawful children of the deceased, the defenders not admitting the marriage, it was incompetent to send to a jury an issue as to the disputed marriage and legitimacy; and trial put off, that the pursuers might prove their relationship in competent form. The difficulty was obviated by an admission of the alleged relationship. *Lenaghan & Others* v. *Monkland Iron & Steel Co.*, 1857, 19 D. 976; 29 J. 467.

514. Decree in Absence—Decree on the Merits—Competency of thereafter Obtaining Decree for Expenses.—In a process in absence, before the decree had been extracted, the pursuer moved for and obtained decree for expenses which had not been included in the first decree. *Williamson* v. *Williamson*, 1860, 22 D. 599; 32 J. 221.

515. Decree in Absence — Reduction — Improbation.—*Sinclair* v. *Brown*, 1835, 13 S. 594. Remitted 2 S. & M'L. 103. Decided 15 S. 770; 12 Fac. 743. See 3 D. 871.

516. Decree in Absence—Competency—Exchequer Cause—Defender Resident in England.—*Held* competent to pronounce decree in absence in an Exchequer cause commenced by *subpœna* served upon a party resident in England. *Amsden* v. *Lord Advocate*, 1858, 20 D. 1301; 30 J. 765.

517. Decree in Absence—Decree causa cognita Declarator by Testamentary Trustees that they had Power to Assume new Trustees.—*Tovey* v. *Tennant*, 1854, 16 D. 866; 26 J. 401.

518. Decree in Absence—Reduction—Reponing. — Where a decree in absence is sought to be reduced, the objections to the decree, both formal and on the merits, must be stated and substantiated in the reduction before reponing can take place. *Scott* v. *Handyside's Trs.*, 1868, 6 M. 753; 40 J. 387.

519. Decree in Absence—Reduction—Decree of Constitution in Absence and of Adjudication Obtained against an Apparent Heir who was a Pupil without Tutors and Curators.—A decree of constitution in absence and of adjudication obtained against an apparent heir who was a pupil without tutors and curators *held* not to be null, but as a decree in absence to be reducible. *Grieve or Dingwall* v. *Burns*, 1871, 7 M. 582; 43 J. 354.

520. Decree in Absence—Reduction—Misrecital of the Date of a Bill.—Decree in absence upon a bill, *reduced*, in respect of a misrecital of the date of the bill, and payments under it. *Barclay* v. *Alexander*, 1846, 8 D. 549; 18 J. 270.

521. Decree in Absence—Reduction—Decree Produced in another Action and Sustained as a Good Claim of Debt by a Decree in foro.—In a reduction of a decree in absence, the defender pleaded that as the decree had been produced in an action of count and reckoning at the pursuer's instance against the defender, and there sustained as a good claim of debt by a decree *in foro*, the pursuer was barred from insisting in the reduction on any of the grounds libelled, which were either competent and omitted or proponed and repelled in the count and reckoning. The Lord Ordinary sustained the defender's plea;

but the court recalled his interlocutor *hoc statu*, and remitted the case to his Lordship. *Kincaid* v. *Stainton*, 1852, 2 Stuart 116.

522. Decree in Absence—Reduction—Proof Led though Defences—Decree in Respect of the Proof.—In a reduction, on the head of death-bed, of a trust-disposition, the trustees lodged preliminary defences, objecting to reduction to certain effects. The pursuer lodged a minute, giving effect to the objections by restricting the summons. The trustees then withdrew from the action. An *ex parte* proof was allowed. *Held* that the pursuer was entitled to a judgment in respect of the proof, and not merely to a decree in absence. The court refused to give the pursuer expenses. *Douglas* v. *Gibb*, *etc.*, 1855, 17 D. 434; 27 J. 185.

523. Decree—Decree in Absence.—After decree in absence, the defender lodged a short representation, on which the Lord Ordinary ordered defences to be lodged, and parties to debate; and no defences being lodged, he refused the representation. *Held* that the decree was not *in foro*. *Watson* v. *Brown*, 1807, Hume 653.

524. Decree in Absence—Jury Trial.—Where a verdict was obtained in absence of one of the parties, after notice of trial to the agents who had acted for that party, and after a motion had been made by one of them to delay the trial, and the verdict was subsequently applied, and decree extracted, *held* that this was not a decree in absence, and that it was incompetent to reduce it, on the allegations that the pursuers had, from poverty, been unable to make appearance at the trial, and that no notice of trial had been given to themselves, personally, or to a properly qualified agent—the party who conducted the case for them, and to whom notice had been given, not having taken out the attorney's certificate. *Gilchrist* v. *Gilchrist*, 1844, 7 D. 214; 17 J. 102.

525. Decree — Decree in Absence — Reponing — Sist — Sist Granted but not Intimated.—A petition to be reponed against a decree in absence, pronounced in the sheriff court, was presented to the sheriff, who granted a sist, and allowed the petition to be seen, but did not order intimation. In the meantime, the days of charge having expired, the pursuer executed a poinding, and of same date, but subsequent to the poinding, the petition and sist were intimated to the pursuer. *Held* (1) that intimation of the petition and sist was necessary to stop diligence; (2) that between the presenting of the petition and the time of reponing, *bona fide* implement by the pursuer, in whole or in part, of the decree, will render it incompetent for the sheriff to repone. *Anderson* v. *Anderson*, 1855, 17 D. 804; 27 J. 415.

526. Decree in Absence—Reponing—Implement of Decree—Poinding Executed—Sheriff Court Act, 1838, s. 18.—*Held* that after a poinding has been executed on a decree in absence by the sheriff, he cannot repone the defender, although the poinding has not been reported. *Dobbins & Bibby* v. *Stephenson & Co.*, 1852, 14 D. 510; 24 J. 255; 1 Stuart 467.

527. Decree in Absence — Reponing — Suspension against Decree in Absence Refused.—A suspension to be reponed against a decree in absence, where the defender had granted a trust deed for the purpose of implementing it, and the pursuer had bound himself not to do diligence, *refused*. *Wotherspoon* v. *Winning*, 1849, 11 D. 371; 21 J. 104.

528. Decree in Absence—Suspension.—Bill of suspension, without caution, of a charge on a decree by default which had been pronounced in a sheriff court, after the term for lodging a paper had been thrice circumduced, *refused*. *Sharp* v. *King's Trs.*, 1838, 16 S. 659.

529. Decree in Absence — Erroneous Name — Partibus. — A decree in absence against a party erroneously named in the *partibus* is inept, but may be turned into a summons; and *observed*, that a registered protest on a forged bill has been so turned. *Allan* v. *Harrison*, 1825, 3 S. 429.

530. Decree in Absence — Several Defenders—Record Made up—Refusal to Grant Decree against Non-Compearing Defenders.—Decree in absence against one of several defenders, after record made up with the others, *refused*. *Morrison* v. *Somerville*, 1860, 22 D. 1082; 32 J. 269.

531. Decree — Form — Judicature Act, 1825, s. 40.—In an advocation from the sheriff court, where a proof had been led, *held* that a finding, "that the said injuries were occasioned through the fault of the defenders in not having the machinery of the said roving frame duly fenced," sufficiently specified the facts upon which the judgment proceeded, as required by the Judicature Act, 1825, s. 40. *Darby* v. *Duncan & Co.*, 1861, 23 D. 529; 33 J. 206.

532. Decree in foro—Decree for Improvement Debt.—Decrees for improvement expenditure under the Montgomery Act, though in absence, are decrees *in foro* and *causa cognita*, and after they have become final are not liable to be challenged except on grounds appearing *ex facie* of the decrees. *E. of Breadalbane* v. *Trs. of Marquis of Breadalbane*, 1868, 6 M. 807; 40 J. 437.

533. Decree—Decree in foro.—After a litigation in an inferior court, in which the defenders were successful, the pursuer brought an advocation in which decree in absence passed against them. One of the defenders lodged a full, and the other a short, representation (which were refused), and expenses were afterwards decerned for, and the decree extracted. *Held* to be *in foro*. *Brown* v. *Brown*, 1806, Hume 652.

534. Decree—Decree in foro.—A party who obtained a decree *in foro*, under a reserved right of action to the defender, *held* entitled to

payment, without finding caution to repeat, in the event of the defender being successful in his reserved action. *Roberton* v. *Alexander*, 1825, 3 S. 504.

535. Decree in foro—Reduction—Grounds for—Subornation of Perjury.—Averments that a decree of declarator of marriage had been pronounced on false evidence, but not alleging that the pursuer had been guilty of subornation of perjury, *held* irrelevant to found a reduction of the decree. *Forster* v. *Grigor or Forster*, 1871, 9 M. 445 ; 43 J. 204. [Cf. *Lockyer* v. *Ferryman*, 1877, 4 R. (H. L.) 32 ; L. R. 2 App. Ca. 519.]

536. Decree by Default—On Failure to Produce Document under Certification.—Where a party to an action fails to produce a document under certification, it does not follow that decree by default should be pronounced against him, but he may be held as confessing the point sought to be proved by the document, or a copy produced by the other party may be held equivalent to the original. *Strachan* v. *Steuart*, 1870, 9 M. 116 ; 43 J. 47.

537. Decree by Default—Failure to Produce Documents as Ordered—Certification.—A sheriff ordered productions in conjoined actions to be made under certification. The productions not having been made, decree of absolvitor in the one action, and in terms of the conclusions of the summons in the other action, was pronounced against the party failing to make the productions. *Held* that the party failing to produce was erroneously holden as confessed in the whole cause, and decree recalled. *Caledonian Rly. Co.* v. *Orr*, 1855, 17 D. 812 ; 27 J. 418.

538. Decree—Failure of Defender to Appear—Judgment by Default.—After a long litigation in four conjoined processes, in which each party was to a certain extent successful, the defender failed to appear, and judgment was pronounced by default, with expenses. *Held* to be a decree *in foro*. *Hutton* v. *Kilgour*, 1805, Hume 650.

539. Decree by Default — Failure to Lodge a Revised Paper—Reduction of Decree — Mora. — *Held* (1) that decree by default against a defender, for failure to lodge a revised paper, is a decree *in foro* ; (2) that it is matter of discretion for the court to permit a reduction to be insisted in ; (3) that a delay of fourteen years was not sufficiently explained by the poverty of the party against whom the decree was taken, he having immediately become bankrupt, and the trustee on his estate having taken no steps towards having the decree opened up. *Mackenzie* v. *Smith*, 1861, 23 D. 1201 ; 33 J. 602.

540. Decree—Interim—Sum Admittedly Due but not Presently Exigible.—The court *refused*, during the preparation of a record, to pronounce decree for an interim payment out of a sum admitted by the defender to be due, but not presently exigible. *Banks* v. *Lang*, 1845, 17 J. 536. Cf. *Dalziel* v. *Scott*, 1831, 3 J. 591.

541. Decree — Interim— Competency of before Record Closed.—Where a sum is admitted to be due, interim decree may be pronounced for payment before the record is closed. *M'Kinlay* v. *M'Kinlay*, 1849, 11 D. 1022 ; 21 J. 368.

542. Decree—Interim—Action of Accounting.—It is competent in an accounting to pronounce decree for an admitted balance before closing the record. *Conacher* v. *Conacher*, 1857, 20 D. 252 ; 30 J. 131.

543. Decree—Jurisdiction Founded by Arrestment—Effect of Decree not Limited to the Value of the Goods Arrested.—*Opinion:* The effect of a decree against a foreigner in an action where arrestment was necessary to found jurisdiction, is not limited to the value of the goods arrested. *Lindsay* v. *London & N.-W. Rly. Co.*, 1860, 22 D. 571 ; 32 J. 221.

544. Decree—Assignation of Decree—Notice to Assignor not Given that Decree Taken.—An assignee of the pursuer of an action having taken decree in his favour against the defender without notice to the pursuer, the decree *recalled*, and a remit made to hear the pursuer, who alleged that the assignation did not cover the sum decerned for. *Fraser* v. *Gordon*, 1834, 12 S. 381.

545. Decree—Competency of Alternative Decree.—A summons concluded to have the defenders ordained to grant bills for certain sums at certain dates, and failing doing so, to pay the sums ; further, to relieve the pursuer of certain obligations, and failing doing so, to pay damages. Decree went out in terms of these conclusions. *Held* that the decree was unobjectionable on the ground of ambiguity, or as being alternative. *Munro* v. *Rose*, 1855, 18 D. 292 ; 28 J. 122.

546. Decree—Error in—Decree of Service — Correction by Sheriff. — Under a petition for service as heir of line and provision, decree of service was pronounced in favour of the petitioner as heir of line and of conquest. It was so stated in the Chancery record and in the extract issued therefrom, but the entry in the diet-book of the sheriff court was correctly made. In a petition by the sheriff-clerk for warrant to the Director of Chancery to correct the principal decree of service, *held* that the error occurring *in essentialibus*, the whole proceedings must be transmitted to the sheriff, with power to him to correct his judgment, and transmit the proceedings of new to Chancery. *Farquhar*, 1853,16 D. 312.

547. Decree—Irregular Decree.—After a proof had been allowed to both parties, but the defender omitted to adduce proof, and the pursuer's proof was reported, and on hearing his procurator in the absence of the defender, and without circumduction, the Lord Ordinary decerned, *held* that the decree was irregular, in respect of no circumduction, and the defender allowed still to prove. *Renny* v. *Cuthill*, 1800, Hume 494.

548. Decree — Decree Opened up after Judgment.—*Held* that a decree was liable to be opened up, although appearance was repeatedly made for the defender, and judgment pronounced on the merits, it being alleged that she had not been fully heard in consequence of poverty, and that the action was incompetent. *Clark* v. *Newmarch*, 1825, 4 S. 182.

549. Decree — Pupil — Decree against Pupil who has no Tutors — Decree in Absence.—Decree against a pupil who has no tutors, and for whom no appearance is made, on a summons regularly executed against him personally, with edictal citation against tutors and curators, but without the appointment of a tutor *ad litem*, is not null and void, but merely subject to be opened up as a decree in absence. *Sinclair* v. *Stark*, 1828, 6 S. 336; 3 Fac. 371. [See No. 515.]

550. Decree — Pupil — Decree against Pupil and Tutors—Effect of.—A decree against pupils and their tutors, after appearance by the pupils and one tutor, is not a decree in absence as to another tutor who did not appear. *Wallace* v. *Anderson*, 1826, 5 S. 179.

551. Decree — Pupil — Decree against Pupil without Tutors—Effect of.—A decree against a pupil without tutors or a tutor *ad litem* is to be regarded as a decree in absence, and all parties to be restored to the state in which they stood at its date, and their rights judged of accordingly. *Dick* v. *M'Ilwham*, 1828, 6 S. 798; 7 S. 364.

552. Decree — Reduction — Improbation.—*Question*, whether a decree of reduction-improbation regularly obtained in absence against a person of full age, is liable to be opened up. *Sinclair* v. *Brown*, 1835, 13 S. 594. *Remitted* 1835, 2 S. & M'L. 103. See 15 S. 770; 3 D. 871.

553. Decree—Bill of Suspension.—Bill of suspension *refused* of a charge on a decree *in foro*, averred to have been incompetently pronounced, and only become final through the poverty of the party. *Sassen* v. *Campbell*, 1829, 8 S. 102.

554. Decree — Suspension. — One of two suspenders of a decree against them jointly and severally, allowed an interlocutor suspending the letters as to the other, who was the true debtor, to become final. *Held* precluded from objecting that he was not liable. *Hunter* v. *Tait*, 1825, 3 S. 493.

555. Defenders—Accumulation of.—Four persons (as proprietors of different lands on the banks of a river) brought an action against three sets of defenders (paper manufacturers, having their works at different places on the banks of the river), grounded on pollution of the stream by the defenders discharging noxious matter into it from their respective works, and seeking to have such pollution interdicted. *Held* that there was such a community of interest between the pursuers as entitled them to sue jointly against all the alleged wrongdoers. *D. of Buccleuch* v. *Cowan & Sons*, 1864, 2 M. 653; 36 J. 311.

556. Defenders — Accumulation of — Conjunct and Several—Dismissal of Action quoad one Defender.—*Held* that an action might proceed against one defender after being found irrelevant against another, although the conclusion was against both "conjunctly and severally." *Braidwoods* v. *Bonnington Sugar Refining Co. Ld.*, 1866, 2 S. L. R. 152.

557. Defenders—Accumulation of—Conjunct and Several Liability — Circumstances in which Held Incompetent to Take Decree against one Defender.—Tradesmen who had been employed to execute repairs upon a parish church pursued the minister and Presbytery, conjunctly and severally, for payment. Before the summons was called in court the minister died, and the action was transferred against his widow as his executrix. No defences were lodged, and the pursuers took decree in absence against the executrix but not against the Presbytery. This decree was afterwards opened up and defences lodged for the executrix, against whom the Lord Ordinary (Ormidale) ultimately gave judgment on the merits, reserving any right of relief she might have against the Presbytery. *Held* that the pursuers were not entitled to proceed directly against the executrix without following out their action against the Presbytery, and case remitted to give the pursuers an opportunity of doing so. *Sanderson & Muirhead* v. *Macfarlane*, 1868, 6 M. 701.

558. Defenders — Accumulation of — Conjunct and Several Liability—Discharge of one Defender.—A summons concluded against three cautioners conjointly and severally, from one of whom the pursuer took payment of one-third of the sum sued for, granting him a discharge both of the claim and of the action. *Held* competent, on the conclusions being restricted to two-thirds, to pronounce decree against the two others, conjointly and severally, for that balance. *Church of England Life & Fire Assurance Co.* v. *Wink & Others*, 1857, 19 D. 1079; 29 J. 486.

559. Defenders—Accumulation of—Conjunct and Several Liability — Separate Wrongs.—An action of damages which concluded against a husband and his wife "conjunctly and severally, or severally, or otherwise as shall be determined," for one sum, in respect of two acts of slander by the wife and one by the husband on a different occasion, *dismissed* as incompetent. *Barr* v. *Neilsons*, 1868, 6 M. 651; 40 J. 337.

560. Defenders—Accumulation of—Conjunct and Several Liability — Issues. — A summons concluded against two defenders, "conjunctly and severally, or severally and respectively." The condescendence contained only averments that the damage was caused by the fault "of the defenders." The court *allowed* the pursuers to add a plea of several fault, and then approved of three issues—one

of joint fault, and one of several fault against each defender. *N. B. Rly. Co.* v. *Leadburn, etc., Rly. Co. & Waddell*, 1865, 3 M. 340 ; 37 J. 163.

561. Defenders — Accumulation of — Separate Wrongs.—An action was brought by parties who had been shareholders in a joint stock company, but who had sold their shares to the company, calling as defenders the company and certain individuals who were or had been the office-bearers of the company. The pursuers averred that they had sold their shares greatly under their true value, and they had done so, being induced thereto by fraudulent acts and concealment on the part of the individual defenders. They concluded against the company for reduction of the sale, for declarator that they were still shareholders, and for count and reckoning for the profits effeiring to the shares, and alternatively against the individual defenders for damages. Objection to the competency of the action *repelled*. *Jardine's Trs.* v. *Carron Co., etc.*, 1862, 24 D. 443 ; 34 J. 228.

562. Defenders—Action against a Firm and three Persons as Partners Thereof and as Individuals—Decree against one of the Partners who Admitted Liability.—In an action against a company and the three individual partners, as partners and as individuals, for payment of a debt, two of the partners denied and the third partner admitted the liability of the company. *Held* that decree could at once be pronounced against the partner admitting liability, reserving all claims of relief competent to him. *Elliot* v. *Aitken*, 1869, 7 M. 894 ; 41 J. 512.

563. Defender—All Parties not Called—Crown in Declarator of Right of Salmon-Fishing.—In an action of declarator of right of salmon-fishing against the magistrates and inhabitants of a burgh, with conclusions for interdict, interdict *granted*, but the action *quoad* the declaratory conclusions *dismissed*, in respect there was no proper contradictor, as the pursuer declined to call the Crown as a party. *E. of Galloway* v. *Mags. of Wigtown*, 1870, 8 M. 959 ; 42 J. 562.

564. Defenders — "All Parties not Called."—In an action for payment of their respective shares brought against two out of three co-obligants under a cautionary obligation binding them *pro rata*, a plea of "all parties not called" *repelled*. *M'Arthur* v. *Scott*, 1836, 15 S. 270 ; 12 Fac. 246.

565. Defender—"All Parties not Called"—Joint Delinquents—Fraud.—In an action against a banking company and its liquidators for declarator that the pursuer was not a shareholder or liable to pay calls, and for setting aside a purchase of shares ; and also against seven of the directors who had been in office at the date of the two last annual reports for relief and damages, on the ground that the purchase had been induced by fraudulent misrepresentations in the reports, the conclusions for setting aside the sale, and all the conclusions so far as directed against the company, were abandoned. The manager who was *ex officio* a director was not a party to the action. None of the directors for the previous years were called as defenders, although the previous balance-sheets were alleged to have been false. Plea, that all parties were not called, *repelled*. *Inglis* v. *Douglas, etc.*, 1860, 22 D. 505 ; 32 J. 450.

566. Defenders—All Parties not Called—Joint Delinquents—More than six Defenders.—In an action at the instance of the liquidators of a banking company against the directors and two of the managers, for loss alleged to have been caused to the company by their neglect of duty, and contravention of the company's contract during their respective tenures of office, *held* (1) that the pursuers were entitled to bring their action, as it was founded upon joint delinquency, against one or more of the alleged wrongdoers ; (2) that it was unnecessary that an individual who had held the office of manager for three weeks previous to the bank's stoppage, should be called ; and (3) that the action was not incompetent under the 28th regulation concerning the session, 1695, on the ground that the number of defenders or sets of defenders exceeded six. *The Western Bank of Scotland* v. *Douglas & Others*, 1860, 22 D. 447 ; 32 J. 212.

567. Defenders—All Parties not Called—Joint and Several Obligation.—Where a committee of management of a large body of shareholders bound and obliged themselves, "as well as the whole other commissioners and shareholders, jointly and severally," to perform a certain obligation, *held* that the committee could be sued for performance of the obligation, without calling the other shareholders, in respect that they bound themselves jointly and severally. *Richmond* v. *Grahame*, 1847, 9 D. 633 ; 19 J. 266.

568. Defenders—All Parties not Called—Joint Delinquents—Action of Damages for Fraud against Bank Directors.—In an action against five out of twelve directors of a banking company, on the ground of fraud in the management of the company's affairs, whereby the pursuer alleged he had suffered injury, *held* that he was not bound to call the whole of the directors ; but that it was competent for him to insist against those whom he specially charged with the fraudulent acts out of which the injury was said to have arisen. *Leslie's Reps.* v. *Pirie*, 1851, 14 D. 213 ; 24 J. 91 ; 1 Stuart 188.

569. Defenders—All Parties not Called—Necessity of Stating this Plea in limine.—The residue of an estate was left to A and B under burden of a legacy. A died ; B took his estate ; and then B died and C was confirmed executor to him. *Held*, in an action for the legacy, that C could not after a proof plead that the representatives of A and B should have been called. *Pollock* v. *Pollock*, 1849, 12 D. 143.

570. Defenders—All Parties not Called—Necessity of Stating Plea in limine—Defender Barred from Insisting in Plea after Judgment by Lord Ordinary.—In a declarator of non-entry brought against the disponee of the last vassal, the disponee stated, *inter alia*, the plea "all parties not called." After the record was closed a joint-minute was lodged renouncing probation; the conclusions of the summons were restricted; and the Lord Ordinary decerned against the defender. The defender reclaimed, and contended (1) that the action was incompetent, as it ought to have been directed against the heir; and (2) that at least it was necessary still to call him as a defender. *Held* (1) that the plea of incompetency ought to have been taken *in limine* by the defender; and (2) that the defender was barred by the procedure in the action from insisting on the heir now being called. *Tod's Trs.* v. *Graham*, 1869, 8 M. 264; 42 J. 115.

571. Defenders—"All Parties not Called"—Necessity for Stating this Plea in limine.—After a petition and complaint against the election of magistrates had been the subject of jury trial, and a verdict returned, and the cause stood upon an order for a hearing as to the application of the verdict, an objection that all parties had not been called, seeing that one councillor had been omitted, *repelled*. *Mags. of Edinburgh* v. *Lawrie*, 27 Jan. 1821, F. C.

572. Defenders—All Parties not Called—Proposed Railway Company—Committee of Management—Representatives of Deceased Members.—A shareholder in a proposed railway company raised an action against the committee of management, concluding against them, conjointly and severally, for payment of deposits advanced by him, and of damages for having withdrawn the bill for incorporating the company from Parliament; but he omitted to call the representatives of one of the members of the committee, since dead, who had acted along with the defenders in withdrawing the bill. *Held* that he was bound to call the representatives as defenders. *Ross* v. *Baird*, 1848, 10 D. 1493; 20 J. 565.

573. Defenders—All Parties not Called—Action against Owners of a Coach—Owners Named in Excise Licence—Other Owners.—In an action of damages for injuries sustained by the overturn of a coach, to which the pursuer called as defenders all the parties whose names appeared as proprietors of the coach in the excise licence, an objection by the defenders that he had not called another of the proprietors whose name did not appear on the licence, *repelled*. *Binnie* v. *Machray*, 1848, 10 D. 1508; 20 J. 572.

574. Defenders—All Parties not Called—Landlord and Tenant.—An action for ameliorations was directed by a tenant at the expiry of his lease against the trustee and executor of his late landlord, who had died a few years before the lease expired. *Held* that it was unnecessary to call the landlord in possession at the expiry of the lease as a party to the action. *Cumine* v. *Bayley*, 1856, 19 D. 97; 29 J. 46.

575. Defenders—All Parties not Called—Foreign Firm.—In an action by a Scottish creditor against an individual partner of a foreign company for a company debt, *held* unnecessary to call the other partner, who was not subject to the jurisdiction. *Muir* v. *Collett*, 1862, 24 D. 1119; 34 J. 558.

576. Defenders—All Parties not Called—Co-Executors—Count and Reckoning.—In an action of count and reckoning against the representatives of a party alleged to have been sole executrix, the plea was taken that these were co-executors whose representatives ought also to have been called, but were not, and could not be called, in respect all claim against them was extinguished by the negative prescription. *Repelled*, so far as insisted in as preliminary. *Burt* v. *Henderson*, 19 D. 196; 29 J. 94.

577. Defenders—All Parties not Called—Accounting as to a Trust-Estate—Trustees all Dead—Representatives of Last Surviving Trustees only Called as Defenders.—In an action of accounting at the instance of a judicial factor on a lapsed trust, founded on the intromissions of a body of trustees who were all dead, and which was directed against the representatives of the last survivor only, *held* that the pursuer was not bound in the first instance to call as defenders the representatives of the other trustees. *Pearson* v. *Houston's Trs.*, 1868, 6 M. 286.

578. Defenders—All Parties not Called—Kirk-Session.—Where a session-clerk sued certain members of the kirk-session for damages for wrongous dismissal from his office without calling the other members, the action *dismissed*. *Goldie* v. *Christie & Petrie*, 1868, 6 M. 541; 40 J. 275.

579. Defenders — "All Parties not Called"—Action against Cautioner—Principal and Co-Cautioner not Called—Refusal of Cautioner to Furnish their Address.—A plea of "all parties not called" *repelled* in an action against a cautioner where his principal and co-cautioner were not called, seeing that the pursuer averred he could not trace these, and the defender who was in a position to know their addresses had not furnished these though requested by the pursuer to do so. *M'Ewan* v. *Donald*, 1852, 14 D. 809; 24 J. 457.

580. Defenders — "All Parties not Called"—Action against Bank for Reduction of Transfer of Shares—Transferrers having no Interest.—In a reduction against a bank of transfers in favour of the pursuer of stock of the bank, and of bills which he granted to the bank, for the price (which they had advanced to him), on the ground that he had been induced to enter into the transaction through fraud by the bank, *held* that it was not necessary that the granters of the transfers should be called as defenders—it

being averred that the bank were the parties who were really interested in the sale of the stock. *Graham* v. *North British Bank*, 1850, 12 D. 907; 22 J. 393, 416.

581. Defender—"All Parties not Called"—Party not Called not Subject to the Jurisdiction.—The rule that all parties interested ought to be called, is an equitable one, which the court will not enforce in such circumstances as would cause it practically to defeat the action; and accordingly, where the party sought to be called is abroad, and has no goods in this country, so as to found jurisdiction by arrestment, the court will not compel the pursuer to call him, though equally interested with the defender cited. *Gibson* v. *Smith*, 1849, 11 D. 1024; 21 J. 331.

582. Defenders—All Parties not Called—Action by Contractors against Chairman of a Company for Falsely Representing he had Authority to Make a Certain Contract—Other Directors.—A party entered into a contract with one railway company (A) to do certain work, which contract he alleged was adopted by the directors of another company (B), and the agreement of adoption was signed by the chairman of that company. In an action against the company (B), it having been pleaded in defence that the agreement was *ultra vires* of the directors, the party raised an action against the chairman individually. *Held* that the party was not bound to call the directors of B as defenders. *M'Ilquham & Co.* v. *Hope Johnstone*, 1852, 14 D. 322; 24 J. 152; 1 Stuart 250.

583. Defenders—Committee of Management—Insurance.—The representatives of a deceased member of a mutual insurance society, not incorporated by any charter, and not registered under the Friendly Societies Act, raised an action against the society for recovery of the sum insured. The defenders called were sixteen members, forming a committee of management, for themselves and as representing the society. *Held* that the action was competently directed against them, the society being so numerous and fluctuating in its character as to make it impossible to call all the members. *Somerville* v. *Rowbotham & Others*, 1862, 24 D. 1187; 34 J. 619.

584. Defender—Death of—Loss of Settlement — Incompetency of Trustees being Sisted until Decree in a Proving of the Tenor.—The defender in an action died *pendente processu*, leaving a settlement nominating trustees, which had been destroyed; and they raised, but had not called, an action for proving its tenor. *Held* that until the deed was revived by decree, they could not sist themselves as parties in the action. *Geikie* v. *Hutchison*, 1848, 10 D. 354; 20 J. 120.

585. Defenders — Declarator of Non-Entry.—In a declarator of non-entry, it is unnecessary to call the heir of the last entered vassal, who had disponed the subjects with procuratory and precept to the defender's author. *Governors of Cauvin's Hospital* v. *Falconer*, 1863, 1 M. 1164; 35 J. 657.

586. Defender—Defender Called for his Interest—Incompetency of Obtaining Decree against.—Although a party had been properly called for his interest as defender to an action, in respect of a claim of relief supposed to be competent against him by another defender, against whom decree was ultimately given, *held*, in the circumstances, that the pursuer had no title to insist for any decree against the party who had been called for his interest. *Horne* v. *M. of Breadalbane's Trs.*, 1838, 16 S. 820.

587. Defender — Designation. — Circumstances in which *observed*, that a defender was sufficiently designed and cited, *dummodo constet de persona*. *Scottish Union Insurance Co.* v. *Calderwood*, 1836, 14 S. 667.

588. Defender—Designation—Misnomer.—In a complaint against the election of the magistrates of a burgh, an objection that John Watson, a councillor, was not called as a defender, *sustained*, although "John Wilson," councillor (a misnomer for Watson), appeared in the names of the petitioners. *Gray* v. *Spens*, 24 Feb. 1804, F. C.; M. "Burgh Royal" App. No. 15.

589. Defenders — English Firm — Individual Partners not Called—English Law—Lex fori.—*Held* that an unincorporated English trading company, against whom jurisdiction has been founded by arrestments, may be sued in the Scottish courts in the firm's name without calling the individual partners, although in the English courts it cannot be so sued. *Paton* v. *Neill Edgar & Co.* (O. H.), 1873, 10 S. L. R. 461.

590. Defender—Error in Name of.—In an action against a widow, the summons and citation stated her maiden name to be "Martha Reid," whereas it was "Martha Hood." She was otherwise correctly designed by her residence, and the name and designation of her husband. A preliminary defence, founded upon the error, *repelled*. *Muir* v. *Hood*, 1845, 7 D. 1009; 17 J. 522.

591. Defenders — Joint and Several Liability—Owner and Master of a Ship—Action of Damages for Injury Suffered by a Cargo.—In an action of damages for injury suffered by a cargo, raised against the owners, and the master of the ship, who had contracted with the shipper, the court *refused* to send the case to trial on separate issues as against the owners and master respectively. *Begg* v. *Rhind*, 1850, 13 D. 185; 23 J. 65.

592. Defender — Married Woman — Husband Called for his Interest—Death of Husband — Necessity for Calling his Representatives.—*Held* not necessary to call the representatives of a husband, who died during the dependence of an action against his wife, in which he had been called as a party for his interest. *Murray* v. *Philp*, 1843, 6 D. 159.

593. Defender—No Conclusion against—Competency of Decree against him.—A summons contained no personal conclusion against one of the defenders, who was called merely that he might be cognisant of the proceedings. *Held* that although he appeared and pleaded on the merits, the summons contained no *termini habiles* for decerniture against him. *Laing* v. *Edinburgh & Glasgow Rly Co.*, 1850, 12 D. 1279; 22 J. 593.

594. Defender — No Formal Sist of Executrix of Deceased Defender—Liability for Expenses.—A party whom the Court of Session decerned against, and found liable in expenses, appealed to the House of Lords, but died before the case was heard. The appeal was revived by his widow, as confirmed executrix, *in forma pauperis*. The House of Lords *dismissed* the appeal, and *affirmed* the interlocutors complained of. Decree was pronounced against her "as relict and executrix of and as representing the deceased" in the Court of Session, although she had never been formally sisted as a party to the original process. *Anderson or Gill*, 1859, 21 D. 723.

595. Defender—Person of Weak Intellect—Property Vested in Trustees—Right of Trustees to Appear — Appearance of Defender himself in Advocation—Appointment of curator bonis.—In an action against a party whose property was vested in trustees, and in which they compeared and gave in defences, alleging that their ward could not appear, being of weak intellect, the sheriff found they had no title to appear, and decerned against the defender in absence. *Held* that the objection was cured by the appearance of the defender in an advocation, and a *curator bonis* subsequently appointed. *Lindsay* v. *Watson*, 1843, 5 D. 1194; 15 J. 493.

596. Defender — Pupil — Tutors and Curators.—An action is incompetently brought against a pupil whose tutors and curators, if he any has, are not called, and the objection cannot be remedied by the appointment of a tutor *ad litem*, even when appearance is made for the pupil. *Thomson's Trs.* v. *Livingston*, 1863, 2 M. 114; 36 J. 52.

597. Defender — Railway Company — Secretary.—*Held* that an action against the secretary of a railway company to have him ordained to register a transfer of stock was incompetent, in respect the railway company was not called. *Watt* v. *Kempt*, 1865, 3 M. 730; 37 J. 373.

598. Defender—Right of Cautioner not Called as Defender to Appear and Defend on Principal Withdrawing his Defence.—Where the defender in a reduction had consented to decree being pronounced, rather than incur the expense of a jury trial, the court *refused* to allow a party who had an interest as a cautioner to support the deed under challenge, but was not a party to it, to appear and defend it. *Chanter* v. *Thoms*, 1845, 7 D. 465; 17 J. 230.

599. Defender—Sequestration—Sist of Trustee — Bankrupt's Name Omitted from Record—Competency of Making him a Party to the Issue or of Assoilzieing him.—In an action the defender's estate was sequestrated and his trustee was sisted. In making up the record the bankrupt's name as a party was omitted and in the meantime he was discharged. *Held* that the pursuer could not, without notice to the bankrupt, make him party to an issue, and that the bankrupt could not be assoilzied in the action. *Chanter & Co.* v. *Borthwick*, 1848, 10 D. 1544; 20 J. 659, 681.

600. Defender—Sist of new Defender—Appeal to House of Lords—Birth of a Child Having an Interest in the Case.—When a child having an interest in a judgment taken to appeal is born after the date of the judgment, the House of Lords, on the matter being represented to them, remit to the Court of Session to appoint a tutor *ad litem*, who may be sisted as a party to the appeal. *Hamilton*, 1861, 24 D. 31; 34 J. 16.

601. Defender—Sist of new Defender—Principal and Agent.—An agent placed a lock on the door of the pew of a parish church for the purpose of excluding a party who had been in possession of sittings in the pew. *Held* by the sheriff, that a petition was properly directed against the agent as the actual wrongdoer; and he having brought an advocation, a minute was lodged for the principal, craving that he should be sisted as a party, and that the process should be sisted until the issue of a declarator at his instance, and consenting to interim interdict. The application was held to be incompetent, and the advocation dismissed. *Dobbie* v. *Halbert*, 1863, 1 M. 532; 35 J. 317.

602. Defender — Title to Exclude — Reduction of Sale under Bond.—A reduction of a sale under a bond was raised against the purchaser and the seller's representatives, on the ground that the conditions of sale had not been observed. The purchaser, in corroboration of the title derived through the seller, had, after the sale, obtained a disposition to the same subjects from one whose title, though *ex facie* absolute, was known to the purchaser to be in reality in security only. *Held* that the purchaser had no title to exclude the action of reduction. *Nisbet* v. *Cairns & Howden*, 1864, 2 M. 863; 36 J. 423.

603. Defenders—Voluntary Association—U. P. Synod.—An action against A. B. as moderator of the United Presbyterian Synod, and as an individual, C. D. as clerk to the Synod, and as an individual, and E., F., G., etc., as the Synod house committee, and as individuals, concluding that the defenders should, "conjunctly and severally, or severally and individually," make payment of an assessment imposed upon occupants, for premises alleged by the pursuer to have been occupied by the Synod, *dismissed*, in respect the parties called as defenders were not called as representing the Synod, which was alleged to have occupied

the premises, but only in an individual capacity, in which capacity it was not alleged they occupied the premises. *Aitken* v. *Harper, etc.*, 1865, 4 M. 36; 38 J. 31.

604. Defenders—Voluntary Association — Insurance Company — Managers and Directors who had Signed Policy.—A libel and charge against an insurance company, and against the managers and certain individual directors who had subscribed a policy of insurance, *sustained*, although the company was not incorporated by charter. *Sea Insurance Co. of Scotland* v. *Gavin*, 1827, 5 S. 375; 2 Fac. 221. Affirmed on merits, 1830, 4 W. & S. 17.

605. Defenders—Voluntary Association —Free Church of Scotland—General Assembly.—An action of reduction of a sentence of deposition was brought by a minister against the General Assembly of the Free Church of Scotland. *Held* that this body could not be sued. *M'Millan* v. *Free Church*, 1862, 24 D. 1282; 2 M. 1444. [And see title *Church*, Nos. 99–103.]

606. Defender—Voluntary Association—Committee — Form of Conclusion and Decree.—Under a summons which, on an allegation that a committee possessed funds, concluded for payment of an account against the members of the committee as such, "but not personally," *held* that the pursuer, who had admitted on the record that the committee had no funds, could not obtain a decree of simple constitution. *Spence* v. *Taylor*, 1857, 19 D. 341; 29 J. 156.

607. Defences—Dilatory—Plea of no Title — Order Pronounced before Plea Dealt with—Ultra petita.—The trustee under a trust-disposition by a tenant for creditors raised two actions against the tenant and his brother—the one for reduction of an assignation of the lease granted by the tenant to his brother, the other for interdict against their removing the stock from the farm. The defenders pleaded no title to sue. After closing the records and conjoining the actions, while the question of title to sue was still undecided, the Lord Ordinary issued an interim order upon the defenders to deliver up the stock to the pursuer. *Held* that the order was incompetent *in hoc statu*, and that, as it was neither concluded for in the summons nor craved in the note of suspension, it was also *ultra petita*. *Fraser's Tr.* v. *Fraser*, 1870, 8 S. L. R. 164.

608. Defences—Dilatory—"No Process" —Judicature Act, 1825, s. 5—Court of Session Act, 1868, s. 21.—"No process" is a preliminary plea, and can only be discussed *initio litis*. The enactments of the Judicature Act, and relative Act of Sederunt, as to the discussion of dilatory defences, are not repealed by the Court of Session Act of 1868. *Cowies* v. *Airdrie Mineral Oil Co.*, 1869, 7 S. L. R. 131.

609. Defences—Lodging—Time.—In an action against several parties, one of the defenders having omitted to lodge defences, and the pursuer having declined then to take decree against him, *held* that it was competent, after revised condescendence had been lodged, to allow him to put in defences. *Muller* v. *Murray*, 1851, 14 D. 212; 24 J. 97; 1 Stuart 186.

610. Defences — Failure to Lodge — Representation.—Although an order was issued for defences, and decree was pronounced on failure to lodge them, and a short representation was given in and refused, *held* still competent, on a representation lodged after the refusal of the former one was final, to hear the defender on the merits. *Young* v. *Mitchell*, 10 Feb. 1803, F. C.; M. 12178.

611. Defences — Signature of, by Party.—*Held* competent for a party to sign his defences, and that it is not necessary that they be subscribed by counsel. *Davidson* v. *Paul*, 1848, 10 D. 1457; 20 J. 533.

612. Defences—Revised—Signature of, by Party.—Revised defences, not signed by counsel, but by the defender himself, cannot be received. *Jaffray* v. *Jaffray*, 1863, 2 M. 355; 36 J. 170.

613. Defences—Action of Separation and Aliment — Defences Lodged in Inner House.—In an action of separation by a wife against a husband, he lodged no defences, and the Lord Ordinary, on a proof, decerned against him. Having reclaimed, the court, although he attended at the proof, and cross-examined the witnesses, allowed him to lodge defences; and the record being thereupon closed, *adhered*. *Paterson* v. *Paterson*, 1848, 20 J. 459.

614. Defence—Waiver.—Circumstances in which *held* that a defender in an action relative to a contract had departed from a defence, that the matter in dispute was the subject of a pending submission to a referee named in the contract, and had agreed that the court should remit to a person of skill: therefore that, on failure of the first party to whom the court remitted, he was not entitled to insist upon a remit to the party named in the contract; and that effect must be given to the report of another who had been selected by the court. *Paul* v. *Springbank Coal Co.*, 1859, 21 D. 206; 31 J. 116.

615. Disclaimer—Agent's Liability for Expenses.—Expenses were awarded to a pursuer, but he afterwards disclaimed having authorised the action. The agent permitted (before answer as to a motion to be sisted as a party) to show that he was authorised to raise the action. *Noble* v. *Mags. of Inverness*, 1825, 3 S. 516.

616. Disclaimer—Disclaimer Disclaimed —Effect of—Supplementary Summons—New Pursuers.—In an action of declarator of a right of public way, disclaimers were signed by all the pursuers before the record was closed, but two of them afterwards disclaimed their first disclaimer. Pending judgment as to the effect of that, another action was raised by these two pursuers, along with four new pursuers, in exactly the same terms as the first action, but with a conclusion that the second

action should be conjoined with the first, or, if not, then that it should be found and declared, etc., as in the first action. Thereafter the right of these two pursuers to insist in the first action was sustained. *Held* (1) that *quoad* them, this second action was unnecessary, and therefore dismissed, with expenses; (2) that *quoad* the four new pursuers, it was competent, but further procedure sisted till the first action should be decided. *Tulloch* v. *Baird*, 1859, 21 D. 807; 31 J. 459.

617. Division—First or Second?—Reclaiming Note against Judgment of Judge of First Division Acting as Lord Ordinary on the Bills.—A reclaiming note to the Second Division is competent against an interlocutor of a judge of the Inner House of the First acting as Ordinary on the Bills. *Tullis* v. *Clark*, 1852, 14 D. 321; 24 J. 153; 1 Stuart 249.

618. Division of Commonty — Procedure. — Prepared states, memorials, and abstracts are not necessary forms of process in divisions of commonty, and may be dispensed with by the court, without the consent of all parties. *Innes* v. *Murray, etc.*, 1859, 21 D. 1381; 31 J. 760.

619. Division of Commonty—Interlocutor—Extract—Printing.—Where the parties in an action of division of commonty are numerous, the court authorise a printed interlocutor to be signed and put up with the interlocutor, and printed copies to be embodied by the extractor in the extract of the decree. *Innes* v. *Murray, etc.*, 1859, 21 D. 1381; 31 J. 760.

620. Division and Sale—Competency. — Where two parties were *pro indiviso* proprietors of certain subjects not divisible, either separately or by apportionment, *held* (by Lord Ordinary) that declarator of division and sale at the instance of one of the parties was competent. *Observed*, that the principle of the Roman law, *de communi dividundo*, is recognised by the Court of Session, and applies to such a case. *Brock* v. *Hamilton*, 1852, 19 D. 701.

621. Division and Sale — Defenders — Heirs-Portioners—One a Minor Residing Abroad.—A process of division and sale of subjects belonging to heirs-portioners, one of whom called as a defender was a minor and resident abroad, was allowed to proceed on production of a copy of the summons, with an approval indorsed by a curator appointed by the court of the country where the minor resided. *Frizell* v. *Thomson*, 1860, 22 D. 1176; 32 J. 536.

622. Division and Sale—Inner or Outer House?—*Question*, whether an action of division and sale is an Outer House action. Form of procedure in an action of division and sale at the instance of a *pro indiviso* proprietor of certain subjects not divisible, the other *pro indiviso* proprietor refusing to concur in the proceedings. *Anderson* v. *Anderson*, 1857, 19 D. 700. *M'Bride* v. *Paul & Others*, 1862, 24 D. 546; 34 J. 285.

623. Divorce—Oath of Calumny—Commission.—The pursuer in an action of divorce was a shipmaster, and about to proceed on a long voyage. On the last day of the summer session, before the summons had been called, the court *granted* leave to have the oath *de calumnia* taken upon commission, to lie *in retentis* till the summons had been called. *Scott*, 1866, 4 M. 1103; 38 J. 582.

624. Divorce—Oath of Calumny—Commission—Pursuer Abroad.—In an action of divorce raised by a wife resident at Brussels, who was certified by her medical attendant to be unable to undertake a journey to this country, *held* competent for the Lord Ordinary to remit to a person abroad to take the oath of calumny. *Orde* v. *Murray*, 1846, 8 D. 535; 18 J. 249.

625. Divorce—Oath of Calumny.—Observations on nature of the oath of calumny. *Paterson* v. *Kilgour*, 1865, 3 M. 1119.

626. Divorce—Oath of Calumny—Taking of to Lie in retentis.—In an action of divorce, after the case had been debated, but before judgment, on a plea of "no jurisdiction," the pursuer's oath of calumny taken, as he expected to be under the necessity of leaving Scotland. *Hook* v. *Hook*, 1861, 23 D. 1293; 33 J. 652.

627. Divorce — Desertion — Dispensing with Action of Adherence, etc.—Conjugal Rights Act, 1861, ss. 11 and 18.—Procedure when the defender, in an action of divorce on the ground of desertion, cannot be found. *M'Callum* v. *M'Callum*, 1865, 3 M. 550; 37 J. 262.

628. Divorce—Proof—To be Taken by Commissaries in the County where the Witnesses Reside.—Circumstances in which, in an action of divorce, the court *remitted* to the sheriff-commissaries, with a recommendation to order the proof to be taken in the county where the witnesses resided. *Thomson* v. *Thomson*, 1836, 15 S. 235.

629. Election Petition—Dismissal—Application for—Relevancy of Petition.—*Held* (1) that an application to dismiss an election petition on the ground of want of specification not being "an interlocutory question or matter," fell to be made to one of the Divisions, and not to one of the Judges on the *rota* for the trial of election petitions; (2) that an election petition which set forth in different articles that the election of the respondent was effected "by an extensive and elaborate organisation of undue influence and large expenditure," and that "bribery, treating, and undue influence were practised," and that "corrupt practices extensively prevailed," was sufficient to meet the requirements of the Parliamentary Elections Act, 1868, and relative rules of court; and motion to dismiss it on the ground of want of specification *refused*. *Observed* that judgments on interlocutory matters by judges on the *rota* for the trial of election petitions are final. *Christie* v. *Grieve*, 1869, 7 M. 378; 41 J. 205.

630. Exchequer Court — Appeal from Justices—Libelling Statute.—In an information for excise penalties before a justice of peace court, it is not necessary to specify the statute alleged to be contravened. *Morgan* v. *Cooper*, 1861, 24 D. 57 ; 34 J. 34.

631. Exchequer — Jurisdiction of Exchequer Court—Beneficial Possession of Crown Property—Assessment.—The master gunner in Edinburgh Castle was assessed for the support of the poor, in respect of his occupancy of the quarters assigned to him in the fortress. He had separate accommodation for his duties as master gunner. A rule was moved for in the Court of Exchequer against the collector of poor-rates, calling upon him to show cause why the assessment, and proceedings to recover the same, should not be set aside as illegal, in respect the occupation was of Crown property, and for behoof of the Crown. *Held* that the assessment was imposed in respect of beneficial occupancy by an individual, upon whom it was merely a personal claim ; and Her Majesty's revenues not being affected by it, that the jurisdiction of the Court of Exchequer was excluded. *Advocate-General* v. *Beattie*, 1856, 18 D. 378 ; 28 J. 308.

632. Exchequer Cause — Procedure — Information under the Foreign Enlistment Act.—In the case of an information containing ninety-eight counts, some of them founded on inconsistent constructions of the Foreign Enlistment Act, *held* expedient, before sending the case to trial, to decide objections taken to the relevancy of the various counts. *Her Majesty's Advocate* v. *Fleming & Others*, 1864, 2 M. 1032 ; 36 J. 497.

633. Exchequer — Stated Case — Inner House or Lord Ordinary—Excise Management Act, 1827.—A case, presented under the Act 7 and 8 Geo. IV. c. 84, for opinion and directions of the Court of Exchequer, is not one of the "proceedings in Exchequer causes" provided by 19 and 20 Vict. c. 56, s. 2, to be brought, in the first instance, before the Lord Ordinary in Exchequer causes ; nor is it a "cause" which, under that Act, can be entertained or dealt with by the Lord Ordinary, but is a matter unprovided for by the said Act in constituting the Court of Session the Court of Exchequer. *Opinion*, however, that under the general substitution of the Court of Session for the Court of Exchequer, and the transference of powers, authority, and jurisdiction effected by the last-mentioned Act, such a case could be entertained by either of the Divisions. *Perth Quarter Sessions*, 1861, 24 D. 221 ; 34 J. 110.

634. Exhibition—Peerage.—*Held* that a party who had been served heir of provision under a charter conveying lands and the dignity of a peerage, but whose right to the peerage had not been ascertained or recognised by the Crown, was not entitled to insist in an action against another party having right to the lands, concluding for exhibition and delivery of all titles relative to the peerage as his own proper writs. *Crawford* v. *Campbell*, 1826, 2 W. & S. 440.

635. Exhibition.—A general *mortis causa* trust conveyance, where the trustees could not complete their title without a constitution and adjudication in implement, does not exclude the heir's right to exhibition *ad deliberandum*. *Liddell* v. *Wilson*, 1855, 18 D. 274 ; 28 J. 113.

636. Exhibition.—The law agent, who was also holder of a bond and disposition in security over part of the heritable estate of a deceased, resisted an action of exhibition *ad deliberandum*, on the ground that the deceased had by testamentary trust-disposition excluded the heir from all interest in his estate. The defender had for six years concealed the existence of this deed, and only after action was raised got two of the trustees nominated in it to accept of the trust. *Held* that he was not entitled to found upon the trust deed in bar of the action. *Question* : What would be the effect of it if pleaded by trustees acting under it in *bona fide*? *Douglas* v. *Holmes*, 1854, 16 D. 1116 ; 26 J. 605.

637. Exhibition. — A person while prosecuting a claim to certain Scottish peerages before the Committee of Privileges in the House of Lords, raised an action in the Court of Session against a person residing in Scotland to enforce production of certain charters and other writs which the pursuer alleged to be material evidence in support of the claim. *Held* that the action was incompetent. *Barclay-Allardice* v. *D. of Montrose*, 1872, 10 M. 774 ; 44 J. 482.

638. Exhibition. — *Held* that it was not necessary to reduce a deed of mutual discharge and a disposition of heritage, before bringing an action of exhibition of accounts, in which a common interest was alleged, but which referred chiefly to the heritage disponed, and that such an action was competent, without conclusions for reduction or count and reckoning. *Webster* v. *Reid's Trs.*, 1857, 20 D. 83 ; 30 J. 53.

639. Exhibition.—A valid entail executed by a person having right to an estate is sufficient to exclude an action of exhibition of the former titles, by a party alleging right to the estate under these titles. *Sir A. Cathcart* v. *E. of Cassillis*, 1825, 1 W. & S. 239.

640. Exhibition — Of Documents in modum probationis of Claim to Peerage Depending before Committee of Privileges of House of Lords.—During the dependence of two competing claims for a Scots Earldom before the Committee of Privileges of the House of Lords, one of the claimants raised an action in the Court of Session against the other, and against the trustees of the last possessor of the title, concluding for exhibition and production *in modum probationis* of documents in their possession relating to the transmission of the Earldom, to be deposited with the clerk to the process for safe custody. The pursuer set forth no title except his claim to the peerage, etc.,

and while stating that the documents were necessary to support his claim in the House of Lords, he did not allege that the Committee of Privileges had required production of the documents. *Held* that the pursuer had not set forth a relevant case to entitle him to insist in the conclusions of the action upon the title libelled, and action *dismissed*. *Campbell* v. *Campbell*, 1869, 7 M. 759; 41 J. 397.

641. Exhibition—Petition for Order on Witnesses, who were to be Examined in Scotland in Connection with Chancery Suit to Perpetuate Testimony, to Search for and Exhibit Family Papers.—A person alleging himself to be the immediate younger brother of one entitled to claim certain estates in Scotland commenced a suit in Chancery for perpetuating testimony, and in a petition to the Court of Session under the Evidence by Commission Act, 1859 (22 Vict. c. 20), obtained an order for examination of certain witnesses. He now petitioned the court for an order on these witnesses to search for and exhibit certain documents (titles and family papers). It appeared from the proceedings that the persons cited as witnesses were the trustees of a deceased proprietor of lands in Scotland, and that the object of the petitioner was to recover certain title deeds and other family papers from the deceased's charter-chest. The trustees opposed the order on the ground that they had not the control of the documents, and had neither the right nor the power to produce them. The order *refused*. *Campbell* v. *E. of Dalhousie*, 1869, 7 M. (H. L.) 101; 41 J. 584; L. R. 1 Sc. App. 462.

642. Expenses — Absent Pursuer. — An incidental decree for a sum of expenses being pronounced against a pursuer, and he being charged thereon, and thereafter execution of search being returned bearing that he was not to be found in his house in Scotland, motion by defenders to have the action dismissed, or the pursuer ordained to find caution, *refused*. *Muir* v. *Hill & Keddell*, 1869, 6 S. L. R. 264.

643. Expenses—Attendance as a Witness at an Election Committee—Competency of an Action.—Although a party brought an action for the expenses of his attendance as a witness at an election committee, *held* that it was not incompetent in consequence of the amount not having been ascertained by taxation and certificate as provided by the stat. 9 Geo. IV. c. 22,—such an action being incompetent at common law, and the object of the statute being to facilitate the recovery of payment. *Rutherford* v. *Elliot*, 1840, 2 D. 726; 15 Fac. 751.

644. Expenses — Auditor's Report — Approval of—Lord Ordinary of the Bills in Vacation.—There not being time to have an account of expenses taxed by the auditor in a sequestration under the Bankrupt Act before the expiry of the session, motion *refused* to remit to the Lord Ordinary on the Bills to approve of the auditor's report, when made during vacation. *Baillie* v. *Anderson*, 1844, 6 D. 1381; 16 J. 585. Cf. *Brown* v. *Jeffrey*, 1822, 2 S. 104.

645. Expenses—Competency of Awarding after Final Judgment — Judicature Act, 1825 (6 Geo. IV. c. 120), ss. 17 and 21. — *Held* that after a final judgment, in which no mention is made of expenses, it is incompetent to award them by a subsequent interlocutor. *Observed* that, by express reservation in a final interlocutor, the question of expenses may be afterwards competently disposed of. *Wilson's Trs.* v. *Wilson's Factor*, 1869, 7 M. 457; 41 J. 244.

646. Expenses — Disposing of — Compliance with Judicature Act, 1825, s. 17.— *Held* that it is competent for the Lord Ordinary to embody his judgment in two interlocutors: (1) an interlocutor on the merits, reserving the question of expenses; and (2) an interlocutor disposing of the question of expenses. *Bannatine's Trs.* v. *Cunninghame*, 1872, 10 M. 317; 44 J. 244.

647. Expenses — Husband and Wife — Divorce.—An application by a wife for money to enable her to carry on her defence against an action of divorce brought by her husband against her, and carried by the husband to the House of Lords, is not competent to the Court of Session, but only to the commissary court where the radical action lies. *Lady Cunninghame Fairlie* v. *Sir W. Cunninghame Fairlie*, 4 Feb. 1813, F. C.

648. Expenses — Jury Trial — Witnesses from a Distance — Competency of Taxing their Expenses before Verdict Applied.— The successful party in a jury trial having, within the period which must elapse before the verdict can be applied, moved the court to remit to the auditor to tax the expenses of witnesses who had been brought from a distance, the opposite party having objected to the competency of this proceeding,—motion *refused*. *Budge* v. *Balfour*, 1852, 15 D. 16; 25 J. 17; 2 Stuart 17.

649. Expenses—Reclaiming.—The court, in adhering to an interlocutor of the Lord Ordinary which said nothing as to expenses, *found* the petitioner not liable in expenses; and he having reclaimed on the merits, *held* competent for the respondent to reclaim as to the expenses. *Donaldson* v. *Burrell*, 16 Feb. 1821, F. C. *Tod* v. *Dinghorn's Trs.*, 1825, 4 S. 82. *Shearer* v. *Knox*, 1823, 2 S. 316.

650. Expenses — Repetition of when Judgment Reversed on Appeal—Procedure. —A party having paid expenses under a decree which, on appeal, was reversed, with a remit, and the case having thereon been remitted to the Lord Ordinary, a petition to the court for repetition of the expenses *held* incompetent, reserving to apply to the Ordinary. *Agnew* v. *Kermack*, 1824, 2 S. 580.

651. Extract — Action against Two Trustees—Death of One—Action Insisted in against Remaining Trustee only — Decree against Defenders.—An action for a business account was raised against two trustees;

one of whom having died before service of the summons, it was served on the survivor, and the case was called as "insisted in against" him "only." Decree in absence was pronounced, and bore to be against "the defenders." An extract given out against the surviving trustee, *held* not disconform to its warrants. *Henderson* v. *Cullen*, 1860, 22 D. 712; 32 J. 276.

652. Extract—Bill Chambers—Whether Extract to be Granted by Bill Chamber Clerk or Extractor.—The extract of an interlocutor by the Inner House, decerning for a petitioner's expenses in an application for the recall of a sequestration, falls to be given out by the Bill Chamber Clerk, and not by the Extractor of Court. *Ferguson*, 1854, 17 D. 263; 27 J. 120. Cf. *Fleming* v. *Dickson*, 1863, 1 M. 1121; 35 J. 644.

653. Extract—Decree—Date of—Date of Signing.—Where a decree was dated 8th July, but bore to have been signed upon the 11th July, *held* that the extract properly gave the latter as the date of the decree. *Cleland* v. *Clason & Clark*, 1849, 11 D. 601; 21 J. 175; 7 Bell 153; 22 J. 607.

654. Extract—Error in—Correction of.—A judicial factor having obtained special powers to make up a title to heritable property, raised actions of constitution and adjudication and implement against the heir. In the summonses an error occurred in stating the date at which the factor got the special powers, and was transcribed into the extracts of the decrees. Authority *granted* to have the errors in the summonses and extracted decrees corrected. *Scott*, 1855, 17 D. 932; 27 J. 469. Cf. *Small's Trs.*, 1856, 18 D. 1210.

655. Extract—Error in Decree—Correction of.—A defender who was called in a multiplepoinding under his correct designation of farmer at Covington Mains, lodged objections, in which he was erroneously designed as at Crookboat; and having been found entitled to expenses, and an extract issued under his erroneous designation, the Lord Ordinary allowed the error to be corrected. In a suspension of a charge on the extract, *held* that the procedure was competent. *Miller* v. *Lindsay*, 1850, 12 D. 964; 22 J. 437.

656. Extract—Clerical Error in Extract and Decree—Retransmission of Process and Decree de novo.—In a summons on which decree had been extracted, two clerical errors occurred, which were repeated in the record and in the extract decree. The court, on a summary petition, *authorised* the extractor to retransmit the process to the clerk, and thereafter allowed the necessary corrections to be made on the summons; and *de novo* pronounced decree in the action. *Connal* v. *Leishman*, 1853, 2 Stuart 428.

657. Extract—Clerical Errors in Summons Repeated in Extract—Correction.—A judicial factor having obtained special powers to make up a title to heritable property, raised actions of constitution and adjudication and implement against the heir. In the summonses an error occurred in stating the date at which the factor got the special powers, and was transcribed into the extracts of the decrees. Authority *granted* to have the errors in the summonses and extracted decrees corrected. *Scott*, 1855, 17 D. 932; 27 J. 469. *Small's Trs.* 1856, 18 D. 1210.

658. Extract—Competency of Abandoning Claim and Extracting Decree for Debt only.—A pursuer in the sheriff court, who obtained decree for a debt sued for, with expenses, allowed the process to lie over unmoved in for sixteen years, when, without notice to the defender, he minuted on the summons an abandonment of his claim for expenses, and obtained extract of the decree for the debt. *Question*, whether the decree had been prematurely and irregularly extracted. *M'Lachlan* v. *Campbell*, 1846, 8 D. 574; 18 J. 286.

659. Extract—Exhaustion of Cause by Final Extract—Competency of Thereafter Presenting Petition to have Public Right of Way Defined.—A jury having found that a public right of way existed over certain lands "in or near" the directions indicated by coloured lines upon a plan, the court applied the verdict and the decree was extracted. Thereafter a petition being presented in the Inner House by the defender's representatives craving a warrant on the extractor to transmit the plan to the clerk to the petition and a remit to qualified persons to visit the lands, and to lay off and mark on the ground the position and direction of the roads, the application was *dismissed* as incompetent. *Observed*, that the sheriff might define the limits of the public right of way. *Home-Drummond, etc.*, 1868, 6 M. 896; 40 J. 503.

660. Extract—Can a Case be Exhausted before Extract?—*Question*, whether before extract an action can ever be held to be exhausted. *Anderson, etc.* v. *E. of Morton*, 1859, 21 D. 1055; 31 J. 597.

661. Extract — Exhaustion of Case — Question of Damages.—A decree containing a reservation to determine the quantum of damages having been extracted, with a decerniture as a final extract, *held* competent, after an appeal had been dismissed, to recall the extract, so as to allow parties to be heard on the reserved point. *E. of Kinnoul*, 22 May 1804, F. C.; M. 12191.

662. Extract — Extract ad interim — Court of Session Act, 1850, s. 28.—Every decree extractable *ad interim* on special allowance before the passing of the 13 and 14 Vict. c. 36, may now be extracted without it, and warrant to extract *ad interim refused* as unnecessary. *Taylor* v. *Jarvis*, 1860, 22 D. 1031; 32 J. 464.

663. Extract—Interim Decree—Court of Session Act, 1850, s. 28.—*Question*, whether the provisions in the Court of Session Act of 1850, making interim extract of "an act and warrant and decree" competent without special allowance to that effect, applies to

such decrees as require to have a warrant of charge annexed, or whether, in regard to these, special allowance is still required. *Buchanan* v. *Young*, 1860, 22 D. 371.

664. Extract — Interim Decree — Competency of Thereafter Granting Decree for Expenses. — *Held* competent, after extract bearing to be interim, obtained without the authority of the court, to decern for expenses which had been found due. *Beveridge* v. *Liddle & Co.*, 1852, 14 D. 772 ; 24 J. 330.

665. Extract — Interim Extract — Whether Process at an End.—*Held* by the whole court, that where a Lord Ordinary had, in respect of no appearance by the pursuer, sustained one of the defences, assoilzied, and allowed the decree of absolvitor to be extracted *ad interim*, a reclaiming note, presented by the pursuer within the reclaiming days, was competent, although the decree had been previously extracted. *Johnstone* v. *Johnstone*, 1845, 8 D. 23 ; 18 J. 17. See also *Young* v. *Bell*, 1850, 12 D. 939 ; 22 J. 412.

666. Extract — Loss of Principal Summons.—When the principal copy of a summons has been lost, extract cannot issue except of consent, and the proper remedy is to bring a proving the tenor. *Mair* v. *Inglis*, 1862, 24 D. 312 ; 34 J. 148. Cf. *White* v. *Arthur*, 1865, 3 M. 1025 ; 37 J. 546.

667. Extract — Loss of Principal Summons—Extract on Certified Copy.—Where a principal summons was lost, authority *granted* to extract on the certified copy, the defender not objecting. *Forsyth* v. *Aird*, 1853, 16 D. 205 ; 26 J. 97.

668. Extract — Motion to Supersede — Alleged Counter Claim.—The court having *held* that certain counter claims deponed to by a defender on an oath of reference were extrinsic, and could be proved only in a separate action, motion to supersede extract till such an action could be brought, *refused*. *Thomson* v. *Duncan*, 1855, 17 D. 1081 ; 27 J. 523.

669. Extract—Multiplepoinding—Question as to whether Case Exhausted by a Final Decree on one Claim.—In a multiplepoinding against three parties for the distribution of a fund, the court pronounced judgments in regard to two of the parties, one of whom extracted the decree as to her claim as an interim decree, and the other extracted the decree in regard to his claim as a final decree. *Held* competent for the third party, who had never before appeared, still to appear, and the holders of the fund ordered to lodge a condescendence, so far as related to his share. *Alexander's Exrs.* v. *Alexander*, 1850, 12 D. 959 ; 22 J. 425.

670. Factors loco curatoris—Factor loco tutoris.—A party appointed, on one petition, factor *loco curatoris* to minor, and factor *loco tutoris* to pupil children. *Sutherland*, 1851, 13 D. 951.

671. Fee-Fund Dues — Alterations on Revised Pleadings. —*Held* that alterations and additions made in chambers at adjusting a record do not make the paper an "amended" pleading, and that fee-fund dues are not exigible in respect of such alterations and additions. *Hogarth* v. *Ross*, 1858, 20 D. 952 ; 30 J. 562.

672. Fishings—Conviction—9 Geo. IV. c. 39, and 7 and 8 Vict. c. 7.—Where a conviction under the Fishing Acts, 9 Geo. IV. c. 39, and 7 and 8 Vict. c. 7, resolved into a dispute as to a patrimonial right to fishings, *held* that such a question could not be tried under the Acts, and a conviction set aside. *Stevenson* v. *Macdonald*, 1855, 2 Irv. 239.

673. Furthcoming — Competency — Property of Married Woman—Sist.—A married woman purchased heritable property with a portion of a fund belonging to herself, exclusive of the *jus mariti*, and the title was taken to herself, excluding the *jus mariti* of her husband. The rents were arrested by the husband's creditors. In an action of furthcoming, in which the wife compeared, *held* that it was not competent in a furthcoming to enter into an inquiry as to the character and validity of the right vested in the wife, or to deny effect to the title founded on by her ; and the action sisted, that competent proceedings might be instituted to establish the liability of the property for the husband's debts. *Loudon* v. *Young*, 1856, 18 D. 856 ; 28 J. 389.

674. Furthcoming—Objection to Decree in Former Action.—In an action of furthcoming proceeding on a decree for payment against a common debtor, it is not competent to the common debtor if he makes appearance to plead objections to the former decree. *Donaldson* v. *Ord*, 1855, 17 D. 1053 ; 27 J. 625.

675. Heritor—Powers of Committee Appointed for Special Purpose—Title to Sue. —The heritors of a parish authorised a committee of their number to institute a libel against the parochial schoolmaster, and to follow it forth to a conclusion. *Held* that a summons at the instance of the committee, "for themselves, and as members of a committee of the heritors," was a good instance. *Ferguson* v. *Heritors of Kirkpatrick-Durham*, 1850, 12 D. 1145 ; 22 J. 492.

676. Incompetency—Is it pars judicis to Dismiss an Action as Incompetent?—*Question*, whether it is *pars judicis* to dismiss an action as incompetent, no objection to the competency being stated by the party. *Connell* v. *Ferguson*, 1857, 19 D. 482 ; 29 J. 228.

677. Inner or Outer House?—Advocation Reported by Lord Ordinary. — In an advocation, the Lord Ordinary, on the motion of the respondent, under 13 and 14 Vict. c. 36, s. 32, pronounced an interlocutor reporting the cause, and ordering the record, etc., to be printed and boxed, etc. The respondent became bankrupt before obtempering the order to print. *Held* that a motion for intimation to the bankrupt's trustee ought to be made before the Lord Ordinary. *Miller* v. *Logan*, 1858, 20 D. 522 ; 30 J. 271.

678. Inner or Outer House? — Arrestments, Recall of—Petition for.—A petition for recall of arrestments and discharge of inhibition *held* competent in the Inner House. *Matthew* v. *Patullo*, 1858, 21 D. 18; 31 J. 1.

679. Inner or Outer House?—Arrestment—Recall.—*Hart*, 1864, 3 M. 336; 37 J. 149. *Latham* v. *Edinburgh & Glasgow Rly. Co.*, 1866, 4 M. 1084; 38 J. 564. *Gardiner* v. *Blackwood*, 1866, 1 S. L. R. 136.

680. Inner or Outer House?—Delivery of Bond of Caution—Action of Choosing Curators.—A petition was presented to the junior Lord Ordinary for delivery of a bond of caution for curators nominated by a minor in an action of choosing curators. The petition stated that the minor had now attained majority, and had granted a discharge to the curators. His Lordship having expressed doubts as to his competency to entertain the petition, it was presented to the First Division, where, without discussion, intimation and service were ordered. Upon expiry of the *inducice* the court remitted to the Lord Ordinary, and upon his report granted the prayer of the petition. *Young, etc.*, 1864, 2 M. 695.

681. Inner or Outer House?—Curator bonis to a Minor — Appointment. — *Held* that a petition by a minor for a *curator bonis* to himself, his father being alive, was competently presented to the junior Lord Ordinary. *M'Nab* v. *M'Nab*, 1871, 10 M. 248; 44 J. 147.

682. Inner or Outer House?—Curator bonis—Recall.—*Question*, whether a petition for the recall of an appointment as *curator bonis* should go to the Outer or Inner House. *Drummond*, 1866, 1 S. L. R. 215.

683. Inner or Outer House?—Curatory—Recall.—A petition for recall of an appointment of a *curator bonis* made by the junior Lord Ordinary, *held* competently presented in the Inner House. *Lawson*, 1863, 2 M. 355; 36 J. 176.

684. Inner or Outer House?—Curator bonis—Recall.—A petition for recall of an appointment of a judicial factor made by the junior Lord Ordinary, *held* competently presented in the Inner House. *Milne*, 1867, 6 M. 31.

685. Inner or Outer House?—Recall of Curatory — Distribution of Business Act, 1857.—*Held* that a petition by a party who had been appointed by the junior Lord Ordinary *curator bonis* to a lunatic, with the concurrence of the nearest relative of the lunatic, for recall of the appointment, and also for discharge and exoneration, and appointment of a new curator, on the ground that the curator was about to go abroad *animo remanendi*, should be presented to the junior Lord Ordinary under the Act 20 and 21 Vict. c. 56, s. 4; and therefore such an application to the Inner House refused as incompetent. *Kyle*, 1862, 24 D. 1083; 34 J. 541. See also *Nairne*, 1862, 24 D. 1086; 34 J. 561. *Lockhart*, 1862, 24 D. 1086. *Borthwick*, 1862, 1 M. 104; 35 J. 59.

686. Inner or Outer House?—Distribution of Business Act, 1857 — Transient Provisions. — A petition by a judicial factor appointed by the court prior to 25th November 1857 under the Bankruptcy (Scotland) Act, 1856, s. 164, having been brought before the junior Lord Ordinary, verbally reported by him to the court as incompetently before him, and granted by the court. *Carter*, 1863, 1 M. 1157; 35 J. 669.

687. Inner or Outer House?—Division and Sale.—A process of division and sale is an Outer House cause. *M'Bride* v. *Paul & Others*, 1862, 24 D. 546; 34 J. 285. *Anderson* v. *Anderson*, 1857, 19 D. 700.

688. Inner House or Bill Chamber?—Petition to Cite Witnesses before an Arbiter. — Petition for authority to cite witnesses and havers resident in different counties, to appear before an arbiter, is properly presented to the court, and not in the Bill Chamber. *Caird*, 1865, 3 M. 851; 37 J. 443. *Harvey* v. *Gibson*, 1826, 4 S. 809; 1 Fac. 158.

689. Inner or Outer House?—Issues Approved of in Inner House—Remit to Lord Ordinary.—When issues are approved of by the Inner House, the interlocutor must contain a remit back to the Lord Ordinary, to enable the case to be proceeded with in the Outer House. *O'Byrne* v. *Burn*, 1854, 17 D. 56.

690. Inner House or Junior Lord Ordinary?—Petition by a Tutor to Borrow Money.—A petition by a tutor to borrow money on the pupil's estate is properly presented to a Division of the court, and not to the junior Lord Ordinary. *Dixon's Tutor*, 1867, 5 M. 1052; 39 J. 594.

691. Inner or Outer House?—Petition and Complaint.—*Held* that a petition and complaint for breach of interdict is not competent before a Lord Ordinary. *M'Neill* v. *Scott*, 1866, 4 M. 608; 38 J. 316.

692. Inner or Outer House?—Petition and Complaint.—A petition and complaint by a bankrupt, to have the interim factor ordained to apply to the sheriff for a renewal of his personal protection, in terms of the minutes of a meeting of his creditors, having been presented to the Lord Ordinary during the sitting of the court, *held* incompetent. *M'Pherson* v. *Thorne*, 1844, 6 D. 422; 16 J. 231.

693. Inner or Outer House?—Petition for Judicial Factor.—*Held* that a petition for sequestration of the rents of subjects alleged to be the joint property of the petitioner and another party, and to one-half of which *pro indiviso* the respondent claimed right by virtue of a title which was disputed by the petitioner, and for appointment of a judicial factor pending the disputes, was competently brought before the Inner House, and intimation and

service ordered. *Rintoul*, 1862, 1 M. 214; 35 J. 80.

694. Inner House or Junior Lord Ordinary?—Nobile officium Petition by Trustees of Charitable Institution for Authority to Feu—Distribution of Business Act, 1857.—*Held* that an application by the trustees and managers of a charitable institution for authority to feu was properly presented to the Inner House. *Managers of Prime Gilt Box of Kirkcaldy*, 1859, 21 D. 871; 31 J. 478.

695. Inner or Outer House?—Removal of Trustees.—A petition for the removal of trustees and executors must be presented to the Inner House. *Mitchell, etc.*, 1864, 2 M. 1378; 36 J. 693.

696. Inner or Outer House?—Sequestration of Heritable Estate.—The court, and not the Lord Ordinary, can sequestrate heritable property forming the subject of a competition. *M'Alpine* v. *M'Alpine*, 10 July 1807, F.C.; M. "Sequestration" App. No. 1.

697. Instance—Incorporated Company.—An action at the instance of a company incorporated by Act of Parliament under the name in which it was incorporated, *sustained*. *Edinburgh Oil Gas Co.* v. *Clyne's Trs.*, 1837, 16 S. 164; 13 Fac. 164. *Whitehaven & Furness Rly. Co.* v. *Macfadzean*, 1848, 10 D. 1127; 20 J. 414.

698. Interlocutor—Action against Debtor and Cautioner—Death of Cautioner—Competency of Pronouncing Interlocutor.—An interlocutor against a principal debtor and his cautioner having been pronounced after the death of the cautioner, *held* inept as to both. *Ferrier* v. *Berry*, 1828, 6 S. 982.

699. Interlocutor—Absolvitor or Dismissal—Absolvitor "from the Action as Laid."—In an action in which a number of parties were called as defenders, *held* that the record having been opened up, and the pursuer having had an opportunity of correcting a defective averment in the previous record in regard to all the defenders, and having still failed to set forth that which would create liability as regards two of the defenders, these two were entitled to absolvitor, unqualified by the words "from the action as laid." *Inglis* v. *Douglas*, 1861, 23 D. 561; 33 J. 344.

700. Interlocutor — Alteration of — Alleged Clerical Error.—A final judgment was pronounced on 26th January, disposing of the whole case and also of the question of expenses, and the judgment was forthwith written out and signed. On 11th March one of the parties moved to have the finding of expenses altered, as not being conform to the judgment pronounced. Motion *refused*. *Wotherspoon* v. *Macdonald*, 1869, 6 S. L. R. 416.

701. Interlocutor — Alteration of — Clerical Error.—After a reclaiming note against an interlocutor sustaining the "fourth" defence in a cause had been sent to the roll, the court, upon a note to the Lord President, *allowed* the "fifth" defence to be substituted, the Lord Ordinary and both parties concurring in the statement, that the fourth had been written in the interlocutor by a clerical error. *Forbes* v. *Gallie*, 1846, 8 D. 525; 18 J. 262.

702. Interlocutor—Error in—Correction.—The court, in delivering judgment, announced that expenses would be given to neither party. The interlocutor was written out and signed without any mention of expenses being contained in it. *Held* that the addition could be made only of consent. *Walker* v. *Flint*, 1863, 1 M. 423; 35 J. 253.

703. Interlocutor—Error—Correction of—Inferior Court.—*Observations* on the incompetency of an inferior judge (Dean of Guild) *ex proprio motu* correcting an error in an interlocutor after it had been issued and seen by the parties. *White* v. *M'Ewen's Trs.*, 1873, 11 M. 602.

704. Interlocutor — Erasures — Erasures Discovered after Extract—Interlocutor Pronounced of New.—A petition for disentail having been granted, and decree extracted, it was discovered that certain words in the interlocutor had been written on erasures. On an application by the petitioner, the court *granted* warrant to the extractor to retransmit the process, in order that the interlocutor might be pronounced of new; but *observed* that the erasures did not vitiate the decree, the words written thereon not being essential to its meaning being understood. *Cadell*, 1853, 15 D. 282; 25 J. 179; 2 Stuart 146.

705. Interlocutor—Error in—Correction of.—The defenders having been assoilzied, the interlocutor omitted a finding in their favour for expenses. The court pronounced an interlocutor some days afterwards, supplying the omission. *Walker* v. *Caledonian Rly. Co.*, 1858, 20 D. 1102; 30 J. 663.

706. Interlocutor—Error in—Correction of.—*Held* competent to rectify an informal interlocutor of the Inner House by pronouncing a new one, the first not having been extracted. *Ritchie* v. *Fergusson*, 1849, 12 D. 119; 22 J. 3.

707. Interlocutor—Competency—Conclusion.—A pursuer concluded for declarator that he had exclusive right to gather sea-ware up to a particular line. The court *found* him entitled to the sea-ware up to a line short of that concluded for, repelling an objection that it was incompetent to find him entitled to a line different from that concluded for. *M'Taggart* v. *M'Douall*, 1867, 5 M. 534; 39 J. 274.

708. Interlocutor—Competency—General Conclusion.—A summons concluded for delivery of all bills and other documents of debt belonging to the pursuer, and in particular of a bill dated on or about 15th June 1857. Evidence was led in the inferior court as to a bill of 12th December 1856, which was proved to be the property of the pursuer. *Held* that the pursuer was entitled, under the

general conclusion of the summons, to delivery of the latter bill. *M'Kelvie* v. *Campbell*, 1865, 3 M. 862 ; 37 J. 453.

709. Interlocutor—Competency—Conclusions.—*Held*, on the construction of a summons in the sheriff court, that its conclusions had reference solely to a right to a servitude road ; and therefore that an interlocutor finding that the road in question was a public road, and that the pursuer was entitled to a possessory judgment, was incompetent. *Thomson* v. *Murdoch, etc.*, 1862, 24 D. 975 ; 34 J. 482.

710. Interlocutor—Failure of Judge to Sign—Nullity of Subsequent Proceedings.—An interlocutor allowing a proof not having been signed by the sheriff-substitute, *held* that all the subsequent proceedings were null, although a proof had been led, pleadings on its import taken place, and a final interlocutor on the merits pronounced, without any objection being stated in the sheriff court on the above ground. *Smith* v. *M'Aulay & Co.*, 1846, 9 D. 190 ; 19 J. 58.

711. Interlocutor—Final—Necessity for Disposing of Expenses—Judicature Act, 1825, s. 17.—*Held* that although the 17th section of the Judicature Act, 1825, enacts that a Lord Ordinary in pronouncing judgment on the merits of a cause "shall also determine the matter of expenses," it is competent for the Lord Ordinary to embody his judgment in two interlocutors—1st, an interlocutor on the merits, reserving the question of expenses ; and 2nd, an interlocutor disposing of the question of expenses. *Bannatine's Trs.* v. *Cuninghame*, 1872, 10 M. 317 ; 44 J. 244.

712. Interlocutor—Form of—Absolvitor—Plea of Prescription—Necessity of Disposing of Plea.—In an action for payment of an account in which, among other pleas, the triennial prescription was pleaded in defence, the Lord Ordinary having assoilzied the defenders without inserting in his interlocutor any special finding as to the plea of triennial prescription, the court *remitted* to him to dispose of that plea. *Kerr* v. *Baird*, 1851, 1 Stuart 63.

713. Interlocutor—Form of—Expenses—Finding Carrying Expenses in Court of Session and in Inferior Courts.—An interlocutor in an advocation under which one branch only of a case was disposed of, finding "the advocator liable in expenses," *held* to carry the expenses both in the Court of Session and in the inferior court on that branch of the litigation. *Halbert* v. *Bogie*, 1857, 19 D. 762 ; 29 J. 350.

714. Interlocutor—Form of—Findings in Fact.—A Lord Ordinary having omitted to pronounce special findings on the facts proved and not proved, under a proof, the case remitted to him to do so. *Kilgour* v. *Brown*, 1852, 14 D. 441 ; 24 J 217 ; 1 Stuart 372.

715. Interlocutor—Form of—Findings in Fact.—A sheriff having omitted to pronounce special findings as to facts proved under a proof, the court *remitted* to him to do so, although they were stated in a note. *Caledonian Rly. Co.* v. *Campbell*, 1852, 14 D. 441 ; 24 J. 215 ; 1 Stuart 369.

716. Interlocutor—Form of—Findings in Facts—Judicature Act, s. 40.—In an advocation from the sheriff court, where a proof had been led, *held* that a finding, "that the said injuries were occasioned through the fault of the defenders, in not having the machinery of the said roving frame duly fenced," sufficiently specified the facts upon which the judgment proceeded, as required by the Judicature Act, 6 Geo. IV. c. 120, s. 40. *Darby* v. *Duncan & Co.*, 1861, 23 D. 529 ; 33 J. 206.

717. Interlocutor—Form of—Judicature Act, s. 40—Remit from House of Lords.—Terms of interlocutor which held by House of Lords to be in compliance with the Act 6 Geo. IV. c. 120, s. 40. *Observed*, that if it appear from interlocutors what facts the court mean to find, their terms will not be critically construed. *Anderson* v. *Gill*, 1858, 20 D. (H. L.) 7 ; 3 Macq. 180 ; 30 J. 497.

718. Interlocutor—Form of—Judicature Act, s. 40.—Where, in an advocation of a judgment in the sheriff court in which a proof had been led, the Lord Ordinary found "in terms of the interlocutor of the sheriff," the court *remitted* to him "to frame an interlocutor with findings in point of fact and law." *Lowndes* v. *Buchanan*, 1854, 17 D. 63 ; 27 J. 7.

719. Interlocutor—Findings in Fact—Judicature Act, s. 49—Remit from House of Lords.—Where the Court of Session, in giving judgment on a proof, had not pronounced findings on the special facts in terms of the 49th section of 6 Geo. IV. c. 120, the House of Lords reversed, and remitted to do so. *Wemyss* v. *Wilson*, 1849, 6 Bell 394 ; 21 J. 379.

720. Interlocutor — Homologation. — *Question*, whether the actions of parties to a process amounted to a homologation of an interlocutor, so as to bar them, by personal exception, from challenging it. *M. of Queensberry* v. *Wright*, 1836, 14 S. 1021 ; 11 Fac. 843.

721. Interlocutor—Printing of long Interlocutors.—Where the interlocutors are long, the court will authorise a printed copy to be signed and put up with the interlocutor sheet, and printed copies to be embodied in extracts. *Innes* v. *Murray, etc.*, 1859, 21 D. 1381 ; 31 J. 760.

722. Interlocutor — Statement therein that Consent of Parties had been Given to a Remit—Finality.—Where a remit is made to persons of skill by an interlocutor which bears that consent was given, if parties do not timeously object to it, it must stand as finally determining the course of inquiry directed by it to have had the concurrence of parties, as much as if a minute of the consent had been

lodged in process. *M'Laren* v. *Ferrier*, 1865, 3 M. 833; 37 J. 429.

723. Interlocutor—Form of Suspension—No Judgment Finding Letters Orderly Proceeded.—A suspension of a decree which had been issued having been brought, judgment decerning "of new" was pronounced and written on the interlocutor sheet of the suspension, but not preceded by any judgment finding the letters orderly proceeded. *Held* that though this finding was now usual, its absence, as at the date of the interlocutor 1844, formed no objection, and that to the effect of supporting the judgment, the original process and the suspension must be viewed as part of the same procedure. *Munro* v. *Rose*, 1855, 18 D. 292; 28 J. 122.

724. Intimation—Bill Chamber—Court of Session.—Intimation on the walls of the Bill Chamber ought to be renewed in the Court of Session. *Thomson*, 1856, 18 D. 856.

725. Intimation — Burgh — Personal Intimation of Proceedings to Chief Magistrate. — Judicial proceedings are sufficiently intimated to the magistrates of a burgh, by intimation being made personally to the chief magistrate as such, although not presiding. *Mags. of Perth* v. *Lord Advocate*, 1836, 1 Swin. 66.

726. Intimation — Suspension and Interdict.—A deliverance of the Lord Ordinary ordering a note of suspension and interdict to be intimated, *held* not properly executed by intimation of the deliverance without the note. *Duff* v. *Mailler*, 1843, 15 J. 231.

727. Inventory of Papers — Sealing — Warrant.—In a case of doubtful succession and disputed possession, warrant granted to two of the clerks of session to inventory the papers in and seal up a charter-room in which there might be documents decisive of the case. *Observed*, that it was competent for the sheriff to grant a warrant to that effect. *Ker* v. *Ker*, 1805, Hume 769.

728. Issue — Form of — Account for Doctor's Charges.—*Held*, in an action by a surgeon against the executors of a deceased for professional attendance and furnishings and medicines, that the issue must make reference to a detailed account specifying the date of and charge for each visit, and each item furnished. Form of issues. *Webster* v. *Alexander*, 1859, 21 D. 509; 31 J. 273.

729. Issue—Form of—Action against an Agent for Fees Due to an Advocate's Clerk.—An action against an agent for fees alleged to be due to a party deceased, as clerk to an advocate, was met by the defence, that the deceased was not an advocate's clerk, but only an amanuensis paid at a fixed salary. Form of issues to try the question. *Craig* v. *Campbell*, 1858, 20 D. 444.

730. Issue—Adjustment—Issue Proposed by Pursuer Disallowed—Issue Adjusted by Court.—An issue adjusted by the court where the issue proposed by the pursuers was disallowed and the pursuers declined to propose any other issue. *Davidson, etc.* v. *E. of Fife, etc.*, 1863, 1 M. 874; 35 J. 531.

731. Issue—Issues Proposed by Pursuer—Appeal against Interlocutor Approving.—Where a case is tried by jury on an issue proposed by the pursuer, and not afterwards objected to by him in the Court of Session, he is not entitled, on the conclusion of the case, to appeal against the interlocutor approving the issues, on the ground that their form is erroneous. *Mackintosh* v. *Fraser, etc.*, 1863, 1 M. (H. L.) 37; 35 J. 457.

732. Issue—Adjustment of—Settled by Presiding Judge in Chambers.—*Johnston* v. *Scott*, 1834, 12 S. 884.

733. Issue—Adjustment of—Report to Inner House — Finding that no Issuable Matter — Procedure. — A case having been reported to the Inner House by the Lord Ordinary, on the adjustment of issues, the court *disallowed* the issue proposed by the pursuer. Thereupon the defender moved for absolvitor. The court, without deciding that the motion was incompetent, *held* that there was no issuable matter, and remitted to the Lord Ordinary to proceed with the case. *Lindsay* v. *Johnston*, 1860, 23 D. 12; 33 J. 3.

734. Issue — Adjustment of — Second Meeting for.—When parties do not adjust and settle issues at the first meeting, *held* competent for the Lord Ordinary to report the issues to the court verbally, without appointing a second meeting. *Ashbury Rly. Carriage Co.* v. *N. B. Rly. Co.*, 1867, 5 M. 975; 39 J. 540.

735. Issue—Adjustment of—Report to Inner House—No Issuable Matter—Dismissal without Remit to Lord Ordinary.—A case being reported on adjustment of issues, the court, holding that the pursuer had not stated a case entitling him to go to a jury, of consent of pursuer did not send the case back to the Lord Ordinary, but finally disposed of it in the Inner House. *Waldie* v. *Gordon's Trs.*, 1867, 5 S. L. R. 40.

736. Issue—Form of—Admissions.—*Question*, whether an admission on the record can be prefixed to an issue against the will of the party making it. *Swayne* v. *Fife Banking Co.*, 1835, 13 S. 1003; 10 Fac. 774.

737. Issue—Form of—Alternative Issues Disapproved of.—*Cairns* v. *Marianski*, 1850, 12 D. 919.

738. Issue—Ambiguity—Reference to Prior Proceedings.—If there is ambiguity in the issue, it may be explained by the prior proceedings; but when it is clear, the court must be ruled by it. *Bertram* v. *Barry*, 1818, 1 Mur. 347. Cf. *Fife* v. *Fife's Trs.*, 1817, 1 Mur. 137.

739. Issue — Amendment. — An issue *allowed* to be amended after it had been adjusted. *Bennies* v. *Dobbie*, 1863, 1 M. 805; 35 J. 500. *Edwards* v. *Begbie*, 1850, 13 D. 227; 23 J. 67. *Moodie* v. *Skae*, 1857, 19 D.

958 ; 29 J. 443. *Blaikie* v. *Duncan*, 1857, 19 D. 1095. *Hill* v. *Kinloch*, 1855, 17 D. 958 ; 27 J. 487. *M'Neil* v. *Caldwell*, 1853, 15 D. 590 ; 2 Stuart 337. *Cochran* v. *Wallace*, 1820, 2 Mur. 296. *Skene* v. *Maberly*, 1820, 2 Mur. 361. *Cooper* v. *Mackintosh*, 1823, 3 Mur. 358. *Dunlop* v. *Buchanan*, 1828, 5 Mur. 17.

740. Issue—Amendment—Clerical Error.—Leave *granted* to amend a clerical error in an adjusted issue. *Thomson* v. *Adam*, 1866, 2 S. L. R. 206.

741. Issue—Form of—Arrest.—An action of damages was raised against a procurator-fiscal for alleged wrongous apprehension upon a conviction sentencing the pursuer to pay a penalty, and in default of payment to be imprisoned. The grounds of action were that the penalty had been paid and also that the fiscal had acted nimiously, oppressively, and maliciously in causing the warrant to be put in force. Form of issue approved of. *Mackay* v. *Grant*, 1865, 3 M. 944 ; 37 J. 497.

742. Issue—Form of—Action by a Bank against Director for Malversation.—*North of Scotland Banking Co.* v. *Thomson*, 1854, 16 D. 1011.

743. Issue—Form of—"For Behoof of."—The words "for behoof of" mean "for the benefit of," and are not in an issue equivalent to "by the authority of." *Robertson* v. *Fleming*, 1861, 4 Macq. 167 ; 23 D. (H. L.) 8 ; 33 J. 691.

744. Issue—Form of—Action on a Bill—Alleged Forgery—Separate Issue as to Adoption.—*Rathbone* v. *Glenny*, 1833, 11 S. 574. Cf. *Frost* v. *North of Scotland Banking Co.*, 1858, 20 D. 1135 ; 30 J. 678.

745. Issue—Form of—Question as to whether a Bill had been Duly Presented and Notice of Dishonour Duly Given.—*Western Bank* v. *Fullarton*, 1863, 1 M. 926.

746. Issue—Form of—Question as to whether one of Several Bills had been Withheld when the Others were Delivered up.—*Joel* v. *Johnstone*, 1860, 22 D. 430 ; 32 J. 180.

747. Issue — Form of — Action for Board.—Form of issue to try whether board was afforded at the defender's request to his daughter, on a bargain that it should be paid for. *Taylor* v. *Allardyce*, 1858, 20 D. 401 ; 30 J. 224.

748. Issue—Form of—Breach of Promise—Latitude.—In an issue adjusted in an action of damages for breach of promise of marriage, a latitude of a year and a half *allowed* as to the date of the promise. *Moor* v. *Oliver*, 1868, 5 S. L. R. 500.

749. Issue—Form of—Breach of Promise—Written or Verbal Promise.—Although an action of damages for breach of promise be founded on allegations of verbal promises, and on correspondence implying promise, the pursuer is not bound to take separate issues applicable to each mode of establishing the promise. A general issue is sufficient, whether, between certain dates, within five years, the defender promised to marry the pursuer. *Murray* v. *Napier*, 1861, 23 D. 1243 ; 33 J. 626.

750. Issue—Form of—Breach of Promise of Marriage and Seduction.—*Forbes* v. *Wilson*, 1868, 6 M. 770 ; 40 J. 396. See *Hill* v. *Wilson*, 1871, 43 J. 242.

751. Issue—Breach of Promise—Seduction — Separate Issues. — An action of damages for breach of promise and seduction concluded for a slump sum. *Held* that the pursuer was entitled to a separate issue on each head, with a separate schedule of damages attached to each. *Paton* v. *Brodie*, 1857, 20 D. 258 ; 30 J. 123.

752. Issue—Form of—Action against a Cautioner who Alleged Time had been Given to the Principal Debtor.—*Warne & Co.* v. *Lillie*, 1867, 5 M. 283 ; 39 J. 127.

753. Issue—Construction of—Words Used in Ordinary Language.—Exception by defenders to refusal of presiding judge at a jury trial to construe a term in the issue *disallowed*. *Observed*, that when words in an issue have a technical legal meaning requiring explanation or construction, that construction must be given by the court to the jury, but it does not fall within the province of the court to explain words which have a technical meaning in science or art or by mercantile usage, the meaning of which should be made the subject of evidence if necessary. *Taylor & Co.* v. *Macfarlane & Co.*, 1867, 4 S. L. R. 33.

754. Issue—Form of—Extra Work under a Contract.—Issues to try a question of alleged balance due under a contract for extra work done. *Russel* v. *Malcolm*, 1855, 17 D. 1075 ; 27 J. 551.

755. Issue—Form of—Count and Reckoning.—An action of count and reckoning in which there were questions of fact, apart from the accounting, to be ascertained, sent to a jury. Form of issue adjusted. *Forbes* v. *Campbell*, 1857, 19 D. 1008 ; 29 J. 443.

756. Issue—Counter Issues—8 and 9 Vict. c. 109, s. 18.—In defence to an action for the balance of an alleged account, founded upon a contract, it was averred "that the contract between the parties (who were both domiciled in England) was a contract by way of gaming or wagering, and is now null and void, in terms of the 8 and 9 Vict. c. 109, s. 18, and cannot support action." An issue of resting-owing having been adjusted for the pursuer, counter issue *allowed* the defender, referring to the law of England generally, on his deleting his reference to the particular statute in the record. *Boyd* v. *Law*, 1855, 17 D. 513 ; 27 J. 219.

757. Issue — Counter Issue — Counter Action.—In an action against a law publisher for payment of the price of "a new edition of Lord Stair's *Institutions*," issue of resting-owing adjusted, and counter issue to try a claim by the defender for law-books furnished to the

pursuer; but *held* that the defender was not entitled, without raising a separate action, to put in issue counter claims (1) for the price of getting an index prepared, the pursuer having failed to furnish one—there being none specified in the missives, and no averment that, by usage of trade, it formed an integral part of such a work; (2) for part of the expense of corrections alleged to have been excessive, but not objected to at the time, and it not appearing to what extent they might have been necessary or beneficial; (3) for the expense of publishing another work alleged to have been done on the joint employment of the pursuer and his brother. *Brodie* v. *Clark*, 1859, 21 D. 634; 31 J. 344.

758. Issue—Form of—Counter Issue—Action by Builder for Payment of a Contract Price—Penalty Clause.—Issues and counter issues adjusted in an action by a builder for a balance of the contract price of buildings, for payment for extra work, and damages for non-implement of a former contract, the defender pleading, *inter alia*, that the buildings had not been completed within the stipulated time, and that under the terms of the contract the builder had incurred penalties for delay exceeding his demand. *Johnston* v. *Robertson*, 1861, 23 D. 646; 33 J. 335. Cf. *Lord Advocate* v. *Hogarth & Co.*, 1859, 21 D. 779; 31 J. 415.

759. Issue—Form of—Counter Issue—Action upon a Marine Policy—Defence of Misrepresentation.—*Baker* v. *Scottish Sea Insurance Co.*, 1855, 17 D. 417; 27 J. 178.

760. Issue—Counter Issue—Action by an Architect for Payment—Defence that Pursuer had Neglected his Duties.—In an action for recovery of the charges and disbursements of an architect, *held* that a defence, that the pursuer had failed to perform his part of the contract, by neglecting to superintend the erection, and check the tradesmen's accounts, and see that the work was properly executed, ought to be put in a counter issue. *Hays* v. *Maclagan*, 1864, 2 M. 453; 36 J. 218.

761. Issue—Counter Issue—Necessity for—Loan—Donation.—Issues adjusted to try the question, whether holograph acknowledgments of loans found in possession of the debtor after his creditor's death had been taken by him without authority from the repositories of the deceased. *Held* that the defender might prove donation without taking a counter issue. *Knox, etc.* v. *Crawford*, 1862, 24 D. 1088; 34 J. 543.

762. Issue—Form of—Damages—Breach of Contract.—In an action of damages for breach of contract the issue should set forth the contract and the alleged breach. Issue adjusted. *Taylor & Co.* v. *Macfarlane & Co.*, 1866, 1 S. L. R. 201.

763. Issue—Form of—Damages—Breach of Contract—Claimed in Respect of Sub-Contracts.—Form of issue in an action of damages for breach of an alleged agreement, on the part of a glass company, to supply the pursuer with glass for the execution of contracts which he said he had entered into on the faith of the alleged agreement. *M'Alister* v. *British Plate Glass Co.*, 1859, 21 D. 546; 31 J. 291.

764. Issue—Form of—Damages—Breach of Contract—Sale of Goods for Specific Purpose.—*Hutchison & Co.* v. *Henry & Corrie*, 1867, 6 M. 57; 40 J. 36. Cf. *Macfarlane & Co.* v. *Taylor*, 1868, 6 M. (H. L.) 1; 40 J. 300.

765. Issue — Damages — Disclosure of Trade Pattern.—Although it was alleged in a summons of damages by one shawl manufacturer against another, that the defender, contrary to the rules and practice of the trade, had wrongfully, unwarrantably, and fraudulently prevailed upon a workman employed by the pursuer to disclose a particular shawl pattern which had been invented for the pursuer, and which the workman was employed to weave, *held* that an issue whether the defender wrongfully prevailed upon the workman to disclose the pattern, to the pursuer's loss and damage, was sufficient to try the cause. *Roxburgh* v. *M'Arthur*, 1841, 3 D. 556; 10 Fac. 565.

766. Issue—Form of—Action of Damages against a Railway Company for Failure to Deliver Goods Timeously.—*Dobson* v. *Edinburgh & Glasgow Rly. Co.*, 1861, 23 D. 872; 33 J. 443.

767. Issue—Form of—"Fault."—In an action of damages founded upon alleged culpable negligence and gross carelessness, the word "fault" is a proper expression to introduce into the issue to try the question. *M'Lachlan* v. *Gordon*, 1855, 17 D. 773.

768. Issue—Form of—Freight.—Form of issues in an action for freight resisted on the ground of damage to the cargo in consequence of the leaky and unseaworthy condition of the vessel, and of delay and fault on the part of the pursuer. *Young* v. *Mann*, 1857, 19 D. 785; 29 J. 363.

769. Issue—Form of—Action of Damages Arising out of Contract of Affreightment.—*Craig* v. *M'Beath*, 1863, 1 M. 1020; 35 J. 587.

770. Issue — Form of — Damages — Improper Packing.—Form of issue in an action of damages by a manufacturer against a calenderer and packer for improperly finishing and packing goods for exportation. *Sutherland* v. *Cochran*, 1856, 18 D. 1137; 28 J. 544.

771. Issue—Form of—Action of Damages against a Law Agent.—In an action by a client against his law agent for damages, the issue proposed was "whether the defenders failed in whole or in part to discharge their duty as law agents." The court *ordered* that the issue should run "whether the defenders failed through negligence to discharge," etc. *Barles* v. *Strathern & Douglas*, 1859, 21 D. 307; 31 J. 173.

772. Issue—Form of—Action of Damages against a Medical Man for Breach of Secrecy.—*A.* v. *B.*, 1851, 14 D. 177.

773. Issue—Form of—Druggist Sued for Damages for Supplying a Poison in Place of a Medicine.—A druggist was sued for damages for supplying a poison in place of a medicine. The issue was whether the defender undertook to supply a certain medicine and in lieu thereof supplied the poison. Objection that it was not put in issue that this arose from the defender's ignorance or carelessness *repelled*; and *observed*, that under this issue the defender might prove that he merely undertook to procure the medicine from another person. *Dalziel* v. *Osborne*, 1857, 20 D. 55; 30 J. 32.

774. Issue—Form of—Action of Damages against two Doctors for Granting Certificates that Pursuer was Insane.—*Strang* v. *Strang*, 1849, 11 D. 378; 21 J. 108.

775. Issue—Form of—Malice—Damages for Injury by Steam-Coach to Road.—In an issue arising out of an action of damages by the proprietors of a steam-coach for injury done in consequence of operations by the trustees on the road on which it ran, *held* not necessary to insert malice, although malice was averred in the summons and condescendence. *Dauney* v. *Maxwell*, 1836, 14 S. 1037; 11 Fac. 860.

776. Issue—Damages — Malice. — Action of damages for recording protest of bill and charging thereon after bill paid. *Held* that the charge was a diligence and not a judicial act, and that therefore it was not necessary for pursuer to put malice in the issue. *Gibb* v. *Edinburgh Brewery Co.*, 1873, 11 M. 705; 45 J. 438.

777. Issue—Form of—Damages to Property by Working Minerals.—Issues adjusted to try a question between a party who feued a piece of ground for building, with a reserved right to work minerals on payment of such damage as might thereby be sustained, and the feuar averred that the buildings which he had erected were injured by the mining operations. *Howie* v. *Campbell*, 1852, 24 J. 184; 14 D. 377.

778. Issue—Form of—Negligence.—In an action by a proprietor of a coal mine against a party through whose alleged negligence a fire in the mine had been occasioned, concluding for repetition and payment of the sums expended by him in extinguishing the fire, the court approved of an issue, "whether the pursuer expended, in measures reasonable and proper in the circumstances, for extinguishing the said fire, and adopted, after due intimation, the sum" therein claimed. *Nisbett* v. *Dixon & Co.*, 1851, 13 D. 776; 23 J. 340.

779. Issue—Form of—Action against a Railway Company for Damage Done to an Article Caused by them.—*Wood & Co.* v. *Peebles Rly. Co.*, 1860, 22 D. 1393; 32 J. 634.

780. Issue—Form of—Custodier—Damages—Negligence.—Form of issue in an action of damages by a distiller, who had placed spirits in a bonded warehouse, based upon alleged neglect and violation of duty on the part of the keeper of the warehouse, in affecting or suffering the removal of the spirits. *Smith* v. *Allan, etc.*, 1858, 20 D. 1254; 30 J. 746.

781. Issue—Form of—Nuisance—Railway Works—Defence Founded on Railway Clauses Act.—*Cooper & Wood* v. *N. B. Rly. Co.*, 1863, 1 M. 499; 35 J. 295.

782. Issue—Form of—Nuisance—River Pollution.—*D. of Buccleuch, etc.* v. *Cowan, etc.*, 1866, 4 M. 475; 38 J. 217. Cf. *Ewen* v. *Turnbull's Trs.*, 1857, 19 D. 513; 29 J. 239.

783. Issue—Form of—Nuisance.—*Gardner* v. *Fraser*, 1860, 22 D. 1501.

784. Issue—Form of—Damages for Personal Injuries—Coal-Pit Accident.—In an action of damages by the representatives of a collier who had been killed in a coal-pit, against his employers, an issue sent to a jury, whether his death was occasioned while he was working in the pit, by injuries arising from the shaft being in an unsafe and insufficient state, from causes for which the employer was responsible. *Marshalls* v. *The Omoa Coal Co.*, 1851, 14 D. 266; 24 J. 94; 1 Stuart 146.

785. Issue—Form of—Action of Damages against a Coalmaster for Death of Miner.—*Cook* v. *Bell*, 1857, 19 D. 398. See 20 D. 137; 30 J. 75. Cf. *Swift* v. *Christie*, 1854, 16 D. 922; 26 J. 483. *Kerr* v. *Bredisholm Coal Co.*, 1852, 2 Stuart 57.

786. Issue—Form of—Damages—Coal-Pit Accident—Insufficiency of Machinery.—*Snedden* v. *Addie*, 1849, 11 D. 1159; 21 J. 454.

787. Issue—Form of—Horse and Van Accident—Meaning of "Belonged."—In an issue whether the pursuer was injured by a horse and van "belonging to the defenders," the words "belonging to" do not imply "the property of," but such control of as makes them constructively the defenders' property for the time. *Shiells* v. *Edinburgh & Glasgow Rly. Co.*, 1856, 18 D. 1199; 28 J. 539.

788. Issue—Form of—Action of Damages for Death of Husband—Defence that Deceased was not Lawfully on the Premises at the Time of his Death.—Form of issue approved of in an action of damages by the widow and children of a man killed by the falling of a shed in course of erection by the defenders, where the defence was that the deceased was not lawfully on the premises at the time of the accident. *Scoullars* v. *Crawford & Fulton*, 1868, 6 M. 1128; 40 J. 558.

789. Issue—Form of—Damages for Death of Son—Question as to Employment.—Form of issue in an action of damages for the loss of a son killed when in the defender's employment, the employment being denied. *Good* v. *Christie*, 1865, 1 S. L. R. 53.

790. Issue—Form of—Damages for Personal Injuries—Averment that Defender Furnished Insufficient Machinery and Employed Reckless and Drunken Men.—Form of issue in an action for reparation for bodily injuries by a servant against his employer, who

it was said did not furnish proper machinery for the work, and employed workmen whom he knew to be reckless, and not of sober habits. *Donald* v. *Brand*, 1862, 24 D. 295; 34 J. 135.

791. Issue—Form of—Action of Damages against a Landlord for Failure to Make Premises Let Safe.—*Gosskirk & Son* v. *Edinburgh Rly. Station Access Co.*, 1863, 2 M. 383.

792. Issue—Form of—Action by Burgess against Magistrates, etc., of a Royal Burgh for Injury Caused by their Neglect to Remove a Stone Obstructing the Pavement.—*Dargie* v. *Mags. of Forfar*, 1856, 18 D. 343; 28 J. 178. Cf. *Ker* v. *Mags. of Stirling*, 1858, 21 D. 169; 31 J. 100.

793. Issue—Form of—Action of Damages against an Adjoining Proprietor for Injuries Caused by Blasting. — *Rattray* v. *Tayport Patent Slip Co., etc.*, 1866, 4 M. 499; 38 J. 232.

794. Issue—Form of—Damages—Personal Injuries—Railway Accident.—In an action of damages by the widow of a party who had been killed on a railway, the court *granted* an issue of, whether the death occurred "in consequence of the fault, negligence, or want of skill of the defenders, or others in their employment, or for whom they are responsible, either in conducting the said train, or in constructing and maintaining the defenders' railway or works, or in providing sufficient carriages, engines, or other machinery." *Cargill* v. *Dundee & Perth Rly. Co.*, 1848, 11 D. 216; 21 J. 51.

795. Issue — Form of — Damages — Personal Injuries—Railway Accident—Two Defenders—A to whom Railway Belonged and B to whom Engine Belonged.—In an action of damages against A and B, a pursuer averred that her son had been killed on a public road at a point where it was crossed on the level by a railway belonging to the defender A, by a train of waggons belonging to that defender, propelled by an engine belonging to the defender B, and that this occurred from the fault of both, or one or other of the defenders. *Sneddon* v. *Langloan Iron Co., etc.*, 1862, 24 D. 569; 34 J. 288. Cf. *N. B. Rly. Co.* v. *Leadburn, etc., Rly. Co. & Waddell*, 1865, 3 M. 340; 37 J. 163.

796. Issue — Form of — Damages — Personal Injuries—Railway Accident—Fault Admitted—Observations on Elements of Damage.—In an action of damages by the children of a party who had been killed by an accident on a railway, the defenders proposed an issue with the admission that the accident had been caused by negligence for which they were liable, and putting to the jury only the question of the amount of damages. *Held* that the pursuers were entitled to the ordinary issue of fault. *Morton* v. *Edinburgh & Glasgow Rly. Co.*, 1845, 8 D. 288; 18 J. 134.

797. Issue — Form of — Damages — Personal Injuries—Railway Accident.—In an action of damages for injury on a railway, it was proposed to put in issue, whether it was caused "by the negligence or want of skill of the defenders, or others in their employment, and for whom they are responsible, or through the insufficiency or malconstruction of the defenders' railway or works, etc., whereby the pursuer was seriously injured." *Held* that it was competent, under the issue, to prove that the insufficiency was of a nature for which the defenders were not responsible; but that the onus of proving that they were not responsible lay upon the defenders. *M'Glashan* v. *Dundee & Perth Rly. Co.*, 1848, 10 D. 1397; 20 J. 508.

798. Issue — Form of — Damages for Personal Injuries—Action against Owners of Railway and Contractors in Possession.—In an action of damages by a boy whose leg had been injured by a waggon on a private railway, the pursuer alleged that the railway was not properly fenced, and that the person in charge of the horse pulling the waggon was not at his post. He called as defenders the owner of the railway and the contractor for the hauling of the waggons. *Held* that he was entitled to a general issue against both owner and contractor, whatever circumstances might emerge at the trial calling for special ruling. Terms of issues adjusted. *Browlie* v. *Tennant*, 1854, 16 D. 998; 26 J. 517.

799. Issue — Form of — Damages for Personal Injuries—Railway Accident—Trespasser on Engine.—Form of issue in an action of damages against a railway company for injuries sustained by a stationmaster travelling on an engine on which the defenders averred he had not permission to be at the time. *Teasdale* v. *Monkland Rly. Co.*, 1866, 2 S. L. R. 6.

800. Issue—Form of—Action of Damages by a Fireman against a Railway Company for Injuries Sustained through the Engine Coming into Contact with an Obstruction.—*Morris* v. *Monkland Rly. Co.*, 1857, 19 D. 360; 29 J. 165.

801. Issue—Form of—Action of Damages for Injuries Sustained by a Railway Accident — Admission of Liability by Railway Company.—In an action of damages for injury sustained by a railway accident, although the railway company admitted that it had been caused by negligence, for which they were liable, *held* that the pursuer was entitled to put the question of *culpa* to the jury as an element to be considered in assessing damages, and that he could not be forced to restrict the issue to the question of damages. *Dobie* v. *Aberdeen Rly. Co.*, 1856, 18 D. 862; 28 J. 391.

802. Issue — Form of — Damages — Personal Injuries—Railway Passenger.—In consequence of a collision on a railway, a passenger was severely injured, and brought an action of damages against the railway company. The defence was that he was an illegal passenger, inasmuch as he was travelling without a ticket. Form of issues to try the question. *Hamilton* v. *Caledonian Rly Co.*, 1856, 18 D. 999; 28 J. 456.

803. Issue—Action of Damages by a Railway Servant against the Company—Fault of Fellow-Servant.—Issues in action of damages by a servant of a railway company against the company for injuries caused by alleged negligence or mismanagement of a fellow-servant. *Hill* v. *Caledonian Rly. Co.*, 1854, 16 D. 1022; 26 J. 553.

804. Issue — Form of — Damages for Personal Injuries—Running down Case.—Issue adjusted in a case in which the pursuer averred that she had been recklessly set down by the conductor of one omnibus and in consequence knocked down by another. *Watt* v. *Menzies*, 1866, 1 S. L. R. 124.

805. Issue—Form of—Where Act Complained of was Done by the Defender on the Orders of a Third Party.—The form of issue adjusted where a person who had suffered injury from an act done by the defender on the order of another sued the defender as personally liable. *Mackenzie* v. *Goldie*, 1866, 4 M. 277; 38 J. 145.

806. Issue—Form of—Action of Damages by Workman not in Defender's Service but who was Assisting his Servants.—Issues in an action of damages for bodily injuries at the instance of a person not in the defenders' employment, who at the request of their manager assisted his servants in moving a heavy weight, and received injuries, as he alleged, from the defective nature of carts employed through the fault of the defender. *Little* v. *Neilson*, 1855, 17 D. 310; 27 J. 135.

807. Issue — Form of — Damages — Personal Injuries — Stage-Coach Accident.—In an action of damages for injury sustained by the overturn of a stage-coach, form of issue approved of for the trial of the case. *Black* v. *Croall & Others*, 1853, 15 D. 912; 2 Stuart 557.

808. Issue—Form of—Action of Damages by Shareholders against the Directors of a Joint Stock Bank.—Form of issues in an action at the instance of a shareholder against two of the directors of a joint stock bank, for damages sustained by the pursuer owing to his having been induced (1) to purchase shares, and (2) to continue to hold them, by the false and fraudulent misrepresentations of defenders that the bank was flourishing when it was in reality insolvent. *Dobbie* v. *Johnstone, etc.*, 1859, 21 D. 624; 31 J. 338. Cf. *Tulloch* v. *Davidson*, 1858, 20 D. 1319; 30 J. 635; 22 D. (H. L.) 7; 3 Macq. 783; 32 J. 363.

809. Issue — Form of — Schedule of Damages — Separate Wrongs — Separate Sums.—In a summons by a tenant of a hotel against a landlord, for failure to make repairs, illegally using sequestration, loss of custom, etc., the conclusion was for a slump sum of damages. *Observed*, that the damages should have been stated separately, as applicable to each ground of damage, and ordered to be separated in the schedule annexed to an issue. *Macpherson* v. *Mackenzie*, 1852, 1 Stuart 396.

810. Issue—Form of—Action of Damages of a Tenant for Injuries Caused by Flood—Specification of Damage.—*Hill* v. *Kinloch*, 1856, 18 D. 722; 28 J. 285.

811. Issue—Form of—Action against a Tenant for Using Certain Clay in Violation of Landlord's Reserved Rights.—*Ferguson* v. *Methven*, 1857, 19 D. 794; 29 J. 369.

812. Issue—Form of—Action of Damages against a Tenant for Heather Burning.—*Grant* v. *Gentle*, 1857, 19 D. 992; 29 J. 456.

813. Issue—Form of—Action of Damages against a Tenant for Miscropping. — *Mackenzie* v. *Monro*, 1860, 23 D. 144; 33 J. 54.

814. Issue—Form of—Damages—Tenant—Game.—Issue in an action by a tenant against his landlord for damages caused by increase of game. *Syme* v. *E. of Moray*, 1868, 6 M. 217; 40 J. 133.

815. Issue — Form of — Landlord and Tenant—Repairs.—In an action of damages at a tenant's instance against a landlord, for failure to put a farm in a proper state of repair, terms of an issue adjusted to try that question. *Budge* v. *Balfour*, 1852, 24 J. 590.

816. Issue—Form of—Action of Damages for Wrongously Carrying away Coal from Land Belonging to the Pursuers.—*Craich* v. *Devon Iron Co.*, 1852, 2 Stuart 52.

817. Issue—Form of—Deposit-Receipt—Restitution.—In an action for restitution of the sum in a deposit-receipt, the pursuers having averred that the defender had obtained payment of the amount by stealing the deposit-receipt and forging the indorsation on it, the court *dismissed* the action, in respect that the pursuers declined to put in issue the theft and the forgery. *Allan* v. *Templeton*, 1867, 5 M. 596; 39 J. 301.

818. Issue—Form of—Deposit-Receipt.—Form of issue adjusted to try the question of the liability of a bank to the payee for the amount contained in a deposit-receipt which they had delayed to pay when asked, and which they had been prevented from paying afterwards by the sum having been arrested in their hands. *M'Farlane* v. *Royal Bank*, 1855, 17 D. 657; 27 J. 278.

819. Issue—Form of—Deposit-Receipt—Wrongous Appropriation. — On averments that the defender had been entrusted by a deceased with bank deposit-receipts, and had uplifted the money and wrongfully appropriated it, the pursuer proposed to take an issue of resting-owing. *Held* that the pursuer was bound to put wrongous appropriation in issue. *Moffats* v. *Underwood*, 1860, 23 D. 48; 33 J. 22.

820. Issue — Donation — Husband and Wife.—The trustee on a bankrupt estate brought an action against the bankrupt and his wife, concluding for declarator that a conveyance of certain house property had been fraudulently taken by the bankrupt in favour of his wife while he was insolvent, or otherwise "that the disposition was a donation" *stante matrimonio*, and as such was revocable by the

trustee; and, in either event, that the bankrupt and his wife should be ordained to denude and convey the subjects to the trustee, and, if necessary, that there should be a decree of reduction. The defence was, that part of the purchase money belonged to the wife's estate. *Held* that the pursuer was not entitled to an issue of partial donation; but *question*, whether the case would have been different had the averment been that the price and not the subject itself was a donation. *Tolmie* v. *Cruickshanks*, 1859, 21 D. 840; 31 J. 466.

821. Issue — Form of — Donation. — A testatrix conveyed the residue of her estate to two nieces equally. On the allegation that a few days before her death she indorsed a deposit-receipt for £2000 to one of them, who drew out the money, the other sued her for a share of it. The indorsation was alleged in defence to have been a donation. *Held* that the *onus probandi* lay on the party alleging donation, and that the pursuer was not bound to take an issue of wrongous appropriation. Issues adjusted to try the question. *Mackellars* v. *Hunter*, 1858, 20 D. 761; 30 J. 409.

822. Issue — Form of — Reduction of a Contract for Executing Works on the Ground of Error, etc.—*Wilson* v. *Caledonian Rly. Co.*, 1860, 22 D. 1408; 32 J. 639.

823. Issue — Form of — Reduction — Error.—Terms of issues adjusted in a reduction of a mutual deed between A and B signed by B under the error (1) that A had in his settlement made a destination in favour of a certain series of heirs whereas it was in favour of another series, and (2) that the mutual deed as extended was in the same terms as its draft. The issues proceeded on fraud and on error innocently induced. *Hogg* v. *Campbell*, 1864, 2 M. 848; 36 J. 428.

824. Issue—Form of—Reduction on the Ground of Facility and Lesion—Counter Issue of Homologation.—*Gall* v. *Bird*, 1855, 17 D. 1027; 27 J. 521.

825. Issue — Reduction — Incapacity — Facility, Fraud, and Circumvention.—In an action of reduction of a deed on the ground of incapacity, and of facility, fraud, and circumvention, the jury found generally for the pursuer. *Held* that there was no such inconsistency in the verdict as to render it necessary to grant a rule for a new trial; and that although there was no evidence to support the verdict on facility, fraud, and circumvention, yet as there was such evidence on the head of incapacity, the verdict must stand. *Scott's Trs.* v. *Bannerman*, 1848, 10 D. 353; 20 J. 120.

826. Issue—Facility and Circumvention — Insanity. — The jury having returned a verdict finding "for the pursuer on all the issues," of which there were three, *observed* (1) that as the grounds of challenge were independent, the jury ought to have found separately on each of the issues; but (2) that there was no abstract inconsistency between a verdict of insanity and one of facility and circumvention. *Morrison* v. *Maclean's Trs.*, 1862, 24 D. 625; 34 J. 311.

827. Issue — Form of — Reduction — Facility.—Form of issues in an action of reduction of a trust deed and codicils by the next-of-kin of a deceased on the ground of incapacity, facility, fraud, and circumvention, and defective execution, in which the trustees pleaded that by other deeds, holograph of the deceased, the pursuers were excluded from the succession. *Maclean* v. *Maclean's Trs.*, 1861, 23 D. 1099; 33 J. 480.

828. Issue — Form of — Reduction of Settlement on the Ground of Facility, etc., and that Witnesses did not Know Granter. —*Buchanan & Others* v. *Heugh's Trs.*, 1858, 20 D. 947; 30 J. 557. Cf. *Suttie* v. *Ross*, 1838, 16 S. 429, 1108; 13 Fac. 371. *Home* v. *Hardy*, 1842, 4 D. 1184. *M'Culloch* v. *M'Cracker*, 1857, 20 D. 206; 30 J. 102. *Jaffray* v. *Simpson's Trs.*, 1833, 12 S. 241; 9 Fac. 159.

829. Issue—Form of—Fraud—Agency. —A debtor in a bond to the Ministers' Widows' Fund suspended a threatened charge by the collector for interest, on the ground that he had already paid the interest to the charger's clerk, and got a receipt. This the charger alleged was forged. The suspension also proceeded on the ground that the clerk was the agent of the charger, duly authorised and accredited to receive payment. The charger denied the alleged authority and agency, but not the fact of payment. Form of issues to try the question. *E. of Galloway* v. *Grant*, 1857, 20 D. 230.

830. Issue — Form of — Fraud — Bankruptcy.—A cautioner for a composition being charged on a promissory-note which he had granted to one of the creditors for the amount due as composition on his debt, *suspended*, on the ground that the bankrupt and the charger had entered into a *pactum illicitum* that the charger should receive a preference over the other creditors. Issues to try the question. *Dickson* v. *Lee Bros.*, 1858, 20 D. 945; 30 J. 556.

831. Issue — Fraud — Concealment.—An issue of fraudulent concealment *refused* in a case where the record did not set forth that there was a duty of communication in which the defender had failed. *Observations* on the nature of misrepresentation and concealment as grounds of action. *Broatch* v. *Jenkins*, 1866, 4 M. 1030; 38 J. 524.

832. Issue—Form of—Fraud—Action for Repayment and for Damages.—*Gourlay, etc.* v. *Watt*, 1870, 9 M. 107; 43 J. 59.

833. Issue — Form of — Fraud and Facility.—*Observed* that, in an issue of facility and fraud in the impetration of a deed, the words "prevailed on" were improperly used instead of "procure," "obtain," or "cause." *Home* v. *Hardy*, 1842, 4 D. 1184; 14 J. 575.

834. Issue—Form of—Fraud—Forgery. —In a suspension by the acceptor of a bill, on the ground that his signature was forged, an

issue *allowed* whether the signature was a forgery, or whether the suspender adopted his signature, and held himself out, or allowed himself to be held out, as liable for the bill. *Findlay* v. *Currie*, 1850, 13 D. 278; 23 J. 116.

835. Issue—Form of—Fraud.—Form of issues to try whether a disposition by B to C was in trust for behoof of D, and was granted and taken in the knowledge and in defraud of a previous engagement on the part of B to dispone to the pursuer. *Morrison* v. *Somerville*, 1860, 22 D. 1082; 32 J. 269.

836. Issue—Form of—Fraud.—*Question* as to the form of issues to try whether a bill of lading had been fraudulently indorsed; and the issues in the case of Hastie & Co. *disapproved* of. *Stoppell & Son* v. *M'Laren & Co.*, 1849, 11 D. 676; 21 J. 237.

837. Issue — Fraud — Facility—Verdict.—The presumption is against a general verdict for the pursuer on both of two issues—the first putting the question, whether a deed is not the deed of the testator; and the second, whether the testator was weak and facile, and the deed impetrated by fraud and circumvention to his lesion; but the court will consider the whole facts of the case, and see whether or not the presumption may be overcome. Upon such a view of the whole case, presumption overcome. *M'Kellar* v. *M'Kellar*, 1861, 24 D. 143; 34 J. 67.

838. Issue — Form of — Reduction of Docqueted Accounts—Alleged Fraud by Law Agent.—*Turner* v. *Tunnock's Trs.*, 1864, 2 M. 509; 36 J. 267.

839. Issue—Form of—Reduction—Fraud and Facility.—Form of issue in an action of reduction of deeds said to have been impetrated by fraudulent misrepresentation and concealment. *Alexander* v. *Alexander*, 1866, 4 M. 291.

840. Issue—Form of—Reduction—Fraud—Facility.—Terms of issue *adjusted* in an action to reduce a deed on the ground that it had been impetrated by fraud and circumvention from the grantor while facile. *M'Culloch* v. *M'Cracken*, 1857, 20 D. 206; 30 J. 102.

841. Issue — Form of — Reduction — "Fraud or Circumvention" — Facility — Whether Issue of "Fraud or Circumvention and Intimidation" or Separate Issues of "Fraud or Circumvention" and "Force and Fear." — In an action of reduction of a testamentary deed, based on averments of weakness and facility on the part of the testator, and of fraud and circumvention and threats of ill-usage on the part of the defenders, the court *allowed* an issue of "fraud or circumvention and intimidation," leaving it open to the jury either (1) to return a general verdict for the pursuers, or (2) a special verdict if it were proved that the deed had been impetrated, not by "fraud (or 'circumvention') and intimidation" cumulatively, but only by one or other of these means (*diss.* Lord Deas, on the ground that if there was to be any other issue than one of "fraud or circumvention," it ought to be a separate one of "force and fear"). *Observations* on alternative forms of issues. *Love* v. *Marshall, etc.*, 1870, 9 M. 291; 43 J. 111.

842. Issue—Form of—Reduction—Fraud.—Form of issue in an action of reduction founded on the Act, 1696, c. 5, and on fraud at common law. *Connon* v. *Ballinten*, 1853, 2 Stuart 376.

843. Issue—Form of—Reduction—Fraud.—In a reduction upon the allegation that the sum in a bond was blank when subscribed, and had been improperly filled up with a sum larger than the understanding of parties warranted—the defence being that the deed had remained in the custody of the pursuer's agent, and was filled up in concert with him in terms of the bargain before delivery—issues *adjusted* to try the question. *E. of Buchan* v. *Scottish Widows' Fund*, 1857, 19 D. 551; 29 J. 258.

844. Issue—Form of—Reduction—Fraud.—Form of issue in a reduction on the ground of fraud, under which the presiding judge *held* that the jury could not competently find for the pursuer unless fraud, the act of one of the parties named in the issue, were proved. *Purdon* v. *Rowat's Trs.*, 1856, 19 D. 206; 29 J. 99.

845. Issue — Form of — Reduction of a Deed on the Ground of Fraudulent Concealment.—*M'Conechy* v. *M'Indoe*, 1853, 16 D. 315; 26 J. 145.

846. Issue—Form of—Reduction—Fraud—Separate Issues.—Where the pursuer in a reduction founds on different acts and kinds of fraud, he must take a separate issue for each. *Ritchie* v. *Ritchie's Trs.*, 1866, 4 M. 292.

847. Issues—Misrepresentation—Fraud.—Issue *adjusted* to try whether a policy of life insurance had been fraudulently obtained by false representations. *M'Laws* v. *United Kingdom Temperance & General Provident Institution*, 1861, 23 D. 559; 33 J. 286.

848. Issue—Form of—Misrepresentation—Fraud.—Terms of issues to try an action at the instance of a shareholder in a bank against directors, the pursuer claiming the amount of purchase money paid by him for his shares, or, alternatively, damages, and alleging that he had been induced to purchase the shares by the fraudulent misrepresentations of the defenders; it being *held* unnecessary to insert in the issue the dates of the misrepresentations founded on, when some of the defenders had been directors only some of the years during which misrepresentation was alleged. *Lindsay* v. *Johnston*, 1863, 1 M. 255; 35 J. 179.

849. Issue — Form of — Reduction of a Lease of a Deer Forest on the Ground of Misrepresentation. — *E. of Wemyss* v. *Campbell*, 1858, 20 D. 1090; 30 J. 537.

850. Issue — Form of — Reduction — Misrepresentation and Error. — Form of issue in a reduction of a contract on the ground of misrepresentation and error, where fraud was not alleged. *Adamson* v. *Glasgow Waterworks Commrs.*, 1859, 21 D. 1012; 31 J. 558.

851. Issue — Form of — Reduction — Misrepresentation, Concealment, and Error. —Form of issues in a reduction of an agreement on the ground of misrepresentation, concealment, and essential error as to the nature of a fund as heritable or moveable dealt with in the deed. *Johnston* v. *Johnston*, 1857, 22 D. (H. L.) 3; 3 Macq. 619; 32 J. 286.

852. Issue—Form of—Reduction of an Offer for a Lease on the Ground of Misrepresentation, etc.—*M'Neillie* v. *Cowie, etc.*, 1858, 20 D. 1229; 30 J. 727.

853. Issue—Form of—Reduction—Fraud —Misrepresentations.—Issues and counter issues *adjusted* in an action for reduction of missives of lease based on fraudulent misrepresentations of the quantity of stock on, and capacity of, the lands. *M'Pherson* v. *Campbell's Trs.*, 1869, 41 J. 634.

854. Issue — Form of — Reduction —Fraudulent Misrepresentation.—Form of issue *adjusted* to try an action of reduction of a deed on the ground of fraudulent misrepresentation and concealment. *Bruce, etc.* v. *Smith, etc.*, 1872, 44 J. 510.

855. Issue — Reduction — Fraudulent Misrepresentation.—*Jardine's Trs.* v. *Dawson*, 2 M. 639; 36 J. 316.

856. Issue—Form of—Fishings.—Form of issues in action as to fishings. *Sir C. Ross* v. *D. of Sutherland*, 1852, 24 J. 553.

857. Issue—Form of—Mussel-Fishings.—The proper form of issue to try the question of prescriptive possession of mussel-fishings, by proprietors who have only a general grant of "fishings," settled to be, "Whether for forty years previous to , or for time immemorial, A B, proprietors of lands," etc., "had exclusive possession of the fishing of mussels," etc.? *Lindsay* v. *Robertson*, 1868, 6 M. 889; 40 J. 494, 508.

858. Issue—Form of—Question as to the Possession on a Barony Title of Salmon-Fishings in the Sea.—*Nicol, etc.* v. *Lord Advocate*, 1868, 7 M. 26; 41 J. 7.

859. Issue—Form of—Salmon-Fishings.—Form of issue *adjusted* to try a question as to the possession of salmon-fishings in the sea. *Nicol, etc.* v. *Lord Advocate*, 1868, 7 M. 26; 41 J. 7.

860. Issue—Innuendo.—A party cannot put a new meaning on a libel at the trial, but is bound by the innuendo set forth in the pleadings. *M'Candie* v. *M'Candie*, 1827, 4 Mur. 198.

861. Issue—Form of—Action on Fire Insurance Policy — Defence of Fraud—Counter Issues.—*M'Kirdy* v. *North British Insurance Co.*, 1858, 20 D. 463; 30 J. 235. Cf. *M'Laws* v. *United Kingdom Temperance & General Provident Institution*, 1861, 23 D. 559; 33 J. 286.

862. Issue—Form of—Action on Policy of Life Assurance—Counter Issues.—*Adamson's Trs.* v. *Scottish Provincial Assurance Co.*, 1868, 6 M. 442; 40 J. 217.

863. Issue — Form of — Action on Policy of Marine Insurance—"Peril of the Sea"—Deviation—Acquiescence. — *Gourock Ropework Co.* v. *Fleming*, 1867, 5 M. 501.

864. Issue—Form of—Question as to whether Certain Premises were Insured at the Date of a Fire.—Form of issue to try whether premises were insured at the date of a fire, under a memorandum of deposit granted by an agent or sub-agent of an insurance company. *Wylie & Lochhead* v. *Times Fire Insurance Co.*, 1860, 22 D. 1498.

865. Issue—Form of—Joint Stock Company—Calls.—Issues in an action for calls against a partner of a joint stock company. *National Exchange Co. of Glasgow* v. *Robertson*, 1854, 16 D. 1083; 26 J. 611.

866. Issue—Form of—Joint Adventure—Subject of Adventure.—In an action at the instance of the executors of a deceased, for payment to them of the share of certain adventures in "hard wood" carried on by the deceased and the defender, the Lord Ordinary *refused* the pursuers an issue in terms of statement in their revised condescendence, to the effect that the transactions libelled on were in "firwood." *Bartholomews* v. *Gardner*, 1853, 2 Stuart 244.

867. Issue—Lodging of—Court of Session Act, 1868, s. 27.—*Held* that the provision of the Court of Session Act, 1868, as to the lodging of issues before the summary debate to take place in a cause, does not infer, on failure to implement the requirements of the statute, dismissal of the action. *Steel* v. *Smith*, 1868, 6 S. L. R. 158.

868. Issue — Lodging — Prorogation of Time for.—*Held* that the period within which issues are appointed to be lodged cannot be prorogated by written consent of parties. *Observed*, that the 4th section of the Court of Session Act, 1850, which allows the period for "lodging any paper" to be prorogated by written consent, is confined to the proper pleadings in the cause. *Anderson* v. *Glasgow & S.-W. Rly. Co.*, 1865, 4 M. 259; 38 J. 141. Cf. *Guardian Fire & Life Assurance Co.* v. *Wallace*, 1866, 4 M. 796.

869. Issue—Form of—Master and Servant—Dismissal.—A gardener, also employed in other capacities, dismissed by his employer, brought an action for wages, on the allegation that he had been engaged as a yearly servant at so much per annum of wages, or at the rate of so much per week for that period. *Held* that the pursuer was bound to put in issue whether he had been employed as a "yearly

servant." *Groom* v. *Clark*, 1859, 21 D. 831; 31 J. 463.

870. Issue—Form of—Infringement of Patent—Specification of locus.—An issue to try whether there has been a breach of patent ought to contain the name of the place where the breach is alleged to have been committed. A counter issue is unnecessary where the question it raises is in reality the same as that raised in the pursuer's issue. *Neilson* v. *Barclay*, 1869, 7 S. L. R. 181.

871. Issue—Form of—Question as to Fraudulent Invasion of a Copyright.—*Carron Co.* v. *Ritchie, Watson, & Co.*, 1857, 19 D. 281; 29 J. 137.

872. Issue—Form of—Question as to the Validity of a Patent.—*Binney & Co.* v. *Miller & Co.*, 1861, 24 D. 63; 34 J. 37. Cf. *Smith* v. *Caledonian Rly. Co.*, 1857, 19 D. 672; 29 J. 307. *Knox* v. *Paterson*, 1858, 20 D. 647; 30 J. 627. *Burch* v. *Glen & M'Indoe*, 1857, 20 D. 648. *Prale* v. *Millar & Sons*, 1863, 1 M. 450; 35 J. 273. *Sykes* v. *Wilson*, 1866, 4 M. 349; 38 J. 181.

873. Issue—Form of—General Averment of Partnership.—*Wilson* v. *Beveridge*, 1831, 10 S. 110.

874. Issue—Form of—Question as to the Existence of a Partnership.—Where a question of the existence of a partnership is sent to a jury, there being no deed of copartnery, the proportional interest of each partner must be put in issue. *Aberdeen Town & County Bank* v. *Clark*, 1859, 22 D. 44; 32 J. 20.

875. Issue—Form of—Partnership—Sale.—Issues in an action against a partnership for the price of goods delivered, where the defence was that the purchase was made by one of the partners, on his own credit. *Tupper & Carr* v. *Rowell*, 1858, 20 D. 758; 30 J. 408.

876. Issue—Form of—Declarator to Fix the March of a Feu.—*Campbell* v. *M'Laren*, 1861, 24 D. 57; 34 J. 34.

877. Issue—Form of—Declarator of a Right of Road.—*Ferguson* v. *Hoyle*, 1859, 21 D. 430; 31 J. 242.

878. Issue—Form of—Right of Road, etc.—*Bates & Baring* v. *M'Queen*, 1853, 15 D. 455; 25 J. 273; 2 Stuart 265. *Anderson* v. *Maxwell*, 1855, 17 D. 1072. *Tulloch* v. *Baird*, 1859, 21 D. 957; 31 J. 527. *Wilson* v. *Hagart*, 1862, 24 D. 1086; 34 J. 545. *Scott* v. *Drummond*, 1866, 4 M. 819; 38 J. 433.

879. Issue—Form of—Prescriptive Possession of Property.—*Aberdeen Harbour Commrs.* v. *Aberdeen Rly. Co.*, 1852, 15 D. 75; 25 J. 62; 2 Stuart 42. *Mushett* v. *D. of Buccleuch*, 1856, 18 D. 322; 28 J. 147.

880. Issue—Form of—Question as to Property in a Close.—*Lightbody* v. *Lawrie*, 1855, 17 D. 653; 27 J. 277.

881. Issue—Form of—Servitude—Bleaching and Drying Clothes.—Form of issue to try a question of a servitude of drying and bleaching clothes. *Rattray* v. *The Tayport Patent Slip Co. Ltd.*, 1866, 1 S. L. R. 194.

882. Issue—Form of—Servitude of Playing Golf over Links.—Form of issue to try a right of servitude for playing golf over links, the property of a burgh. *Sanderson* v. *Lees & Brown*, 1859, 21 D. 1011.

883. Issue—Form of—Declarator of Property and of the Servitude of Eavesdrop.—*Steele* v. *Oliver & Co.*, 1832, 10 S. 858.

884. Issue—Form of—Right to a Ferry.—*Leslie & Others* v. *Grieve*, 1861, 33 J. 318.

885. Issue—Form of—Action as to Right of Pursuer to a Mill-Runner Conform to Possession by him and the other Inhabitants of a Town.—*Thorburn* v. *Charters*, 1841, 4 D. 169.

886. Issue—Form of—Question as to Right to a Mill-Lead.—Form of issues to try a question of disputed right to a mill-lead and water passing through the lands of a neighbouring proprietor. *Lennox* v. *Hurlet & Campsie Alum Co.*, 1859, 22 D. 178; 32 J. 75.

887. Issue—Form of—Question as to Rights in the Water of a Stream.—*Brand* v. *Chartres*, 1842, 4 D. 345.

888. Issue—Form of—Action for Interference with Stream—Counter Issues of Prescription and Acquiescence.—Issue *adjusted* in an action by a lower heritor against an upper, for alleged wrongful interference with the course of a stream. Counter issues of prescription and acquiescence *disallowed*, there being no foundation for them in the averments. *Dixon's Trs.* v. *Stewart's Trs.*, 1867, 4 S. L. R. 163.

889. Issue—Form of—Question as to Right of Proprietor to Alter the Course of a Stream.—*Macfarlane* v. *Lowis*, 1857, 19 D. 1038. Cf. *Welsh* v. *Rose*, 1857, 20 D. 53; 30 J. 31.

890. Issue—Form of—Question as to Right of a Lower Heritor as to Use of Water Sent down through an Artificial Channel.—*Mackenzie* v. *Woddrop*, 1854, 16 D. 381; 26 J. 180.

891. Issue—Form of—Question of Interference with Water Rights Arising between a Tenant and an Upper Heritor.—*Gardner* v. *Walker & Donald*, 1862, 24 D. 1430; 34 J. 600.

892. Issue—Form of—Question as to Right of Opposite Proprietor on a Tidal River to Erect an Embankment to Protect his Lands.—*Lindsay* v. *Thomson*, 1866, 5 M. 29; 39 J. 22.

893. Issue—Form of—Rates—Suspension and Liberation.—A party who was incarcerated for alleged arrears of poor's rates, presented a suspension and liberation, on the ground that he was not an inhabitant of the parish. Form of issue to try the question, the inspector standing pursuer in the issue. *M'Laren* v. *Steele*, 1853, 16 D. 274.

894. Issue—Form of—Reference to a Plan.—*Held* that it is not incompetent, in

framing issues, to make reference to a judicial plan. *Geekie* v. *Proctor*, 1849, 11 D. 651 ; 21 J. 162.

895. Issue—Form of—Action of Relief by Factor against Principal.—Terms of issue *adjusted* in an action by a factor against his principal for relief from certain promissory-notes, stated to have been granted by the factor for behoof of the principal. *Dingwall's Trs.* v. *E. of Kintore*, 1862, 24 D. 427; 34 J. 210.

896. Issue—Form of—Reduction of an Agreement.—In a reduction of a minute of agreement on the ground that it was, in certain particulars, entered into without authority, *held* that the whole agreement, and not merely the parts complained of, must be put in issue. *Beattie* v. *Paterson, etc.*, 1862, 24 D. 262.

897. Issue—Form of—Reduction of a Bill on the Ground of Forgery, and being in Violation of the Act, 1696, c. 5.—*Macdonald* v. *Gilmour*, 1839, 1 D. 706 ; 14 Fac. 796.

898. Issue — Form of — Reduction — Bankruptcy.—Form of issues *settled* to try the question between the indorsee of a bill of lading claiming delivery of goods, and the consigners seeking to stop them *in transitu*, who raised a reduction of the indorsation on the grounds that the indorsee was not a *bona fide* onerous holder—that the transference to him was fraudulent—and also on the Act, 1696, c. 5 ; and the issues in *Hastie* v. *Johnston*, 1848, 11 D. 240, *disapproved* of. *Stoppel* v. *M'Laren & Co.*, 1849, 11 D. 676; 21 J. 237 ; 13 D. 61. See *Adamson, Howie, & Co.* v. *Guild*, 1868, 6 M. 347.

899. Issue—Form of—Reduction of an Assignation under the Act, 1621, c. 18.—*Caird* v. *Key*, 1857, 20 D. 187. Cf. *Bolden* v. *Ferguson*, 1863, 1 M. 522 ; 35 J. 313.

900. Issue — Form of — Reduction — Bankruptcy—Fraud.—Form of issues *adjusted* in a reduction of alienations by a bankrupt founded on the Act, 1621, c. 18, and on allegations of fraud. *Wink* v. *Reid*, 1866, 2 S. L. R. 40.

901. Issue—Form of—Reduction under the Act, 1696, c. 5.—*Ramsay* v. *Donald*, 1854, 16 D. 720 ; 26 J. 313.

902. Issue — Form of — Reduction — Competency.—Pending an action against a brother and sister, to have it found that funds deposited in bank in name of the sister really belonged to the brother, against whom the pursuer held a decree, the brother died. The sister's agent paid the claim, and took an assignation of the decree in his own favour. Action at the instance of the brother's executor against the sister and her agent, concluding for declarator that the money paid was a part of the brother's estate, that the sums assigned belonged to the pursuer, and that the assignee should "deliver" the decree to him, *held* competent without a reduction of the assignation. Issues *adjusted* to try the case. *Anstruther* v. *Mitchell & Cullen*, 1857, 19 D. 674 ; 29 J. 312.

903. Issue — Form of — Reduction of Deed Executed on "Death-Bed."—*Hardie* v. *Macall*, 1847, 9 D. 698 ; 19 J. 291.

904. Issue—Form of—Reduction of a Decree-Arbitral upon the Ground of Undue Communications to Oversman, etc.—Issues in a reduction of a decree-arbitral upon the ground of the defenders having procured the decree by undue communications and misrepresentations to the oversman, and also of want of due examination on his part. *M'Nair's Trs.* v. *Roxburgh*, 1855, 17 D. 445 ; 27 J. 189. Cf. *E. of Hopetoun* v. *Scots Mines Co.*, 1859, 21 D. 782 ; 31 J. 420.

905. Issue—Form of—Reduction on the Ground of Informality of Execution.—In an action of reduction of certain deeds executed notarially, on the ground that they ought to have been subscribed by the party's own hand, *held* that the general issue was not the proper one to try the question, and a remit made to have an issue prepared relative to the special facts in dispute between the parties. *Reid* v. *Reid's Trs.*, 1835, 13 S. 1063 ; 10 S. 865.

906. Issue—Form of — Reduction — Incapacity.—In a reduction of a disposition, averments which *held* sufficient to entitle the pursuer to an issue on the ground of mental incapacity, but not of fraud and circumvention. *Halliday* v. *Morrison*, 1857, 19 D. 929 ; 29 J. 410, 431.

907. Issue — Form of — Reduction of Sale — Intoxication. — Form of issues in reduction of a minute of sale on the plea of intoxication. *Johnston* v. *Clark*, 1854, 17 D. 228 ; 27 J. 79. See also *Couston* v. *Miller*, 1862, 24 D. 607 ; 34 J. 302.

908. Issue — Form of — Reduction — Service.—In a reduction by the Crown of a general service, an issue sent to a jury was whether the defender was not the heir-at-law in general of the deceased? *Henderson* v. *Dick*, 1848, 20 J. 562.

909. Issue — Form of — Reduction of Service.—In a reduction of a service, *held* that the proper issue was, whether the pursuers are the nearest and lawful heirs of A. B.? *Willox* v. *Farrell*, 1846, 8 D. 1226 ; 18 J. 592. *M'Lean* v. *Officers of State*, 1846, 5 Bell 60 ; 18 J. 392. *M'Lean* v. *M'Lean*, 1849, 11 D. 880 ; 21 J. 194.

910. Issue — Form of — Reduction — Service. — In a reduction by a daughter, served heir of her alleged father, of a prior service in favour of the defender, the latter allowed to repeat a reduction of the pursuer's service. Form of issue *adopted* for trial of the question of propinquity. *Gilchrist* v. *Gilchrist or Whicker*, 1852, 1 Stuart 393 ; 1852, 14 D. 919 ; 24 J. 554.

911. Issue — Form of — Reduction of Service.—Form of issue in a reduction of a service. *Gilchrist* v. *Whicker*, 1852, 24 J. 554.

912. Issue—Form of—Service—Reduction.—In a reduction of a service as heir, on the ground of nearer relationship, *held* that the propinquity of the pursuer, as stated on record, ought—so long as there exists doubt whether issues are controllable by reference to the record—to be set forth in the issues, and especially where there is ground for apprehending that the pursuer may attempt to prove at the trial a different pedigree from that set forth on record. *Macgillivray* v. *Souter, etc.*, 1860, 23 D. 212; 33 J. 101.

913. Issue — Form of — Reduction — Whether Issue Covered by Summons—Settlement—Codicils.—Under a summons of reduction calling for a settlement described as having two codicils attached thereto, specially setting forth "all, etc., to be seen, etc., and reduced," for reasons which only mentioned the "foresaid disposition and settlement," without specially referring to the codicils, *held* competent to take an issue as to the codicils, as well as to the principal deed. *Donaldsons* v. *Donaldson's Trs.*, 1831, 9 S. 565.

914. Issue—Form of—Resting-Owing.—In an action against a part owner of a vessel by his co-owners for his share of repairs made by the ship's-husband, the defence was that they were not ordinary repairs, and were made without authority. *Held* that a simple issue of "resting-owing" was sufficient to cover all defences. *Hamiltons & Co.* v. *Landale*, 1860, 22 D. 1059; 32 J. 488.

915. Issue—Form of—Resting-Owing.—In an action against a bank for payment of the sum contained in a deposit-receipt, the defence that the money had been paid to the authorised agent of the creditors in it, by whose mark, attested by witnesses, the receipt bore to be indorsed, was met by denial of the authority, and averment that the indorsation was not genuine. Form of issues approved for trying the cause; and objection *repelled*, that the burden of proof was upon the pursuers. *Forbes' Exrs.* v. *Western Bank*, 1853, 16 D. 242; 26 J. 103.

916. Issue—Form of—Resting-Owing—Accounting.—Issue of resting-owing *adjusted* to try the question whether the defender had accounted to a deceased person for a sum of money which he had drawn from bank for her. *Byres* v. *Forbes*, 1866, 4 M. 388; 38 J. 198.

917. Issue — Form of — Resting-Owing—Bill.—The representative of a party deceased sued her agent, averring that he had not accounted for the proceeds of a bill entrusted to him by a client for renewal—which renewal he had taken in his own name—nor for the contents of a deposit-receipt entrusted to him, which he had uplifted. Form of issues *adjusted* for trial. *Mackenzie* v. *Brodie*, 1859, 21 D. 804; 31 J. 163.

918. Issue—Form of—Resting-Owing—Alleged Breach of Contract Sued on.—In an action founded on employment to manufacture cast-iron furnishings, the defender averred a contract specifying the dimensions of the castings, and that the furnishings were defective. Form of issue. *Alston & Gourlay* v. *Wilson*, 1862, 24 D. 806; 34 J. 409.

919. Issue — Form of — Resting-Owing—Cautioners.—A document, not addressed, bore that the two parties who subscribed it "became bound for the payment of the rent of the toll-bar which James Burnett may take, and for the year from 26th May 1857 to 26th May 1858." At the date of this letter, Burnett was tacksman of a toll-bar. He thereafter became tacksman of another toll-bar of about double the rent. He fell into arrear, and an action was brought against him, and the parties to the letter as cautioners. *Held* that the pursuer was only entitled to an issue whether, under that document, the defenders became cautioners for the rent of the toll-bar which was taken, and were resting-owing, etc. *Burnett* v. *Burnett*, 1859, 21 D. 813; 31 J. 456.

920. Issue — Form of — Employment—Resting-Owing.—In an action for an account for plaster work, the defence being non-employment, the court *refused* an issue whether the defender "approved of and adopted" the work, and was resting-owing the price, but adjusted one whether the work was executed "on the employment of the defender," and was resting-owing, etc. *Neilson* v. *Ritchie*, 1861, 23 D. 1300; 33 J. 659.

921. Issue—Form of—Carriage—Fault.—In an action against a shipping company for value of goods lost during carriage, the pursuer took an issue, whether the goods had been lost through the fault of the defenders, and obtained a verdict. In resisting a motion for a new trial, the pursuer contended that under the edict he need not have taken an issue of fault, that the carrier required to prove inevitable accident, and that therefore the verdict could be supported without proof of fault. *Held* that as an issue of fault had been taken, the verdict could not be supported unless there was evidence of fault to go to the jury. *Denholm* v. *London & Edinburgh Shipping Co.*, 1865, 37 J. 421.

922. Issue — Resting-Owing — Sale. — In an action against the owners of a vessel for furnishings, the pursuer alleged that the furnishings were made on the order of certain of the defenders, for behoof of themselves and the other owners (the rest of the defenders), who denied that they had any interest in the vessel at the date of the alleged order. *Held* that it was sufficient to put in issue whether the furnishings were made to the defenders for the use of the ship, and whether the defenders were resting-owing, etc., and that it was not necessary to put in issue expressly the prior contract alleged. *Fyffe* v. *Harwood*, 1859, 21 D. 845; 31 J. 475.

923. Issue — Form of — Sale. — Form of issue *adjusted* in an action of damages for failing to deliver goods fit for a specific purpose in breach of a contract of sale. *Hutchison & Co.* v. *Henry & Corrie*, 1867, 6 M. 57; 40 J. 36.

924. Issue—Form of—Sale—Contract Price.—In an action raised for the contract price of two fields of potatoes, sold at a price "per acre," the pursuer set forth the measurement and price as per Scots acre. The defenders objected to an issue being granted, on the ground that the sale per Scots acre was illegal, and the contract void. Issue *allowed* as for a sale "per imperial acre." *Handyside* v. *Pringle & M'Dougall*, 1863, 1 M. 1154 ; 35 J. 668.

925. Issue—Form of—Sale—Contract Price.—In an action for the price of two lots of potatoes—the first averred to have been sold at a contract price of £5, 5s. per ton, the second at the selling price of the day, which was said to have been £6—the defender averred the contract price of the first to be £4, 5s., and that the selling price at the date of the second transaction was £4, 10s. *Held* that, in regard to the first lot, the contract price must be put in issue, but that as to the second lot the pursuer was entitled to an issue of resting-owing without specifying the rate per ton. *Trodden* v. *Sweetman*, 1862, 24 D. 600 ; 34 J. 300.

926. Issue—Form of—Sale—Counter Issue—Damages.—Form of issue to try a disputed sale of cattle. Issue in counter action to try question of damages for injury sustained by diseased cattle being wrongfully sent to a farm. *Stott* v. *M'William*, 1855, 17 D. 1074; 27 J. 551.

927. Issue—Form of—Sale of Shares—Seller's Right to Relief.—The seller of shares sued A for relief of calls made on him through A's failure to register the transfer. He averred that he sold the shares to B, who he understood acted for A. Objection to the relevancy on the ground that there was no averment of a sale to A *repelled*. An issue "whether the defender applied for and accepted the transfer of the shares, etc." (without any reference to the contract), *approved*. *Black* v. *Cullen*, 1851, 13 D. 1114 ; 23 J. 525.

928. Issue—Form of—Sale and Warranty—Horse.—Issues to try question whether horses were sold under warranty. *Croall* v. *Hunter*, 1855, 17 D. 652.

929. Issue—Form of—Sale and Warranty—Horse.—Terms of issues *adjusted* to try a question as to breach of special warranty in the sale of a horse, and where repayment of the price was demanded. *Maule* v. *Laing & Sons*, 1853, 15 D. 778 ; 25 J. 465.

930. Issue—Sale and Warranty—Horse.—*Observed*, that in an action by a purchaser of a horse against the seller for a fair price, the purchaser does not require to take an issue as to warrandice. *M'Bey* v. *Reid*, 1842, 4 D. 349.

931. Issue—Sale—Warranty—Counter Issue—Horse.—Issue in an action upon a warranty given at the sale of a horse in Scotland, the purchaser averring that he had taken the horse to England, and had there, upon discovering its unsoundness, sold it, admittedly without judicial authority, after offering to return it to the seller, who declined to take it. Counter issue, whether the purchaser failed duly to return the horse to the seller. *Robson* v. *Thomson*, 1764, 2 M. 593 ; 36 J. 289.

932. Issue—Sale—Warranty—Horse.—*Held* in an action for repayment of the price of a horse alleged to have been unsound at the date of the purchase, that under the Mercantile Law Amendment Act the pursuer must take an issue of express warranty. *Young* v. *Giffen*, 1858, 21 D. 87 ; 31 J. 60.

933. Issue—Form of—Sale—Warranty—Horse.—Issues *adjusted* in an action at the instance of the purchaser of a horse at an auction on the ground of breach of warranty, and that the horse had been taken back. *Ferrier* v. *Dods*, 1865, 3 M. 561 ; 37 J. 270.

934. Issue—Form of—Action of Damages for Seduction.—*Walker* v. *M'Isaac*, 1857, 19 D. 340 ; 29 J. 156.

935. Issue—Form of—Action of Damages for Seduction and Adultery by Husband against Wife's Paramour.—*Glover* v. *Samson*, 1856, 18 D. 609 ; 28 J. 256.

936. Issue—Form of—Seduction—Specification of Time and Place.—*Held* that the pursuer in an action of seduction cannot have two issues specifying different occasions, and that in the single issue she must specify time and place. *Hill* v. *Wilson*, 1871, 8 S. L. R. 340.

937. Issue—Form of—Separate Issues.—*Observed* in the House of Lords, that an issue should not embrace two questions; each question should be put as a separate issue. *Kirkpatrick* v. *Irvine*, 1850, 7 Bell 186 ; 22 J. 634.

938. Issue—Form of—Action against Several Defenders—Specification of Defender's Name in Issue.—In an action against several defenders, which was abandoned against some of them, *held* that the heading of the issue must specify all the defenders remaining in the cause. *Macintosh* v. *Fraser*, *etc.*, 1859, 21 D. 783 ; 31 J. 421. Cf. *Morgan* v. *Morris*, 1853, 16 D. 82; 26 J. 49 ; 18 D. (H. L.) 46 ; 2 Macq. 342 ; 27 J. 602.

939. Issue—Form of—Action for Money Advanced to Pay for Shares—Defence of Fraudulent Misrepresentation.—*National Exchange Co.* v. *Drew & Dick*, 1856, 18 D. 614 ; 28 J. 257.

940. Issue—Form of—Suspension by a Partner on the Ground that the Charge was Solely for Behoof of Another Partner.—One of the two partners of a company which had been dissolved but not wound up, having been charged in name of a creditor holding a decree against them, brought a suspension, on the ground that the charge was insisted in solely for behoof of his copartner. Form of issue. *Pearson* v. *Lockhart*, 1867, 5 M. 301 ; 39 J. 132.

941. Issue—Form of—Ship—Salvage.—In an action for £2000 in name of salvage, the defence was that the service was rendered under a contract for £50, entered into between

the masters of the two vessels, and that the owner and crew of the assisting vessel were bound by the contract, which was just and reasonable. Issue and counter issue *adjusted* to try the case. *Buchanan & Others* v. *Barr & Shearer*, 1867, 5 M. 973.

942. Issue — Ship — Damage to Ship in Course of her Removal to Another Harbour by Persons Wrongfully Arresting her.—In an issue whether a foreign vessel, arrested and taken from her anchorage to a neighbouring harbour, through carelessness and unskilfulness on the part of the defenders, or of those for whom they were responsible, struck against the quay and was injured, it is immaterial whether this took place before or after the arrestments were used. If before, it may aggravate the damages; if after, the arresters are not justified in handing the vessel over to the care of unskilful persons, and would still be liable. *Petersen* v. *M'Lean & Hope & Hertz*, 1868, 6 M. 218; 40 J. 134.

943. Issue—Form of — Ship — Disbursements.—In an action by the indorsee of a draft by a shipmaster on his owners for the amount of necessary disbursements, issues *adjusted* to try whether the advances had been made, and counter issues as to whether the disbursers were liable to the owners in certain debts averred, which, if due, it was held that in respect of them the defenders were entitled to plead compensation. *London Joint-Stock Bank* v. *Stewart*, 1859, 21 D. 1327; 31 J. 728.

944. Issue—Ship—Loss of Goods—Carriage.—Issues allowed against two companies (the owners of a ship and the charterers of the ship) in conjoined actions against them for damages for the loss of goods carried on the ship although the pursuer's averments in the two actions were not consistent. Issues *adjusted*. *London & Caledonian Marine Insurance Co.* v. *London & Edinburgh Shipping Co., etc.*, 1867, 5 M. 982; 39 J. 540.

945. Issue—Form of—Ship.—Forms of issue in an action against shipowners for the price of goods said to have been wrongfully sold as damaged (in violation of instructions from the shippers, and notwithstanding an offer by them of payment of all charges) at a port into which the vessel had put for repairs. *Bartholomew & Co.* v. *Ruxton & Co.*, 1862, 24 D. 277.

946. Issue—Form of—Ship—Repairs.—In an action for payment of an account for repairs on a vessel, the defence was non-employment. Form of issue to try the question. *Ross* v. *Macgregor*, 1856, 18 D. 611.

947. Issue — Form of — Ship-Stranding —Fault of Master.—A vessel was stranded. Part of the cargo was lost, and the remainder was ultimately abandoned. The consignee of the cargo brought an action of damages against the owners for breach of "an agreement under which" they were bound "to do what was necessary to protect" the cargo, which it was averred that they had failed to do. *Held* that the master's conduct forming an integral part of the pursuer's case, the pursuer was bound to take an issue of "wrongful" failure, the word "wrongful" being held to comprehend all questions arising after as well as before the stranding of the vessel. *Napier* v. *Leith*, 1859, 21 D. 551; 31 J. 294.

948. Issue—Form of—Slander—Counter Issue.—Form of counter issue *allowed* in justification of a statement said to be slanderous. *Carmichael* v. *Cowan*, 1862, 1 M. 204; 35 J. 95. *Torrance* v. *Weddel*, 1868, 7 M. 243; 41 J. 149.

949. Issue—Collocation of Slanderous Epithets—Veritas.—The pursuer of an action of damages for defamation is not bound to put in separate issues different epithets used in one conversation. He is entitled to depart from one of the slanderous epithets, and put in issue only the other two. The term "blackguard" is actionable without any innuendo. Allegations that the defender had been a poacher, and had poached in 1851, and had been frequently seen poaching down to 1856, do not entitle the defender to an issue in justification of (in 1857) calling the pursuer a blackguard and bad character. Form of issues. *Brownlie* v. *Thomson*, 1859, 21 D. 480; 31 J. 260.

950. Issue — Form of — Slander — Defenders a Mercantile Firm.—Form of issue in an action of damages for slandering a mercantile company. *Glebe Sugar Refining Co.* v. *Lusk*, 1866, 2 S. L. R. 9.

951. Issue—Alternative Innuendoes.—In an action of damages by a woman for defamation, *held* that alternative innuendoes of unchastity and light conduct may be put in the same issue, but the alternatives should be separately stated, and not mixed up together. *M'Culloch* v. *Litt*, 1850, 13 D. 334; 23 J. 144.

952. Issue — Innuendo. — The innuendo which the pursuer founds on must appear in the issue. *Scouller* v. *Gunn*, 1852, 24 J. 552; 1 Stuart 945.

953. Issue — Innuendo — Facts and Circumstances.—The persons to whom communication of a slander is alleged should be specified in the issue. An issue will not be allowed unless the words sued on are either defamatory or ambiguous; and facts and circumstances necessary to give defamatory meaning to ordinarily innocent words must be averred. *Rodger* v. *Macewen*, 1848, 10 D. 882; 20 J. 329.

954. Issue—Making Charge to Police—Preliminary Accusation — One Issue — Privilege. — In an action of damages for calling the pursuer a thief, and giving him into the custody of the police upon a charge of theft, averments which held to imply that the whole *res gestæ* formed in reality only one occurrence, and therefore that the pursuer was not entitled to two issues, the first as to the unprivileged defamation before the police were

called in, and the second as to the charge to the police officers, and one issue as in a privileged case adjusted. *Ferguson* v. *Colquhoun*, 1862, 24 D. 1428; 34 J. 712.

955. Issue—Form of—Slander—Malice.—A raised an action in the sheriff court against B for a debt. B, without appearing in the action, paid A the amount of the debt, with a certain sum for expenses; but, notwithstanding such payment, decree in absence was thereafter taken in the action in the sheriff court, and was, but without A's instrumentality, published in certain "Black Lists." In an action for damages by B against A, *held* that the taking of the decree in absence by A was actionable, provided it was malicious, but not otherwise. Form of issue *adjusted*. *Davies & Co.* v. *Brown & Lyell*, 1867, 5 M. 842; 39 J. 471.

956. Issue—Form of—Slander—Malice and Want of Probable Cause.—In an action of damages for wrongfully and illegally entering the pursuer's house, and carrying off articles alleged by the defender to have been stolen from him, *held* that the pursuer was not bound to insert malice and want of probable cause in the issue, even though the defender had previously given information to the police of the alleged theft, and the inspector of police was present when the articles were seized. *Walker* v. *Cumming*, 1868, 6 M. 318; 40 J. 175.

957. Issue—Malice—Proof.—*Held* that when the pursuer in an action of damages for slander has averred malice on record, it is competent for him to meet the defence of privilege by proof of malice at the trial, though he has taken an issue of false and calumnious, without malice. *M'Bride* v. *Williams & Dalzell*, 1869, 7 M. 427; 41 J. 241.

958. Issue—Form of—Slander.—Form of issue *approved* to try an action of damages for an alleged libellous newspaper article written in an allegorical style, and considered by the pursuer to be meant to apply to him. *Mackie* v. *Lawson*, 1851; 13 D. 725; 23 J. 319.

959. Issue—Form of—Slander—Newspaper.—Form of issue in an action against a newspaper publisher for slander. *Paterson* v. *Somers*, 1866, 1 S. L. R. 195.

960. Issue—Slander in Communication to Press.—Form of issues in a case of slander in a communication to a public journal criticising the capacity and credit of a medical man. *Müllar* v. *Robertson & Others*, 1852, 15 D. 170; 25 J. 116; 2 Stuart 85.

961. Issue—Holding up to Hatred and Contempt.—An issue of holding up to hatred and contempt *allowed* for a series of articles in a newspaper. *Cunningham* v. *Philips*, 1868, 6 M. 926; 40 J. 533.

962. Issue—Holding up to Ridicule.—The publication in a newspaper of a series of notices tending to render the subject of them ridiculous and injure his feelings, forms a relevant ground for an action of damages. Form of issues in such an action. *Sheriff* v. *Wilson*, 1855, 17 D. 528; 27 J. 232.

963. Issue — Specification — Persons Present.—Where a pursuer took an issue, whether "the defender did, in the presence and hearing of C. M. and others, falsely and calumniously say," etc.? and the jury returned a verdict with a finding "that it is not proved that the defamatory words were uttered in the presence and hearing of C. M.," the court entered up the verdict for the defender. *Broomfield* v. *Greig*, 1868, 6 M. 992; 40 J. 568.

964. Issue — Specification — Names of Persons Present—Counter Issue—Apology Offered and Accepted.—The issue should contain the names of the persons in whose presence the defamatory words are said to have been uttered. A counter issue of apology offered and accepted was *refused*. *Campbell* v. *Menzies*, 1855, 17 D. 1132; 27 J. 584.

965. Issue—Specification of Time.—Issues *disallowed* which asked if a verbal slander had been uttered in a period exceeding a month. A latitude of one month *allowed*. *Grant* v. *Fraser*, 1870, 8 M. 1011.

966. Issue—Specification of Time.—Issues in an action of damages for slander "in or about the month of May 1861," *allowed*. *Stephen* v. *Paterson*, 1865, 3 M. 571; 37 J. 284.

967. Issue — Specification of Time — Repetition of Slander.—In an action for repeated defamation, the pursuer having taken one issue in which were specified the time when, place where, and persons before whom, the slander was uttered, *held* entitled to a second issue of repeated slander during a period of three months, without specification of the days or places. *Innes* v. *Swanson*, 1857, 20 D. 250; 30 J. 128.

968. Issue — Specification of Time — Repetition of Slander.—An issue as to a repeated verbal slander, uttered "on various occasions in September, October, and November," in a particular shop and adjacent street, *sustained*. *Lockhart* v. *Cumming*, 1852, 14 D. 452; 24 J. 223; 1 Stuart 394.

969. Issue — Want of Specification.—Terms of counter issues in an action for libel which were *disallowed*, in respect the averments were too vague. *Lowe* v. *Taylor*, 1844, 7 D. 117.

970. Issue — Specification of Time — Evidence Disallowed.—Issues being taken specially whether slanderous words were used in each of three several conversations with A, *held* that the pursuer was not entitled to examine B as to the use of these expressions in a conversation with him alone, and on a different occasion. *Cullen* v. *Ewing*, 1832, 10 S. 497. Reversed on other grounds, 1833, 6 W. & S. 566.

971. Issue — Separate Issues — Two Pursuers.—When two persons allege injury

by one calumnious statement, it is competent for both to insist for damages in one summons, if the damage due to each be separately concluded for, but each must take a separate issue. *Harkes* v. *Mowat*, 1862, 24 D. 701; 34 J. 348.

972. Issue—Trust.—In an action raised by a father against his son for the purpose of establishing the pursuer's right to a bond and disposition in security, taken and recorded by mistake (as he alleged), in favour of the son, the conclusions of the summons were (1) for reduction of the bond in so far as in favour of the son; (2) for declarator that the father was the true creditor in the bond; and (3) for adjudication of the lands and bond from the son to the father. The defender denied the allegation of error, and objected to an issue being granted to try the question, on the ground that the action was substantially a declarator of trust, and that the pursuer was therefore restricted to proof by the defender's writ or oath. *Held* that the pursuer was entitled to an issue; and issue *adjusted*. *Waddell & Others* v. *Waddell & Others*, 1863, 1 M. 635; 35 J. 377.

973. Issue—Form of—Trust.—Terms of issues in an action at the instance of beneficiaries against the representatives of trustees, who were alleged to have occasioned the loss of trust funds by allowing them to remain unsecured in the hands of one of their number, factor to the trust. *Robertson* v. *Mackenzie*, 1854, 26 J. 498.

974. Issue — Variance between Evidence and Issue.—Under an issue whether certain operations had been done by William Kerr, it is incompetent to prove what was done by Gilbert Kerr; nor will the court indorse the fact on the verdict. *M. of Tweeddale* v. *Kerr*, 1821, 2 Mur. 572. Cf. *Welsh* v. *Stewart*, 1818, 1 Mur. 400.

975. Issue — Varying Issue — Reclaiming.—Whether reclaiming note or motion to vary issues the proper course when it is desired to obtain an entirely different issue from that approved by the Lord Ordinary. *Rintoul & Co.* v. *Port Eglinton Storage Co.*, 1869, 7 S. L. R. 199. See also *Hare* v. *Hopes*, 1870, 8 S. L. R. 189; and *M'Arthur* v. *Ballantyne*, 1871, 8 S. L. R. 499.

976. Issue—Varying Issue—No Motion to Vary — Court of Session Act, 1868, s. 28—A. S. 14 Oct. 1868, s. 6.—A pursuer presented a reclaiming note against an interlocutor holding certain issues as adjusted and settled, and maintained that no issue should have been allowed. *Held* that it was incompetent under the reclaiming note to move the court to vary the terms of the issue. *Ross' Factor* v. *Ballantyne*, 1871, 8 S. L. R. 499.

977. Issue—Verdict—Application of.—To an issue whether a deed was signed by a party "when he was under essential error as to its nature and effect, induced through fraud and misrepresentation or undue concealment," the jury returned this verdict: "Find for the pursuer"—the deed having been signed "when he was under essential error as to its nature and effect, induced through undue concealment on the part of the defender." *Held* that this was a verdict for the pursuer. *Urquhart* v. *Bonnar*, 1866, 5 M. 45; 39 J. 35.

978. Issue — Vitious Intromission.—Issues *allowed* to try questions of alleged vitious intromission and extinction *confusione* of a debt due to the intromitter, on a process between the heir of the debtor and the onerous assignee of the alleged vitious intromitter. *Harper* v. *Barr*, 1854, 17 D. 33.

979. Issue — Wrongous Imprisonment.—In an action of damages for wrongous incarceration on a promissory-note, towards payment of which it was contended that certain sums in the hands of the charger's agent ought to have been imputed, while it was alleged that the balance had been tendered but rejected before incarceration, issues *adjusted* to try the question. *Doyle* v. *Steven*, 1860, 23 D. 13; 33 J. 309.

980. Issue—Wrongous Interdict.—Form of issue in an action of damages for wrongful application for interdict. *Sloss* v. *Cathcart*, 1865, 1 S. L. R. 88.

981. Issue — Wrongous Ejection during the Nighttime.—*Macgregor* v. *Viscount Strathallan*, 1864, 2 M. 1339; 36 J. 674. Cf. *Burnet* v. *Stewart*, 1863, 1 M. 524; 35 J. 312.

982. Judgment—Alleged Error—Competency of Altering before Interlocutor Signed. — Although errors or mistakes in figures may be corrected, a judgment cannot be substantially altered after it has been announced from the Bench. *Cuthill* v. *Burns*, 1862, 24 D. 1849; 34 J. 426.

983. Judgment — Competency. — After judgment, although the interlocutor has not been pronounced, the court will not listen to a statement by one of the parties that the result of it, so far as it adopted a report made to the court, involved an error in accounting,—that point not having been mentioned in the course of the argument. *Hard* v. *Anstruther*, 1862, 2 M. (H. L.) 1; 36 J. 323.

984. Judgment — Minute. — *Held* that an interlocutor assoilzieing the defenders in an action to reduce the minutes of a company, on the ground that the matters averred on record were not relevant to set aside the minutes, was a "judgment on the merits" in the sense of a minute by which parties bound themselves to abide by such a judgment. *Glasgow, Airdrie, etc., Rly. Co.* v. *Drew*, 1861, 23 D. 835; 33 J. 443.

985. Judicial Factor—Lord Ordinary on Bills.—*Held* that it was competent for the Lord Ordinary on the Bills, during vacation, to supply the vacancy occasioned by the death of a judicial factor who was appointed over a railway. *Primrose* v. *Caledonian Railway Co.*, 1851, 13 D. 1214; 23 J. 194, 495, 571.

986. Judicial Factor — Petition for Special Powers — Administration of

Charity.—A petition by a judicial factor on a trust-estate for authority to make an interim division of the residue of the trust-estate among certain charitable institutions, according to a scheme suggested to the court, *held* not to be "a scheme for the administration of a charitable or other permanent endowment" falling to be reported to the court by the Lord Ordinary under the 16th section of the Trusts Act, 1867. *MacAndrew*, 1868, 5 S. L. R. 504.

987. Juratory Caution — Removing. — Suspension of decree of removing *passed* on juratory caution, where a tenant had counter claims against the landlord pending in an action of damages, at the tenant's instance, for non-fulfilment of stipulations of the lease. *Scott* v. *Christie*, 1856, 18 D. 859; 28 J. 390.

988. Jury Court — Whether an Independent Court. — It is competent for the Court of Session to remit to the auditor the account of an agent against his client, relative to an action of damages before the jury court. *Jameson* v. *Wight*, 1829, 7 S. 379; 4 Fac. 483. See *Robertson* v. *Allardyce*, 1829, 7 S. 813; 4 Fac. 1112.

989. Jury Trial — Abandonment. — A jury trial being called, the pursuer's counsel abandoned the action, consenting to decree of absolvitor with modified expenses. *Muckarsie* v. *Wilson*, 1838, M'F. 114.

990. Jury Trial—Additional Evidence Allowed after Cases Closed—A. S. 16 Feb. 1841, s. 27.—After both the pursuer and the defender had closed their cases and the pursuer's counsel had addressed the jury, the defender for the first time observed that the pursuer had failed to lead evidence in support of a certain notice which was necessary to prove his case, and he thereupon asked the presiding judge to direct the jury in respect thereof to find for the defender. The presiding judge refused to do so, and allowed evidence of notice to be then led. *Held* that it was within the discretion of the judge to allow the evidence, and bill of exceptions *disallowed*. *Christie* v. *Thompson*, 1859, 21 D. 337; 31 J. 186.

991. Jury Trial—Adjustment of Issues—Inner or Outer House.—*Held* competent for the Lord Ordinary, after adjustment of issues in the Outer House, and where no notice of trial had been given, to grant commission and diligence for recovery of writings. *Hornel* v. *Gordon & Others*, 1862, 24 D. 551; 34 J. 285.

992. Jury Trial — Issue — Adjustment of—Report to Inner House—Relevancy.—*Held* that before reporting issues under the stat. 13 and 14 Vict. c. 36, a preliminary defence ought to be disposed of. *Denison & Co., & Barclay* v. *Bell & Barclay*, 1852, 15 D. 5; 2 Stuart 1. *Burdis & Others* v. *Wingate*, 1852, 2 Stuart 1.

993. Jury Trial—Bill of Exceptions—Alleged Irregularities at Recording of Verdict — Affidavits by Jurymen and Agents — Incompetency of Referring to Anything but the Judge's Notes.—A bill of exceptions was founded on irregularities alleged to have taken place at the recording of the verdict, and in support of it affidavits were tendered by jurymen, and by the agent and clerk of one of the parties. *Held* that affidavits were inadmissible to contradict the notes of the presiding judge as to what took place at the trial. *Dobbie* v. *Johnston*, 1861, 23 D. 1139; 33 J. 567.

994. Jury Trial—Bill of Exceptions—Ambiguous Directions.—On the trial of an issue, whether A. F. died in consequence of injuries sustained from an unfenced shaft in the mash-house of the defenders' brewery, through the fault of the defenders, the presiding judge directed the jury, that if they were satisfied on the evidence that A. F. "ought not to have been in the mash-house" on the occasion in question, the defenders were entitled to a verdict. *Held* that as the direction might refer either to fault in A. F. in having gone into the mash-house, or to fault in the defenders or their servants in having allowed her to go there, or to fault on both sides, the direction was ambiguous, and exception thereto *allowed*. *Fraser* v. *Younger & Sons*, 1867, 5 M. 861; 39 J. 494.

995. Jury Trial—Bill of Exceptions—Amendment.—*Held* that a motion to amend or alter a signed bill of exceptions, so as to make it consistent and in conformity with the notes taken by the presiding judge at the trial, was incompetent. *Pollok* v. *Morris*, 1845, 7 D. 973; 17 J. 68, 113, 512.

996. Jury Trial—Bill of Exceptions—Charge. — To sustain a bill of exception to a judge's charge it is not necessary to show that the judge's misdirection did in point of fact mislead the jury; it is enough if it was calculated to do so. *Cleland* v. *Weir*, 1847, 6 Bell 70; 19 J. 450. Revg. 9 D. 199; 19 J. 106, 693.

997. Jury Trial—Bill of Exceptions—Construction of. — *Observed*, that bills of exception are to be strictly construed; that the bill alone can be looked at to see whether a ruling is correct; and that if the statement of law be correct as a general proposition, and there be nothing to show that it has been wrongly applied, the exception must be *disallowed*. *Kyle* v. *Jeffreys*, 1859, 21 D. (H. L.) 8; 3 Macq. 611; 31 J. 566.

998. Jury Trial—Bill of Exceptions—Decision to Presiding Judge as to Reading a Deposition. — *Question*, whether it is competent on a bill of exceptions to review the decision of a presiding judge at a jury trial on the point, whether there was sufficient evidence that a witness was unable to attend in court, with a view to justify the reading of his deposition, which had been taken on adjusted interrogatories by commission. *Willox* v. *Farrell*, 1848, 10 D. 807; 20 J. 284.

999. Jury Trial—Bill of Exceptions—Direction to Jury "that on the Facts Proved they must Find for Defenders."—The jury were directed, in point of law, "that on the state of the facts proved they must find for the defenders." The pursuers excepted, contending (1) that the jury alone could find what facts were proved; and (2) that there was evidence which should have gone to the jury. Exception *disallowed*. *Neilson* v. *Rodger*, 1854, 16 D. 603; 26 J. 273.

1000. Jury Trial—Bill of Exceptions—Directions as to Construction of Words in a Specification — Province of Judge and Jury.—Where, on the trial of an issue as to an alleged infringement of a patent, a question arises as to the construction of words in the specification used to express commodities in a particular department of trade, with which the judge cannot be supposed to be conversant, it is a proper course for the judge to admit evidence as to their meaning in the trade, and to leave the meaning to be determined by the jury on the evidence. *M'Dougall* v. *Girdwood*, 1867, 5 M. 937; 39 J. 526.

1001. Jury Trial—Bill of Exceptions—Facility and Circumvention.—*Opinion*, that where there is evidence of lesion and facility, it is not necessary that anything amounting to moral fraud should be proved, or that any specific acts of circumvention should be established; it is enough that it appeared that, in the whole circumstances of the party granting the deed, there was used persuasion which he was not in a condition to resist. *Clunie* v. *Stirling*, 1854, 17 D. 15.

1002. Jury Trial—Bill of Exceptions—Form of—Excepting to Directions in Law.—At a jury trial, the presiding judge, in directing the jury, quoted the rubric of a reported case, and also passages from the reported opinions of the judges. The defender "excepted to the foresaid directions." On a bill of exceptions, *held* that the law contained in these opinions and in the rubric not having been excepted to, there was not a well-taken objection to the direction of the judge. *Baird* v. *Reilly*, 1856, 18 D. 734; 28 J. 313.

1003. Jury Trial—Bill of Exceptions—Issue with two Branches—General Finding.—An issue which had two branches was sent to a jury, who returned a general verdict for the pursuers. A new trial *granted*, on the ground that it would have been contrary to evidence to return a verdict for the pursuers on the first branch. *Callaghan & Others* v. *Monkland Iron & Steel Co.*, 1856, 19 D. 52; 29 J. 21.

1004. Jury Trial—Bill of Exceptions—Misdirection of Judge.—*Observed*, that to sustain a bill of exceptions to a charge it is not necessary to show that the direction challenged actually misled the jury; it is enough if it was calculated to do so. *Cleland* v. *Weir*, 1847, 6 Bell 70; 19 J. 450. Revg. 9 D. 199; 19 J. 106, 693.

1005. Jury Trial—Bill of Exceptions—Motion for a New Trial.—Procedure where bill of exceptions and a motion for a new trial are heard together. *M'Allister* v. *Gemmill*, 1862, 24 D. 956; 34 J. 475.

1006. Jury Trial—Bill of Exceptions—New Trial — Motion to have Verdict Quashed. — *Held* that a motion to have the whole proceedings at a trial before a special jury set aside and quashed, in respect that the jurors had not been properly selected in terms of the Act 55 Geo. III. c. 42, s. 27, was incompetent, in respect there was no way of setting aside the verdict of a jury, except in the way prescribed by the Act 55 Geo. III. c. 42, ss. 6 and 7, viz. by (1) a bill of exceptions, or (2) a motion for a new trial. *D. of Buccleuch, etc.* v. *Cowan, etc.*, 1866, 5 M. 214; 39 J. 152.

1007. Jury Trial—Bill of Exceptions—Reasonable and Probable Cause for Jury.—*Held* that reasonable and probable cause is a question for the judge, and not for the jury. But it is the province of the jury to return a verdict upon the facts, as to whether a contract contained in its inception provisions whence the court would adduce the illegality; but the judge is not entitled to tell the jury that upon the facts proved it was illegal. *Fraser* v. *Hill* 1853, 1 Macq. 392; 15 D. (H. L.) 40; 25 J. 391; 2 Stuart 65.

1008. Jury Trial—Bill of Exceptions—Refusal to Lay Down Abstract Legal Propositions.—A judge is presumed to have laid down correctly in his charge the whole law applicable to the case, under the proper qualifications; and the parties, when no exceptions are taken to the charge, are not entitled to call upon the judge at its close to give additional directions to the jury in the form of abstract propositions. *Hogg, etc.* v. *Campbell, etc.*, 1865, 3 M. 1018.

1009. Jury Trial—Bill of Exceptions—Refusal to Admit Evidence — Court of Session Act, 1850, s. 45.—The court, though of opinion that the evidence which was rejected should have been admitted, *refused* to disturb the verdict, as they considered that the evidence if admitted should not have affected the verdict. *Maxwell* v. *Reid*, 1863, 1 M. 932; 35 J. 552.

1010. Jury Trial—Bill of Exceptions—Refusal to Admit Documents Tendered by Pursuer—Court of Session Act, 1850, s. 45.—Documents tendered by the pursuer at a jury trial were rejected; and a verdict was thereupon allowed to be taken for the defender on all the issues; and it was not denied that the rejection of this evidence was immaterial to one of the issues. *Held* that the provisions of the above section, to the effect that a new trial should be granted only when it appeared that the evidence which was rejected would have affected the verdict of the jury, was not applicable to such a case, and a new trial allowed on all the issues. *Cameron* v. *Cameron's Trs.*, 1850, 13 D. 412; 23 J. 180.

1011. Jury Trial—Bill of Exceptions—Second Bill of Exceptions.—After a bill of exceptions against the ruling of a judge on a trial, and a motion for a new trial had been refused, the court *refused* to receive a bill of exceptions against their opinions. *Cuthbertson* v. *Young*, 1852, 14 D. 375.

1012. Jury Trial—Bill of Exceptions—Verdict Contrary to Evidence—Reduction of Deed on the Ground of Insanity.—In the reduction of a codicil, on the ground that the testator was of unsound mind, the verdict of the jury set aside as against evidence, and a new trial granted. *Waddel* v. *Hope*, 1845, 7 D. 1017 ; 17 J. 542.

1013. Jury Trial—Bill of Exceptions—Wrongful Sale of Certain Articles Scheduled to Issue—Whether Pursuer Required to Prove that all the Articles were Sold.—Under an issue, whether the pursuer was joint proprietor "of the articles specified in the schedule hereunto annexed," and whether the defenders "carried through a sale of the said articles wrongfully," exception, that the pursuer could not prove his case by proving that only part of the articles in the schedule were sold, *disallowed*. *Keir* v. *Bontine*, 1865, 3 M. 527 ; 37 J. 264.

1014. Jury Trial—Documents—Objections to—Stage at which Objection must be Stated.—An objection to the admissibility of a document as evidence, must be stated when it is first produced in the course of the trial ; and it is too late if the witnesses have been examined on it, and it is not stated till the document is offered to be put in as evidence at the close of the case. *Robertson* v. *Thom*, 1848, 11 D. 353 ; 21 J. 96.

1015. Jury Trial—Documents—Opening on.—*Observed*, that in opening a case to a jury, it should be opened briefly on the parole, but fully on the documentary evidence proposed to be adduced. *Dougall's Trs.* v. *Tay Ferry Trs.*, 1852, 1 Stuart 301.

1016. Jury Trial—Production of Documents — Mentioned in Opening Case.—Documents mentioned in opening a case ought afterwards to be given in evidence and read. *Hay* v. *Boyd*, 1822, 3 Mur. 15. Cf. *Gibson* v. *Stevenson*, 1822, 3 Mur. 220.

1017. Jury Trial—Lodging Documents—Eight Days' Rule—New Trial.—In an action by a railway company against a shareholder for payment of calls, *held* (1) that the register of shareholders and the minute-book of the directors were not admissible, as they had not been produced eight days before the trial ; (2) that excerpts produced before that time, which were not certified, were not sufficient notice that the documents could not be lodged in time ; (3) that the company was not entitled to a new trial, on the ground that it was in these circumstances "essential to the justice of the case." *Whitehaven & Furness Rly. Co.* v. *Macfadyen*, 1849, 11 D. 846 ; 21 J. 248.

1018. Jury Trial—Lodging Documents—Eight Days' Rule.—*Ruled*, that where a register of shareholders was not lodged in process eight days before a trial, or notice given that it was then to be produced, copies of entries in it, although lodged in process in due time, could not be received in evidence. *Carrick* v. *Saunders*, 1850, 12 D. 922 ; 22 J. 351.

1019. Jury Trial—Lodging Documents—Drafts of Deeds Bound in one Volume—Excerpts Therefrom. — A law agent, who bound up, in the same volume, the original scrolls of all the deeds prepared in his office, although they affected different clients, declined to produce this volume under a commission and diligence granted in an action against one of his clients, but allowed excerpts of the scrolls connected with the matter in dispute to be taken at sight of the commissioner, and he brought the original scroll with him to the trial, for collation with the excerpt. *Ruled*, that the excerpt so taken might be put in evidence, and that it was not necessary to lodge the original scroll eight days before the trial. *Wilson* v. *Glasgow & S.-W. Rly. Co.*, 1851, 14 D. 1.

1020. Jury Trial—Lodging Documents—Eight Days' Rule.—*Ruled*, that the minute-book of a railway company, not produced eight days before the trial, and of the intention to produce which no notice had been given, could not be received in evidence, although excerpts from it, made at the sight of a commissioner, had been lodged in process eight days before the trial. *G. N. Rly. Co.* v. *Inglis*, 1850, 12 D. 1194 ; 22 J. 548 ; 1852 (H. L.), 24 J. 434 ; 1 Stuart 749.

1021. Jury Trial—Production of Document—Exhibition to Jury.—It is for the judge to say what does or does not go to the jury ; and therefore a document being produced does not necessarily go to the jury. *Lindsay* v. *Gilchrist*, 1822, 3 Mur. 100.

1022. Jury Trial—Production of Documents—Production of Part of Correspondence.—A party producing part of a correspondence in evidence, is not bound to produce the whole. *Tytler* v. *Macintosh*, 1823, 3 Mur. 240.

1023. Jury Trial—Production of Documents.—The court has power to allow a haver to produce a writing at the trial. *Stothart* v. *Johnstone's Trs.*, 1821, 2 Mur. 541.

1024. Jury Trial—Production of Documents—Production of One of a Series of Letters. — A party producing one letter is not bound to produce others, if it be intelligible without them. *Brydon* v. *Brydon's Exrs.*, 1822, 3 Mur. 124.

1025. Jury Trial—Failure of Defender to Appear—Decree.—A defender in an action of damages having failed to appear when the case was called for trial, the court *held* him as confessed, and decerned for a sum to which the pursuer restricted the conclusions of his summons. *Ritchie* v. *Aitchison*, 1848, 10 D. 454 ; 20 J. 133.

1026. Jury Trial—Forgery—Competency of Jury Deciding Case on a Comparison of

Writings.—In a suspension of a charge on a bill on the ground of forgery, the jury were allowed to see the bill and compare it with documents admitted to be the genuine handwriting of the suspender, but they were not allowed to take the documents out of court; and they were told that they were not to decide the question put in the issue upon a comparison of the documents, but upon the evidence which had been led. *Gellatly* v. *Jones*, 1851, 13 D. 961.

1027. Jury Trial—Inspection—Order for Defender to Give Access to Pursuers' Experts.—In an action set down for trial, the pursuers stated that it was necessary for the preparation of their case that they should have an opportunity of examining the stores and minerals of the defenders (an iron manufacturing company), and moved for an order on the defenders to give such access to the pursuers and two engineers. Motion *granted*. *Jardine's Trs.* v. *Carron Co.*, 1864, 2 M. 1372; 36 J. 690.

1028. Jury Trial—Issue—Issue Raising Prejudicial Question Tried First.—In an action for payment of furnishings, and for reduction of an agreement by which the claim had been restricted to a portion of the account, two issues were prepared, the first of resting-owing, and the second applicable to the reductive conclusions. The court appointed the second issue (as being the prejudicial question) to stand first, and the issues to be tried separately. *Morton* v. *Scott*, 1844, 6 D. 930; 16 J. 481.

1029. Jury Trial—Issue—Separate Issues—Action of Damages against the Master and Owner of a Ship.—In an action of damages for injury suffered by a cargo, raised against the owners, and the master of the ship, who had contracted with the shipper, the court *refused* to send the case to trial on separate issues, as against the owners and master respectively. *Begg* v. *Rhind*, 1850, 13 D. 185; 23 J. 65.

1030. Jury Trial—Issue—Adjustment of—Report to Inner House—Remit to Lord Ordinary.—A case reported by the Lord Ordinary for the adjustment of issues, ought not to be retained in the Inner House for trial, but remitted back to the Lord Ordinary, in order that the parties may have the benefit of speedy trial. *Holehouse* v. *Walker*, 1853, 15 D. 665; 25 J. 404; 2 Stuart 393.

1031. Jury Trial—Judge's Charge.—It is the duty of a judge at a jury trial to direct the jury with reference to the various possible views which may be taken of the facts. *Gelot* v. *Stewart*, 1871, 9 M. 957; 43 J. 578.

1032. Jury Trial—Limit of Damages—Schedule to Issue.—A jury, in assessing damages, cannot exceed the sums specified in the schedule annexed to the issue. *Clark* v. *Thomson*, 1817, 1 Mur. 188.

1033. Jury Trial—New Trial.—A party, by his titles to lands in the neighbourhood of a burgh, had right to "parts and pertinents" and "commonties," and he claimed a right of common property in adjacent ground, which the jury, on an issue as to whether he had for forty years possessed as common property the ground, found for the defenders, the magistrates of the burgh. A motion for a new trial, on the ground of surprise, in respect the pursuer had got no warning that his possession was to be ascribed to inhabitancy of the burgh, *refused*. *Mackenzie* v. *Magistrates of Fortrose*, 1842, 4 D. 911.

1034. Jury Trial—New Trial—Absence of Necessary Witness—Alleged Perjury of Witnesses.—The absence of a witness from a trial before the Lord Ordinary without a jury is not a ground for granting a new trial where delay had not been asked, and where there was no surprise nor *res noviter emergens*; nor can a party obtain a new trial by offering to contradict by parole testimony certain statements of the witnesses. *Turnbull* v. *Campbell*, 1859, 21 D. 1021; 31 J. 595.

1035. Jury Trial—New Trial—Bill of Exceptions Pending in the House of Lords.—A party tendered a bill of exceptions, and also gave notice of a motion for a new trial; and the exceptions having been disallowed, the judgment was taken to appeal. *Held* that it was competent to proceed with the motion for a new trial, but that in the circumstances it would be inexpedient to do so. *Hastie & Co.* v. *Johnstone*, 1848, 11 D. 247.

1036. Jury Trial—New Trial—Bill of Exceptions — Form of — Disconformity between Note and Bill of Exceptions.—*Held* that in preparing the formal bill of exceptions, it is irregular for the judge to make any alteration upon the exceptions, as they appear by the note of them tendered by the party and signed by the judge at the trial; but (2) that if such alteration be made, the House cannot look at any other exceptions than those set forth in the formal bill. *E. of Glasgow* v. *Hurlet Alum Co.*, 1850, 7 Bell 100; 22 J. 487.

1037. Jury Trial — New Trial — Case Given up by Counsel.—A rule to show cause why a new trial should not be granted, in respect that the case was given up by counsel notwithstanding the defender's remonstrances, *refused*. *Currie* v. *Glen*, 1846, 9 D. 308; 19 J. 101.

1038. Jury Trial—New Trial—Case Depending in Outer House—Inner House.—A case depending in the Outer House was tried before the Lord Ordinary and a jury, under the 42nd section of 13 and 14 Vict. c. 36. The party applied to him for a rule on his adversary to show cause why a new trial should not be granted. *Held* by the Lord Ordinary, that he had no power to entertain the motion. *Henderson* v. *Thomson*, 1852, 2 J. 183; 1 Stuart 332.

1039. Jury Trial—New Trial—"Essential to Justice"—Alleged Failure of Counsel to Follow Instructions.—When a pursuer of a jury trial who had lost his case alleged, in support of a motion for a rule, that in violation of his instructions his counsel had failed to

examine him as a witness, *held* that, as in a question with the defender, the acts of counsel were binding upon the pursuer, and that the remedy for such alleged violation of instructions was not in a new trial. *Mackintosh* v. *Fraser*, 1860, 22 D. 421 ; 32 J. 187.

1040. Jury Trial—New Trial—"Essential to the Justice of the Case."—A case went to trial on the question whether the tenants under a coal lease had wrought a valuable mineral substance not let to them. At the trial there was a great deal of scientific evidence of a conflicting nature, as to whether that mineral was coal or not. A motion for a rule to show cause why there should not be a new trial, on the ground that a new trial was essential for the justice of the case, although the verdict was not alleged to have been contrary to evidence, *refused*. *Gillespie* v. *Russell*, 1854, 17 D. 1.

1041. Jury Trial—New Trial—Evidence of Jurors.—After a jury have returned their verdict and dispersed, it is *incompetent* to impugn such verdict by the evidence of the jurors. *Stewart* v. *Fraser*, 1830, 2 J. 299.

1042. Jury Trial—New Trial—Evidence of Witnesses Examined at Previous Trial who have Died or Cannot Attend.—When a new trial is granted, and witnesses examined at the previous trial have died or cannot attend, it is competent for the presiding judge, either in court or at chambers, to certify his notes of the evidence of such witnesses, although there have been no bills of exceptions; in which case the judge's signature certifies the correctness of the notes. *Bell* v. *Reid*, 1862, 24 D. 1428.

1043. Jury Trial—New Trial—Excessive Damages.—The court will not order a new trial merely because they think the jury have given too much. To justify this course the damages must be excessive in the sense of being what is termed in England "outrageous." *Houlden* v. *Couper*, 1871, 9 S. L. R. 169 ; 44 J. 144.

1044. Jury Trial—New Trial—Excess of Damages.—A party obtained from a sheriff-clerk a Border warrant, upon which he incarcerated for five days an Englishwoman who was on a visit to Scotland, and the warrant and procedure following upon it were thereafter held to be illegal. In an action of damages for wrongous imprisonment against the party and the sheriff-clerk, the jury awarded £500 against the former, and £300 against the latter. *Held* in an application for new trial that a new trial should not be granted on the ground of excess of damages. *Landell* v. *Landell*, 1841, 3 D. 819.

1045. Jury Trial—New Trial—Excessive Damages.—Rule for a new trial, moved on the ground of the damages being excessive, *refused*. *Adamson* v. *Whitson*, 1849, 11 D. 680.

1046. Jury Trial—New Trial—Failure to Produce Material Evidence res noviter.—Verdict *set aside*, and new trial *granted*, in respect that the pursuer, who was the unsuccessful party, had not the benefit, at the trial, of written evidence material to the issue, which was in the possession of a party (the private agent, although not the agent of the defenders) who was examined as a haver, but who had omitted to produce it, and which was only discovered by the pursuer after the trial. *Bannerman* v. *Scott*, 1846, 9 D. 163 ; 19 J. 47.

1047. Jury Trial—New Trial—Incompetency of Raising Questions as to Judge's Directions.—*Question*, whether in moving for a new trial on the ground of the verdict being contrary to the evidence, the party is entitled to maintain to the court points of law on which he had asked no direction at the trial, or the soundness of which would imply misdirection by the presiding judge which had not been excepted to. *Barles* v. *Strathern & Douglas*, 1860, 22 D. 851 ; 32 J. 352.

1048. Jury Trial—New Trial—Motion for—Insufficient Award of Damages.—In an action of damages for an injury whereby the pursuer was disabled from following his profession, new trial *granted*, on the ground that the sum awarded by the jury was insufficient. *Black* v. *Croall*, 1854, 16 D. 431 ; 26 J. 204.

1049. Jury Trial—New Trial—Judge's Notes—Correction of Inaccuracies Therein.—Objection to a judgment on a motion for a new trial, that the judge's notes of evidence, as laid before the court, were not precisely the same as taken down by him at the trial, *repelled*. *Observed*, that the regulations on the subject are merely directory, and leave it in the power of the judge to correct inaccuracies. *Morrison* v. *Maclean's Trs.*, 1865, 3 M. (H. L.) 42 ; 37 J. 466.

1050. Jury Trial—New Trial—Judge's Notes.—On a motion that an application for a new trial, on the ground that a verdict returned upon a trial which took place before the Lord Ordinary in the cause was contrary to evidence, be sent to the summar roll, and that an order be pronounced, enabling the parties to get the judge's notes, the court sent the case to the summar roll, but pronounced no order as to the judge's notes. *Campbell* v. *M'Laren*, 1863, 1 M. 216; 35 J. 326.

1051. Jury Trial—New Trial—Motion for—Lord Ordinary or Inner House.—A case depending in the Outer House was tried before the Lord Ordinary and a jury under the 42nd section of the statute. The unsuccessful party applied to the Lord Ordinary for a rule on his adversary to show cause why a new trial should not be granted. *Held* by the Lord Ordinary, that he had no power, under the statute, to entertain the motion. *Henderson* v. *Blackwood*, 1852, 24 J. 183.

1052. Jury Trial—New Trial—Non-Appearance.—A party, who had given notice of a motion for a rule, did not appear to support the motion when put out in the

roll for hearing. Circumstances in which the court *held* that the notice of motion had been passed from, and *remitted* to the Lord Ordinary to apply the verdict. *Langworth* v. *Hope*, 1866, 2 S. L. R. 12.

1053. Jury Trial—New Trial—Notice of Motion for—Extension of Session for Disposal of Certain Causes.—Where the court had extended the session for the disposal of certain causes, *held* that this was an extension of the session for no other purpose than for hearing these causes; and therefore that, under the A. S. 16 Feb. 1841, a notice of motion for a new trial was competently given within six days after the 12th of November, when the session commenced for other purposes. *Maclean* v. *Maclean's Trs.*, 1862, 1 M. 66; 35 J. 25.

1054. Jury Trial—New Trial—Motion for—Petition and Complaint for Breach of Interdict—Verdict for Defenders.—Under a petition and complaint, with concourse of the Lord Advocate, praying to have the defenders found guilty of a contempt of court and breach of interdict, and punished by fine or imprisonment, and liable in damages, an issue went to trial whether they had committed a breach of interdict, and the jury found for them. *Held*, on a motion to set aside the verdict as contrary to evidence and grant a new trial, that unless the strongest grounds were shown for setting aside the verdict, it must be sustained in a penal complaint, and this not being done, motion *refused*. *Mackenzie* v. *Mags. of Dingwall*, 1839, 1 D. 487; 14 Fac. 535.

1055. Jury Trial—New Trial—Public Road.—*Sheriff* v. *Ferguson*, 1844, 6 D. 530.

1056. Jury Trial—New Trial—Second Division Cause—Case Tried at Circuit under Order of First Division.—A motion *refused* for a rule to show cause why a verdict should not be set aside on the ground that the case being a Second Division cause, had been tried (at a circuit town) under an order of the First Division, and that therefore the judge who tried it had no jurisdiction. *E. of Fife's Trs.* v. *Lumsden*, 1847, 9 D. 1402; 19 J. 618; 1850, 7 Bell 288; 22 J. 621.

1057. Jury Trial—New Trial—Slander—Award under £20.—*Observed* that it is no ground for refusing to grant a new trial that the jury have awarded less than £20 as damages. *Gardner* v. *M'Gaghans*, 1866, 2 S. L. R. 6.

1058. Jury Trial—New Trial—Surprise—Unsuccessful Bill of Exceptions.—Although a bill of exceptions, on the ground that an element of damage, to which the judge directed the attention of the jury, was not in the issues, had been disallowed, yet *held* (1) that the party excepting was not barred from demanding a new trial on the ground of surprise, though he had not taken any exception on this ground; and (2) as that part of the case involving that element of damage had not been properly investigated or satisfactorily tried, a new trial ought to be allowed, on payment by the defender of the expenses of the former trial. *Snare* v. *E. of Fife's Trs.*, 1852, 24 J. 539; 1 Stuart 895.

1059. Jury Trial—New Trial—Surprise.—A faculty of appointing the party for whose behoof trustees were to hold an estate found in the possession of the party named in it was to be regarded as a delivered writ, *held* (1) that the *onus probandi* lies on the party founding on it; (2) that the presumption arising from mere possession does not limit the proof to the writ or oath of the party; (3) that, in the circumstances of this new trial on the ground of surprise, and of the verdict being contrary to evidence, *refused*. *M'Aslan* v. *Glen*, 1859, 21 D. 511; 31 J. 274.

1060. Jury Trial—New Trial—Surprise.—*Held* that objection of discrepancy between title and specification, of which no notice had been given on record, could not competently be stated as a ground for entering-up verdict for the defender. *Kerr* v. *Clark & Co.*, 1868, 7 M. 51; 41 J. 34.

1061. Jury Trial—New Trial—Motion Refused—Verdict—Applying of.—A verdict was found for a defender, and a motion for a new trial was refused on 15th December 1838. On a motion being made, in 1842, to apply the verdict, a counter motion was made by the pursuer to arrest judgment, in respect that the proceedings at the trial were not conformable to 1 Will. IV. c. 69, s. 11, and were therefore a nullity; but it appearing from the report of the case, when the motion for a new trial was refused, that this objection had been before the court, and was repelled, the court *refused* to enter on it, and applied the verdict. *Cleland* v. *Paterson*, 1842, 5 D. 345.

1062. Jury Trial—New Trial—Verdict—Form of.—After a jury trial, one of the parties moved for "a rule to show cause why the case should not be re-tried, in respect that the verdict, as it appears on the notes of the judge furnished to the parties, was not delivered by the chancellor or foreman of the jury in open court, and taken down by the clerk." The court *refused* the motion. *Mackenzie* v. *Dunlop, Wilson, & Co.*, 1853, 25 J. 558.

1063. Jury Trial—New Trial—Objection to Form of Verdict—No Objection Taken at Trial.—The judge at a trial having directed the jury as to the shape in which they should return their verdict, without any exception having been taken, and the jury having returned a verdict in terms of the direction, *opinion*, that it was incompetent for the party who had thus failed to except, to move for a new trial, on the ground that the verdict was not an answer to the issue. *Mags. of Campbeltown* v. *Galbreath*, 1844, 7 D. 255; 17 J. 129.

1064. Jury Trial—New Trial—Motion for—Objection to Verdict as Self-Contradictory and Irrational.—A party sued a railway company for damages in respect of injuries sustained by having sprained his ankle in descending from

one of their carriages, alleging as the causes the defective construction of the carriage, the darkness of the station, and the existence of a depression, the result of wear in the surface of the platform. The jury found for the pursuer and assessed the damages at one shilling. On a motion for a new trial by the pursuer, *held* (1) that the presiding judge had rightly left the case to the jury; (2) that in respect the verdict was self-contradictory and irrational there had been a miscarriage of justice entitling the pursuer to a new trial. *Stewart* v. *The Caledonian Rly. Co.*, 1869, 42 J. 38. See for result of new trial *Stewart* v. *The Caledonian Rly. Co.*, 1870, 8 M. 486; 42 J. 228.

1065. Jury Trial—New Trial—Verdict against Evidence.—In an action of damages for slander from the pulpit, the jury having found for the defender, the court set aside the verdict as against evidence, and *granted* a new trial. *Smith* v. *Gentle*, 1844, 6 D. 565; 16 J. 249.

1066. Jury Trial—New Trial—Verdict against Evidence.—Verdict returned under an issue, whether a party had been induced to subscribe a bond of caution by undue concealment or deception, set aside as not warranted by the evidence, and a new trial *granted*. *Railton* v. *Matthews*, 1845, 7 D. 748; 17 J. 398.

1067. Jury Trial—New Trial—Verdict Contrary to Evidence.—A rule to show cause why a verdict awarding damages to a collier boy, in consequence of bodily injury sustained from the use, by the tenants of a coal-work, of insufficient machinery, *refused*, although some of the judges would not have concurred in the verdict. *Whitelaw* v. *Moffat*, 1849, 12 D. 434.

1068. Jury Trial—New Trial—Verdict Contrary to Evidence.—A motion for a new trial, on the ground that the verdict was contrary to evidence, *refused*; the court observing that it would require a very strong case to entitle the losing party to a new trial on this ground, seeing that the verdict was in accordance with the opinion of the judge. *M'Culloch* v. *North British Bank*, 1849, 11 D. 1197; 21 J. 344.

1069. Jury Trial—New Trial—Verdict Contrary to Evidence—Actions on Policy of Marine Insurance—Different Verdicts on Same Facts.—A shipowner on the same day effected two policies of insurance on the same ship with two different companies. The ship having been lost, he raised separate actions against each company on the policies issued by them respectively. *Held* that, although he got a verdict in the first action, yet on a motion for a new trial in the second, where the verdict was against him, the court could pay no regard to the verdict in the first action; and as the evidence was not palpably contrary to the evidence, they refused the motion. *Stone* v. *General Maritime Co.*, 1851, 13 D. 1288; 23 J. 602.

1070. Jury Trial—New Trial—Verdict Contrary to Evidence — Credibility. — Motion for a rule on the ground that a verdict was contrary to evidence *refused*, the sole question before the jury being one of credibility. *Observations* as to the principles on which new trials on that ground should be allowed. *M'Lachlans* v. *Gardner*, 1866, 3 S. L. R. 6.

1071. Jury Trial—New Trial—Verdict Contrary to Evidence—Declarator of Right of Way.—In an action of declarator of right of way, in respect of possession for forty years prior to a certain date, or for time immemorial, in which the jury had given a verdict for the pursuers, a new trial was granted, the court being of opinion that interruption of the pursuers' possession was proved to have taken place in 1835; that the pursuers had adduced no evidence extending farther back than 1798; and that, assuming the jury to have rightly held the evidence between those dates to have proved possession by the pursuers, any presumption that the previous possession had been of the same character was excluded by positive testimony adduced by the defender, and uncontradicted, that for several years prior to 1798 the public had not possessed a right of way; and therefore that the verdict was contrary to the evidence. *Mags. of Elgin* v. *Robertson & Others*, 1862, 24 D. 301; 34 J. 149.

1072. Jury Trial—New Trial—Verdict Contrary to Evidence—Evidence of Important Witness Taken on Commission.—In a jury trial where both oral and documentary evidence was adduced, the evidence of the most important witness was taken on commission, and read to the jury, he being at the time abroad. The defenders, against whom a verdict was returned, moved for a new trial, on the ground that the verdict was contrary to evidence, and stated that the absent witness was now in this country. The court holding the evidence insufficient, and that the defender was entitled to have the important witness examined before a jury, *granted* a new trial, without imposing as a condition the payment of expenses. *Stewart* v. *M'Farlane*, 1856, 18 D. 786; 28 J. 337.

1073. Jury Trial—New Trial—Verdict Contrary to Evidence—Fraudulent Misrepresentation.—Circumstances in which a verdict for a pursuer under an issue of fraudulent misrepresentation or fraudulent concealment by the defender was set aside as contrary to evidence, and a new trial ordered. *Question*, whether under such an issue it is necessary to establish moral fraud. *Miller* v. *Geils*, 1848, 10 D. 715; 20 J. 503.

1074. Jury Trial—New Trial—Verdict Contrary to Evidence—Fraudulent Misrepresentation.—Under an issue of fraudulent misrepresentation or fraudulent concealment, a verdict having been found for the pursuer, a rule to show cause why a new trial should not be granted, on the ground of the verdict being contrary to evidence, *discharged*. *Kirkpatrick* v. *Irvine*, 1850, 7 Bell 186; 22 J. 634.

1075. Jury Trial—New Trial—Motion for—Objection to Verdict as Informal and Ambiguous—Issue with Three Branches.—

An issue was sent to a jury in an action of assythment, which put the following queries:—(1) whether a person deceased suffered severe bodily injury from an explosion in a coal-pit; (2) whether he suffered further injury from undue detention at the pit-bottom; and (3) whether the deceased's death was in consequence of these injuries. This verdict was returned: "Find for the pursuers on both the first and second issues, by a majority of nine on the first issue, and by a majority of ten on the second issue, and assess the damages," etc. On a motion for a new trial, objections to the verdict—(1) as informal, in respect it treated what was really three parts of one issue as separate issues, and was neither a general verdict, nor contained an answer to the whole matters put in issue; (2) as ambiguous, in respect it did not appear whether the jury intended to return a verdict for the pursuers on the whole case; or, if they did, whether they proceeded on the ground of the death having been caused by the accident, on which the whole case depended,—*repelled*. *Lenaghan & Others* v. *Monkland Iron & Steel Co.*, 1857, 19 D. 975; 29 J. 467.

1076. Jury Trial—New Trial—Verdict Contrary to Evidence—General Verdict—Three Issues — Inconsistency. — The jury having returned a verdict finding "for the pursuer on all the issues," of which there were three, *observed* (1) that as the grounds of challenge were independent, the jury ought to have found separately on each of the issues; but (2) that there was no abstract inconsistency between a verdict of insanity and one of facility and circumvention; but circumstances in which verdict set aside as contrary to evidence. *Morrison* v. *Maclean's Trs.*, 1862, 24 D. 625; 34 J. 311.

1077. Jury Trial—New Trial—Verdict for Pursuer at First Trial and for Defender at Second—Third Trial Refused.—In a reduction of testamentary writings, a verdict was returned for the pursuer, which was set aside as against evidence. On a new trial the verdict was for the defender. Motion to set this aside as against evidence, *refused*. *Morrison* v. *Maclean's Trs.*, 1863, 1 M. 304; 35 J. 205.

1078. Jury Trial—New Trial—Verdict Contrary to Evidence — Question as to Partnership Liability.—The question here was to whether the defender had held himself out as a partner of a firm. The jury held that he had, and the court *refused* to disturb the verdict. *Gardner* v. *Anderson*, 1862, 24 D. 315; 34 J. 159.

1079. Jury Trial—New Trial—Motion for—Verdict Contrary to Evidence—Real Question between Parties not Raised by Issues.—When the court were satisfied from the evidence led at the first trial that the questions between the parties had not been fairly raised, a new trial was *granted* on new issues, to be adjusted on an amended record on payment of expenses. *Gelot* v. *Stewart*, 1870, 8 M. 649; 42 J. 321.

1080. Jury Trial—New Trial—Verdict Contrary to Evidence — Reduction of Decree-Arbitral on the Ground of Corruption.—In a reduction of a decree-arbitral on the ground of corruption the jury found for the pursuer. New trial *granted* on the ground that to justify the verdict there must be evidence of moral bias or unfairness on the part of the arbiter, and that there was no such evidence led. *Cameron* v. *Menzies*, 1868, 6 M. 279; 40 J. 249.

1081. Jury Trial—New Trial—Verdict Contrary to Evidence—Reduction of Testamentary Deeds — Presumptions — Several Issues.—The presumption is against a general verdict for the pursuer on both of two issues—(1) whether a deed is not the deed of the testator; and (2) whether the testator was weak and facile, and the deed impetrated by fraud and circumvention to his lesion; but the court will consider the whole facts, and determine whether or not the presumption can be overcome. Upon such a view of the whole case, presumption overcome, and rule for new trial discharged. *M'Kellar* v. *M'Kellar*, 1861, 24 D. 143.

1082. Jury Trial—New Trial—Verdict Contrary to Evidence — Running Down Case—Question as to the Ownership of the Horse.—A railway company were defenders in an issue, whether a horse and van, "belonging to the defenders," did, through the fault of the defenders, "injure the pursuer." A verdict for the pursuer was set aside, and a new trial granted, as it was proved that the horse was the property of a contractor, and the driver was his servant; but the contractor and railway company were not proved to stand to each other in the relation of master and servant. *Shiells* v. *Edinburgh & Glasgow Rly. Co.*, 1856, 18 D. 1199; 28 J. 539.

1083. Jury Trial—New Trial—Verdict Contrary to Evidence — Two Grounds of Liability.—*Opinion* (1) that it is settled not to be a sufficient ground for setting aside a verdict, that the court think they would have drawn a different conclusion from the evidence; (2) that where two grounds of liability are stated in the issues, and the jury return a general verdict, it is not sufficient to set aside the verdict, that a great preponderance of the evidence, on one of the points merely, is against it. *Macaulay* v. *Buist & Co.*, 1846, 9 D. 245; 19 J. 81.

1084. Jury Trial—New Trial—Verdict Contrary to Evidence—Issue Laid on two Grounds—Sufficient Evidence in Support of one Ground.—In an action of reduction of a deed, on the ground (1) of incapacity, and (2) of facility, fraud, and circumvention, the jury found generally for the pursuer. *Held*, on a motion for a rule to show cause why a new trial should not be granted, that there was no such inconsistency in the verdict as to render it necessary to grant a rule; and that although there was no evidence to support the verdict on facility, fraud, and circumvention,

yet as there was such evidence on the head of incapacity, the verdict must stand. *Scott's Trs.* v. *Bannerman*, 1848, 10 D. 353 ; 20 J. 120.

1085. Jury Trial—New Trial—Verdict Contrary to Evidence—Wrongous Confinement in an Asylum.—In an action of damages for wrongous confinement in a lunatic asylum, the verdict was for the defenders. Circumstances in which a motion for a rule to show cause why there should not be a new trial, on the ground of the verdict being contrary to evidence, *refused*. *Mackintosh* v. *Fraser*, 1860, 22 D. 421 ; 32 J. 187.

1086. Jury Trial—New Trial—Verdict Contrary to Evidence — Instrumentum noviter repertum.—*Held* that the court could not set aside a verdict as contrary to evidence where the real question for the jury was the credibility of certain witnesses, whose testimony, if reliable, would have been conclusive. A motion for a new trial, on the ground of *instrumentum noviter repertum*, *refused*, because (1) the document would have had no material effect at the trial ; (2) it had been all along in the possession of the agent of the party asking for the new trial. *Byres* v. *Forbes*, 1866, 4 M. 388 ; 38 J. 198.

1087. Jury Trial—New Trial—Motion for — Verdict for Defender Owing to a Document being Unstamped—After-Stamping.—A jury having found for a defender in consequence of an objection to a document as unstamped being sustained, and the pursuer having got it stamped, a new trial was *granted*, on paying to the defenders the expenses as between party and party occasioned by the former trial, and not available at the new. *Ivison* v. *Edinburgh Silk Co.*, 1845, 8 D. 236 ; 18 J. 110.

1088. Jury Trial—New Trial—Verdict—Special Verdict—Findings Insufficient to Enable the Court to Decide the Case.—A jury returned answers to questions put to them by the presiding judge. These findings being insufficient to enable the court to pronounce a satisfactory judgment in favour of either party, and the parties themselves not agreeing as to the facts necessary to raise the question of law for the decision of the court, a new trial *ordered*. *Caledonian & Dumbartonshire Junction Rly. Co.* v. *Lockhart*, 1854, 17 D. 25.

1089. Jury Trial — New Trial — Third Trial Refused.—Where there had been three jury trials, in the second and third of which the jury had found for the pursuer, and the verdict in the second trial had been set aside as contrary to evidence, the court *refused* to set aside the verdict in the third trial on this ground, and grant a fourth trial. *Railton* v. *Matthews*, 1846, 8 D. 747 ; 18 J. 378, 446.

1090. Jury Trial—New Trial—Motion for—Whether such a Motion Removes Cause from Outer House—Court of Session Act, 1850, s. 40.—When an issue in a cause depending before a Lord Ordinary has been tried before his Lordship and a jury, in terms of s. 40 of the Court of Session Act, 1850, the cause is not removed to the Inner House by a motion for a new trial, and therefore a remit to the Lord Ordinary after the motion has been disposed of is unnecessary and incompetent. *Gardiner* v. *Keddie*, 1866, 4 M. 850 ; 38 J. 444.

1091. Jury Trial—Notice of Trial.—An objection that a notice of trial, which was signed by counsel, and bore the agent's name upon the back, was informal, as it should be signed by the agent, *repelled*. *Carnegie* v. *M'Tier*, 1844, 6 D. 985 ; 16 J. 453.

1092. Jury Trial — Notice of Trial — "Days."—*Held* that, in the A. S. 16 Feb. 1841, s. 13, the term "days" means sederunt days, not natural days. *Railton* v. *Matthews*, 1844, 7 D. 152 ; 17 J. 71.

1093. Jury Trial—Notice of Trial for Sittings — Discharge of — Whether Case Thereby Remitted to Inner House.—When a cause comes into the Inner House upon a notice for trial at the sittings, *held* that discharging the notice for trial has not the effect of remitting the cause to the Lord Ordinary. *Harvie* v. *Clarke*, 1861, 33 J. 578.

1094. Jury Trial—Notice of Trial Discharged on Account of Failure to Pay Expenses already Incurred.—Where the pursuer had failed in part of the case, and had been found liable in a sum of expenses, the defender, on the third last sederunt day of the Session, moved to have the notice of trial given by the pursuer for the Circuit Court discharged, on the ground that he had stated he was unable to pay these expenses. The court, in respect of the pursuer's failure to pay or find caution for these expenses, *discharged* the notice of trial. *Logan* v. *Weir*, 1872, 9 S. L. R. 402.

1095. Jury Trial—Order of Trial in two Actions of Reduction—Reversal of Order in which Notice of Trial Given.—An heir-at-law challenged in separate actions of reduction, on the ground of insanity, two deeds executed to her prejudice, the one being a disposition conveying an estate to one of the defenders, and the other a disposition to trustees containing a direction to convey the estate to that defender. *Held* that as the latter deed if sustained would exclude the interest of the pursuer to reduce the other challenging the deed in favour of the trustees, the trial of the action should precede that in the other. *Waddel* v. *Hope*, 1844, 6 D. 1230 ; 16 J. 650.

1096. Jury Trial — Place and Date — Change of.—Circumstances in which, on the motion of the defender, the court changed the place of trial. *Railton* v. *Matthews*, 1844, 7 D. 153 ; 17 J. 71. Cf. *Wilson* v. *Farrell*, 1847, 9 D. 1513 ; 19 J. 349, 496, 692.

1097. Jury Trial — Place and Date — Trial at Circuit Court or Sittings.—In an action of interdict for infringement of a patent brought in May, the pursuers gave notice of trial for the Christmas sittings. The

defenders moved the court to fix the trial for the Glasgow Autumn Circuit. The court *refused* the motion, and fixed the trial to take place at the Christmas sittings. *Cunningham* v. *Spiers & Co.*, 1866, 2 S. L. R. 206.

1098. Jury Trial — Place and Date — Circuit or Edinburgh—Change of Place —Skilled Evidence.—Place of trial changed from Inverness to Edinburgh, it appearing that the evidence would mostly consist of that of skilled medical witnesses, better procurable at Edinburgh than at Inverness. *Fraser* v. *Macnee*, 1868, 5 S. L. R. 365.

1099. Jury Trial—Place and Date—Circuit—Caithness Case at Aberdeen.—A pursuer's notice of trial at Aberdeen, where both parties resided in Caithness-shire, *held* incompetent. *Bremner*, 1847, 19 J. 692.

1100. Jury Trial—Place and Date—Conjoining Trials—Place of Trial when at Circuit.—The pursuers in an action gave notice of trial at the Glasgow Circuit. The defender objected, and moved the court to discharge the notice as incompetent, in respect that the subject-matter of the action did not belong to the Glasgow district of the Western Circuit, but to the Inveraray district, and the trial, if taken at circuit, must be taken at Inveraray. Objection *sustained*, and notice of trial *discharged*. *Mackintosh, etc.* v. *Moir*, 1871, 9 M. 698 ; 43 J. 402.

1101. Jury Trial — Place and Date — Countermand—Discharge.—The court will not discharge a notice of trial which a party may himself countermand. *Graham* v. *Western Bank*, 1865, 1 S. L. R. 53.

1102. Jury Trial — Place and Date — Lead—Postponement.—*Held* that the pursuer, in a jury case, had not lost the lead, although more than ten days had elapsed after the settlement of the issue—parties having been, during that time, engaged in discussing motions before the Lord Ordinary, with a view to fixing a day of trial. *M'Neill* v. *Caldwell & Sheddan*, 1853, 15 D. 582 ; 2 Stuart 326. *Morison* v. *Mackenzie & Co.*, 1853, 15 D. 816 ; 25 J. 498 ; 2 Stuart 504. *Melrose & Co.* v. *Hastie & Co.*, 1850, 12 D. 672 ; 22 J. 207, 252. *M'Cowan* v. *Wright*, 1852, 24 J. 652 ; 1 Stuart 1107. *Leadhills Mining Co.*, 1856, 15 D. 594. *Wallace* v. *Mackenzie*, 1860, 32 J. 413. *White* v. *Halkerstone*, 1860, 22 D. 1058 ; 32 J. 417. *Hutchison* v. *West of Scotland Fishery Co.*, 1860, 22 D. 1068 ; 32 J. 491. *N. B. Rly. Co.* v. *Leadburn, etc., Rly.*, 1865, 3 M. 340 ; 37 J. 163. *Bell* v. *Anderson*, 1862, 24 D. 603 ; 34 J. 248.

1103. Jury Trial — Place and Date — Lord Ordinary or Sittings—Pursuer's Lead —Retransmission of Case to Lord Ordinary —Case Remitted from Inner House to Lord Ordinary to Fix Trial.—A case having been transmitted to the Inner House by notice of trial, warrant for its retransmission *granted*, the pursuer being desirous to move the Lord Ordinary to fix a day for trial before himself. *Gordon* v. *Scottish N.-E. Rly. Co.*, 1867, 3 S. L. R. 266.

1104. Jury Trial—Place and Date—Trial at Sittings or before Lord Ordinary.—Issues in a case were adjusted before the Lord Ordinary on 12th June. On the 14th the pursuers gave notice of trial for the July sittings. On the 15th the defender moved the Lord Ordinary to fix a day for the trial before himself. The court *held* that as there was very little time to be gained by having the trial before the Lord Ordinary, there was no good reason for depriving the pursuers of their lead, and therefore *fixed* the trial for the sittings. *Union Bank* v. *Ross*, 1866, 2 S. L. R. 86.

1105. Jury Trial—Place and Date—Lord Ordinary or Circuit.—A trial in a question of boundaries, on the motion of the pursuer, fixed to take place before the Lord Ordinary and a jury, the defender objecting, and moving that as a view of the ground would be desirable, the trial should take place on circuit, the *locus* being near the circuit town. *Welsh* v. *Rose*, 1858, 20 D. 513. Cf. *Moffat* v. *Lamont*, 1859, 21 D. 212 ; and *Patterson* v. *Patterson*, 1862, 24 D. 1443 ; 34 J. 714.

1106. Jury Trial—Place and Date—Lord Ordinary—"Special Cause"—Intervention of Vacation.—A Lord Ordinary was moved, under 13 and 14 Vict. c. 36, s. 14, to fix a day for trial during the next summer session. As this day was not within three weeks from the date of the motion, his Lordship reported the point, stating that he considered the intervention of the vacation to be "special cause" in terms of the statute. In this view the court concurred, and authorised him to appoint a day after the vacation. *A. B.*, 1855, 17 D. 759.

1107. Jury Trial—Place and Date—Lord Ordinary or Sittings.—Defenders gave notice of trial for the spring sittings. The pursuers moved the Lord Ordinary to fix a time for the trial before himself and a jury. No good reason being stated why the case should not be tried forthwith, case *appointed* to be tried before the Lord Ordinary. *Losh, Wilson, & Co.* v. *Douglas*, 1857, 29 J. 183. Cf. *M'Laren* v. *Steel*, 1854, 16 D. 898 ; 26 J. 466. *Faulks* v. *Park*, 1854, 16 D. 963 ; 26 J. 513. *Boyd* v. *Law*, 1856, 18 D. 618. *Hallidays* v. *Morrison*, 1857, 19 D. 929 ; 29 J. 410, 431. *Lauder* v. *Barr*, 1857, 20 D. 71. *Carron Co.* v. *Ritchie, Watson, & Co.*, 1857, 19 D. 384. *Shiells* v. *Edinburgh & Glasgow Rly. Co.*, 1856, 18 D. 1301 ; 28 J. 657. *Mushet* v. *D. of Buccleuch*, 1856, 18 D. 486 ; 28 J. 147. *Ainslie* v. *Sutton*, 1846, 8 D. 528. *Burgess*, 1846, 7 D. 1085 ; 17 J. 559. *Angus* v. *Scottish Marine Insurance Co.*, 1845, 7 D. 603 ; 17 J. 300. *Morton* v. *Scott*, 1844, 7 D. 248 ; 17 J. 123.

1108. Jury Trial — Place and Date— Notice—Countermand—Special Jury Summoned.—After a pursuer had given notice of trial at the circuit, and a special jury had been appointed on the motion of the defender, the court *ordered* the pursuer to report a diligence within fourteen days, reserving his right to countermand the trial. *Gilmour* v. *Gilmour's Trs.*, 1852, 14 D. 675 ; 24 J. 364 ; 1 Stuart 637.

1109. Jury Trial — Place and Date—Motion to Discharge Trial—Alleged Nullity of Whole Proceedings.—An action was raised in name of a foreigner and mandatary. Between the date of execution and calling of the summons the principal died, and his son was sisted in his stead as soon as the news of the death reached this country. More than a year after, issues were adjusted and notice of trial given. The defender now moved for discharge of the order for trial, on the ground that the whole proceedings were null. The court *refused* the motion, observing, that if the pursuer succeeded before the jury, the defender might raise his plea of nullity of the proceedings when the verdict came to be applied. *Dobie* v. *Macfarlane*, 1855, 17 D. 750; 27 J. 319.

1110. Jury Trial — Postponement — Absence of Material Witness—View.—A motion for postponement of a jury trial, on the grounds (1) of the absence from illness of a witness, and (2) of the impossibility, by reason of snow, of making an examination of the surface of certain mines, *refused*. *Leadhills Mining Co.* v. *Scots Mining Co.*, 1860, 22 D. 989; 32 J. 422. Cf. *Dobie* v. *Aberdeen Rly. Co.*, 1856, 19 D. 195; 29 J. 93.

1111. Jury Trial — Postponement — Absence of a Material Witness.—Circumstances in which postponement granted because of the absence of a witness from illness. *Wylie & Lochhead* v. *Times Fire Insurance Co.*, 1860, 22 D. 1498.

1112. Jury Trial — Postponement — Absence of Pursuer who was to be a Defender's Witness.—Postponement of trial moved for by defender, in order that the pursuer, who was abroad, might be present to be examined, *refused*, but commission *granted* to examine him on interrogatories. *Donnar* v. *Paterson*, 1859, 21 D. 1301. Cf. *Macintosh* v. *Fraser*, 1859, 21 D. 783; 31 J. 421. *Conacher* v. *Conacher*, 1859, 21 D. 597; 3 J. 320.

1113. Jury Trial — Postponement — Appeal to House of Lords.—In an action in which issues had been adjusted, the defenders having appealed against the interlocutor approving issues, and whole previous interlocutors, the petition was referred to the Appeal Committee to consider its competency, but no order for service was made. The case was set down for trial in the Court of Session on the notice of the pursuers. Motion by the defenders to discharge notice of trial *granted*. *National Exchange Co.* v. *Drew & Dick*, 1858, 20 D. 837; 30 J. 484.

1114. Jury Trial — Postponement — Change of Agency.—Jury trial postponed on the ground of change of agency for the pursuer a few days before the trial, the pursuer being incarcerated, and the materials for the trial being considered by the new agent insufficient to enable him to do justice to the case. *Scott* v. *Christie's Trs.*, 1856, 19 D. 195; 29 J. 94.

1115. Jury Trial — Postponement — Poverty of Pursuer.—A pursuer moved the court to postpone the trial on the ground of her poverty. Her circumstances had not changed since the raising of the action or the adjustment of issues. Motion *refused*. *Gordon* v. *Davidson*, 1865, 3 M. 595; 37 J. 296.

1116. Jury Trial — Postponement — Res noviter.—In an action by a company against a shareholder for payment of calls, *held* to be no ground for fixing the day of trial, that, since the record was adjusted, the company had forfeited the shares on which the calls were alleged to be due. *Great Northern Rly. Co.* v. *Inglis*, 1849, 11 D. 1257; 21 J. 500. Affg. 24 J. 434; 1 Stuart 749.

1117. Jury Trial—Preliminary Questions of Law—Reservation thereof for Disposal at Trial.—A fire broke out in coal-fields let on lease, and the tenants of these coal-fields took measures, with (they alleged) the landlord's sanction, which were successful in stopping the fire, and thereafter raised action against the landlord for reimbursement of the expense of these operations. *Held* that questions of law as to liability of the landlord were not to be decided previous to trial by jury. *Devon Iron Co.* v. *E. of Mansfield*, 1839, 2 D. 268; 15 Fac. 251.

1118. Jury Trial—Productions—Papers Produced by Keepers of Records or Clerks of Inferior Courts.—It was directed by the presiding judge at a trial, that when keepers of records, or clerks of inferior courts, produce papers under authority of a warrant of the Court of Session, they should produce these papers, with a relative signed inventory, so as to avoid the expense of adducing them as witnesses to the fact that the papers were so produced by them. *Morris* v. *Brymer*, 1854, 16 D. 869; 26 J. 417.

1119. Jury Trial—Lodging Productions—Deeds in Register House.—The court will not grant a warrant on the Lord Clerk Register and his deputies to transmit the deeds which had been recorded to the clerk to a process eight days before a trial, holding that the rule requiring production of documents previous to the trial would be satisfied by the production of extracts. Witnesses, whose seeing the deed might be important, might be taken to the Register House. *Maclean*, 1861, 23 D. 1262; 33 J. 480.

1120. Jury Trial—Lodging Productions.—*Held* that although documents were in the possession of a party, and were not produced before the record was closed, they might be received in evidence at a jury trial, provided they were lodged with the clerk eight days before the trial. *Cameron* v. *Cameron's Trs.*, 1850, 13 D. 412; 23 J. 180.

1121. Jury Trial—Productions—Lodging.—*Held* (1) that it is not an inflexible rule that documents to be founded on at a jury trial must be lodged eight days before the trial; (2) that the rule will not be applied to public registers, such as parochial registers, unless the ends of justice absolutely require it; (3) that where diligence is sought to recover parochial registers of births, etc.

extending over about two centuries, that they might be founded on at the trial, it is not incumbent on the party so founding on them to give notice, previous to the trial, to his opponent of the particular use he intends to make of them; and (4) that by taking excerpts from such registers under a diligence, he is not thereby precluded from founding at the trial upon other entries than those of which he has so taken excerpts. *Cochrane* v. *Ferrier*, 1859, 21 D. 749; 31 J. 402.

1122. Jury Trial—Record—Issue—Proof of Malice where Averred, though not put in Issue.—*Held* that when the pursuer in an action of damages for slander has averred malice on record, it is competent for him to meet the defence of privilege by proof of malice at the trial, though he has taken an issue of false and calumnious without malice. *M'Bride* v. *Williams & Dalzell*, 1869, 7 M. 427; 41 J. 241.

1123. Jury Trial — Reduction. — In an action of reduction of a trust deed and codicils by the next-of-kin of a deceased, on the ground of incapacity, facility, fraud and circumvention, and defective execution, the trustees pleaded that by other deeds, holograph of the deceased, the pursuers were excluded from the succession. The pursuers then raised an action for declarator that these previous deeds were mere instructions to an agent to prepare the deeds sought to be reduced, and were not to be treated as testamentary writings, but concluding also, that if they were testamentary, they too should be reduced on the grounds of incapacity, facility, and circumvention. The actions were conjoined. *Held* (1) that the question, whether or not holograph deeds *ex facie* complete were intended to receive effect as testamentary writings, was not a proper subject for trial by jury; (2) that, before deciding that point, it was proper to send for trial by jury issues as to the alleged facility, fraud and circumvention, and defective execution. *Maclean* v. *Maclean's Trs.*, 1861, 23 D. 1099; 33 J. 480.

1124. Jury Trial—Relevancy—Issue.—*Held* in a question of relevancy previous to trial, that homologation of deeds challenged, and as to which issues were sent to a jury, was not to be previously decided, but would arise at the trial under an issue to that effect. *M'Michan* v. *M'Michan*, 1839, 1 D. 1085; 14 Fac. 1095.

1125. Jury Trial—Separation of Trials—Action of Damages for Assault against Two Parties.—In an action of damages for assault against two parties, it was averred in the summons, that one of them took the principal share in committing it, but that the other aided and abetted him, and the conclusion was for different sums of damages against each. *Held* that there were no grounds for separate issues or separate trials. *Anderson* v. *Barr*, 1847, 9 D. 929.

1126. Jury Trial—Separation of Trial—Wrongous Apprehension—Wrongous Dismissal.—In an action of damages by a servant who, on the information of his master, had been apprehended on suspicion of theft, against the master who had given the information, the policeman who apprehended him, and the superintendent of police who ordered his apprehension, and there being no third parties present who could be adduced as witnesses, the court *allowed* separate trials. *Taylor* v. *Cathcart*, 1846, 9 D. 192; 19 J. 59.

1127. Jury Trial — Separation — Action against Bank Directors.—In an action of reparation against several directors of a bank, founded on fraud, although the cases stated against the several defenders were to a certain extent different, a motion by one of them to have his case tried separately from the rest, *refused*. *Inglis* v. *Douglas*, 1861, 23 D. 561; 33 J. 344.

1128. Jury Trial—Separation of—Penuria testium. — Circumstances in which a motion to separate the trial of an action of damages as against two defenders, on the ground of *penuria testium*, and to enable each of the defenders to bear evidence in favour of the other, was *refused*; but separate issues were *granted*. *Paterson* v. *Walker*, 1848, 11 D. 167; 21 J. 32.

1129. Jury Trial—Several Defenders—Separate Issues—Action of Damages for Wrongous Use of Diligence against Law Agents and Others.—In an action of damages for wrongous use of diligence, directed against the principal parties for whom the diligence was alleged to have been executed, and also against the law agent, *held* that, in the circumstances of the case, as alleged on record, a separate issue ought to be taken by the pursuer against each of the defenders. Terms of issues *adjusted*. *Inglis* v. *M'Intyre*, 1861, 23 D. 1240; 33 J. 625.

1130. Jury Trial—Special Jury.—Circumstances in which motion to have an issue tried by a special jury *granted*. *Lindsay* v. *Robertson*, 1868, 6 M. 889; 40 J. 508.

1131. Jury Trial—Special Jury—Declarator of Right of Way.—In an action of declarator of right of way, the court set aside a verdict in favour of the pursuers, and granted a new trial. Motion by the defender to have the case tried before a special jury, *granted*. *Jenkins* v. *Murray*, 1866, 5 M. 39; 39 J. 33.

1132. Jury Trial—Special Jury—Declarator of Right of Way.—In an action of declarator of right of way, the court set aside the verdict of a jury; and a new trial having been granted, the court, on the motion of the defenders, *ordered* the case to be tried before a special jury. *Mags. of Elgin* v. *Robertson*, *etc.*, 1862, 24 D. 788; 34 J. 399.

1133. Jury—Special Jury—Insufficient Number of Jurymen—Addition of Tales—Jury Trials Act, 1814 to 1815, s. 28.—Where a cause was set down for trial by a special jury, but a sufficient number failed to attend, *held* that the court had no power to

grant a *tales*, and the pursuers (who asked for the *tales*) were not entitled to expenses. *Milligan* v. *M'Lachlan's Trs.*, 1836, 15 S. 30; 12 Fac. 31.

1134. Jury Trial—Special Jury—Railway Accident.—In an action of damages for injury sustained through the alleged fault of a railway company, the defenders moved for a special jury to try the case. The court *refused* the motion. *Dempsey* v. *E. & G. Rly. Co.*, 1866, 2 S. L. R. 169.

1135. Jury Trial—Trial of Issues by Lord Ordinary without a Jury—Findings—Finality.—When the Lord Ordinary, under 13 and 14 Vict. c. 36, s. 48, appoints questions to be tried before himself without a jury, these questions ought to be stated in his interlocutor specifically, and not by a reference to the record. Where, in the findings pronounced after such a trial, the Lord Ordinary finds facts which were not remitted to trial, it is competent for the court to strike them out. *Buchanan* v. *Cowan*, 1857, 19 D. 716; 29 J. 334. See also *Hood* v. *Williamson*, 1861, 23 D. 496; 33 J. 227. *Roberts* v. *Gibson*, 1865, 3 M. 554; 37 J. 278. *Balfour* v. *Wordsworth*, 1854, 16 D. 1028; 26 J. 546. *Ranken* v. *Drew*, 1855, 17 D. 363; 27 J. 157. *Allan* v. *M'Murray*, 1855, 17 D. 969; 27 J. 492.

1136. Jury Trial—Verdict—Form of, in Right-of-Way Case, where Legal Question Reserved.—In a right-of-way case the jury returned a verdict finding "for the pursuers, with power to the court to enter the verdict for the defender if they should be of opinion that the road in question was legally shut up" by the road trustees in 1824. *Held* that the verdict was unobjectionable in form, and fairly brought the legal question before the court. *Murray, etc.* v. *Arbuthnot*, 1870, 9 M. 198; 43 J. 98.

1137. Jury Trial—Verdict—Applying—Alternative Verdict—General Issue—Appeal to House of Lords—Amendment of the Application of Verdict.—The verdict of a jury, as recorded by the clerk, being a general verdict for the pursuers, though the issue was alternative, the court, on a remit to that effect by the House of Lords, amended the entry of the verdict according to the substance of the actual findings and the notes of the presiding judge; and also amended the application of the verdict, in consequence of the alteration made in the entry of the verdict. *Fairservice or Cairns* v. *Marianski*, 1852, 15 D. 268; 25 J. 186; 2 Stuart 153. Cf. *M'Conechy* v. *M'Indoe*, 1853, 16 D. 315; 26 J. 145.

1138. Jury Trial—Verdict—Applying——Ambiguous Verdict—Incompetency of Correcting.—*Held* that although it is competent for the court to correct an error in the entering of a verdict, there is no power to amend a verdict which has been delivered by the jury, and taken down as delivered; and the remedy for an ambiguous verdict is not the alteration of the verdict, but a new trial. *Morgan* v. *Morris*, 1858, 20 D. (H. L.) 18; 30 J. 686; 3 Macq. 323.

1139. Jury Trial—Verdict—Applying—Bill of Exceptions—Explanatory Findings by Jury.—It is competent for the jury to add to a general verdict such explanatory findings as they may consider essential to justice, or necessary to exhaust the case. *Kyle* v. *Macpherson's Trs.*, 1856, 18 D. 1031.

1140. Jury Trial—Verdict—Applying—Compensation—Failure to Plead.—In an action of damages by a tenant against his landlord, who omitted to state a plea of compensation—the jury having found damages—the court, on a motion to apply the verdict, *allowed* the landlord (no opposition being offered) to add a plea of compensation. *Heddle* v. *Baikie*, 1846, 9 D. 197; 19 J. 69. But thereafter effect given to the verdict without abiding the discussion of the counter claims, 1847, 9 D. 1254; 19 J. 540.

1141. Jury Trial—Verdict—Application of—Conjoined Actions.—A person having raised an action of count and reckoning against the representatives of his deceased partner, was met by a defence founded on the fact that a balance-sheet had been made out and signed by the partners. He then alleged that his signature had been obtained by fraud, and raised an action to reduce it. The actions were conjoined and an issue adjusted to try the question of fraud. The jury found for the defenders. *Held* that in applying the verdict the defenders were entitled to absolvitor from both actions. *Steven* v. *M'Dowall's Trs.*, 1866, 2 S. L. R. 155.

1142. Jury Trial—Verdict—Applying—Failure to Object to Motion—Appeal to House of Lords—Competency of Objecting there to Application of Verdict.—*Cleland* v. *Weir*, 1849, 6 Bell 402; 21 J. 383.

1143. Jury Trial—Verdict—Applying—Verdict Partly for Pursuer and Partly for Defender — Inconsistency.—To an issue, whether agents employed to sell railway shares did, in violation of their duty, purchase 217 of the shares, "or any part thereof," a jury returned a verdict "for the pursuers, in so far as regards 100 of the shares," . . . "inasmuch as"—here followed an explanation of how they had arrived at that result; and "for the defenders as regards the remaining 117 shares." Each party claimed the verdict—the defenders, on the ground that the explanation was inconsistent with the finding. *Held* that the verdict was ambiguous and that there must be a new trial. *Gourlay's Trs.* v. *Kerr*, 1857, 19 D. 789; 29 J. 365.

1144. Jury Trial—Verdict—Applying—Verdict not Affirming Defender's Case but Negativing Pursuer's.—A defender is entitled to be assoilzied though the verdict be not affirmative of his case, if it be negative of the pursuer's. *Melrose* v. *Hastie*, 1854, 17 D. (H. L.) 4; 1 Macq. 698; 26 J. 319.

1145. Jury Trial—Verdict—Applying—Issue on Essential Error—Terms of Verdict

Held to be for Pursuer.—To an issue, whether a deed was signed by a party "when he was under essential error as to its nature and effect, induced through fraud and misrepresentation or undue concealment," the jury returned this verdict: "Find for the pursuer," the deed having been signed "when he was under essential error as to its nature and effect, induced through undue concealment on the part of the defender." *Held* that this was a verdict for the pursuer. *Urquhart* v. *Bonnar*, 1866, 5 M. 45; 39 J. 35.

1146. Jury Trial—Verdict—Applying—Different Verdict on Two Issues.—On two issues in an action of damages, the first for personal injuries, the second for injuries to a horse and gig, through the fault of a servant of the defender, the pursuer obtained a verdict on the first, with £5 damages; and on the second, the jury found that the horse and gig had suffered damage to the amount of £14, 10s., through the fault of the defender, but that the horse and gig belonged to an innkeeper, and that the damage had not been disbursed by the pursuer. Thereafter the defender, on payment of £12, obtained a discharge of all claims from the innkeeper. *Held* that the verdict on the first issue must be applied in favour of the pursuer, and that it was unnecessary to enter up any verdict on the second issue. *Fairweather* v. *Blacklock*, 1861, 24 D. 90; 34 J. 47.

1147. Jury Trial—Verdict—Applying—Objections that Verdict was Immaterial to Legal Rights of Parties and was not Specific.—Circumstances in which the court *repelled* objection to the application of a verdict (1) that it was immaterial to the legal rights of parties; and (2) that it was not sufficiently specific. *M'Whinnie* v. *Johnston & Morrison*, 1864, 2 M. 668; 36 J. 370.

1148. Jury Trial—Verdict—Applying—Declarator as to Public Road — Verdict Finding that the Public Road for Foot Passengers only. — In an action raised in 1864, concluding for declarator that a certain road was a public road, on an issue whether, for forty years, or for time immemorial, the road had been used as a public road, the jury found that, for time immemorial prior to 1806, it had been used as a public road for all purposes, but that since that year it had not been used for horses, carts, or cattle, but as a public road for foot passengers only. *Held* that this was a verdict for the pursuers, in so far as regarded a public footpath or road for foot passengers, and a verdict for the defenders in so far as regarded a road for horses, carts, or cattle; and verdict applied accordingly. *Macfarlane, etc.* v. *Morrison, etc.*, 1865, 4 M. 257.

1149. Jury Trial—Verdict—Applying—Right-of-Way Case. — In a declarator of right-of-way a verdict for the pursuer fixes the direction of the road in question, but leaves it to the discretion of the court to fix what the precise line of the road should be. *Mackintosh* v. *Moir*, 1872, 10 M. 517; 44 J. 278.

1150. Jury Trial—Verdict—Applying—Interest.—A case went to trial on an issue, whether the defenders were "owing the pursuers £70, 13s., or part of that sum, with interest." The jury found for the pursuer "to the extent of £50, 13s." *Held* that interest was not due under the verdict. *Webster* v. *Alexander, etc.*, 1859, 21 D. 1214; 31 J. 673.

1151. Jury Trial—Verdict—Applying—Interest.—A case went to trial on an issue of damages; "sum claimed £71 sterling, with interest at the rate of 5 per cent. per annum from the said 12th July 1861," being the date of the alleged loss. The jury returned a verdict for the pursuer, and assessed the damages at £71 sterling, exclusive of interest. *Held* that the question of interest having been put in issue, was a question for the determination of the jury; that the terms of the verdict did not reserve it; and that the court under such a verdict could not give interest. *Denholm* v. *London & Edinburgh Shipping Co.*, 1865, 3 M. 815; 37 J. 421.

1152. Jury Trial—Verdict—Applying—Verdict Meeting Issue.—Terms of a verdict which was held to meet the issue, and to be a verdict in favour of the pursuers. *Forbes' Exrs.* v. *Western Bank*, 1854, 16 D. 807; 26 J. 380.

1153. Jury Trial—Verdict—Verdict "for the Pursuer, with Power to the Court to Enter it up for the Defender."—*Observed*, in H. of L., that a verdict "for the pursuer, with power to the court to enter it up for the defender" in certain events, is not in proper form. *Mackenzie* v. *Dunlop, Wilson, & Co.*, 1856, 3 Macq. 22; 19 D. (H. L.) 11; 28 J. 688.

1154. Jury Trial—Verdict—Entering-Up.—In a case of verbal slander the record and issue must distinctly specify the occasion on which the slander was uttered, and the pursuer must prove that case. Accordingly, where a pursuer took an issue, whether "the defender did, in the presence and hearing of C M and others, falsely and calumniously say," etc., and the jury returned a verdict with a finding "that it is not proved that the defamatory words were uttered in the presence and hearing of C M"—the court *entered-up* the verdict for the defender. *Broomfield* v. *Greig*, 1868, 6 M. 992; 40 J. 568.

1155. Jury Trial—Verdict—Verdict not Answering Issue—Question as to Domicile—Court of Exchequer.—A claim for duty was resisted, on the ground that the deceased had not a Scots domicile. The case was sent to a jury, and a special verdict was returned, setting forth the deceased's testamentary writings, the particulars of his property, heritable and moveable, and where situated; where and how he carried on his business, where he lived and resided, and the principal facts in his life. Certain expressions as to his intentions respecting his residence used in conversation, and several of his letters, were also set forth; but there was no finding as to the domicile. Verdict *quashed*. *Advocate-General* v. *Lamont*, 1856, 18 D. 374; 28 J. 307.

1156. Jury Trial — Verdict — Finding that the Death was Caused Partly by Deceased's and Partly by Employer's Fault —Verdict Entered for Defender.—In an action of assythment at the instance of the widow and children against the employers of a deceased husband and father, laid solely on the ground of fault of the employers, the issue sent to the jury was, "whether the deceased's death occurred through the fault of the defenders." The jury found that the death was caused partly by the fault of the deceased himself, and partly by the fault of his employers. The court entered-up the verdict for the defenders, and pronounced decree of absolvitor. *M'Naughton* v. *Caledonian Rly. Co.*, 1858, 21 D. 160; 31 J. 94.

1157. Jury Trial—Verdict—Delivery of by Jury—Absence of Judge.—The presiding judge at a jury trial having left the court after charging the jury, who retired, they, on their return, delivered their verdict to the clerk in the absence of the judge. *Held* that, neither party having objected to the judge's absence, the reception of the verdict by the clerk must be held to be of consent of parties, and was not a ground for a new trial. *Brownlie* v. *Tennant*, 1855, 17 D. 422; 27 J. 179.

1158. Jury Trial—Witness.—A defender having been sequestrated during a process, his trustee was sisted and his name was subsequently dropped out of the proceedings; he was discharged. *Held* (1) that his name could not stand as a party to the issues, without notice being given to him. (2) Motion at the instance of his trustee and of a co-defender to have him assoilzied in order that he might be made a witness *refused*. (3) *Question*, whether he would be a competent witness? *Chanter & Co.* v. *Borthwick*, 1848, 10 D. 1544; 20 J. 681.

1159. Lis alibi pendens—Abandonment of Previous Action by Letter.—A multiplepoinding was brought to compel a trustee's representatives to account for his intromissions. Certain objections were stated to the competency of that action, and no further steps were taken therein. About ten years afterwards, the pursuers of the multiplepoinding wrote to the trustee's representatives abandoning that process, and they thereafter raised an action of count and reckoning against the surviving representative of the trustee, that action having the same object as the multiplepoinding. It being admitted by the pursuers that they were liable for the expenses incurred by the defender in the action of multiplepoinding, the court *repelled* the defender's preliminary plea of *lis alibi pendens*, founded on the dependence of the multiplepoinding. *Gracie* v. *Kerr*, 1846, 19 J. 60.

1160. Lis alibi pendens — Bankruptcy in England of Insurance Company—Action of Relief by Partners inter se in Scotland.—An insurance company, carrying on business both in Scotland and England, became insolvent, and a fiat of bankruptcy was issued against them in England, under the Winding-Up Act, 7 and 8 Vict. c. 3. Several of the Scots partners were compelled to pay debts of the company; and they brought an action of relief before the Court of Session against the other partners. The court *repelled* the preliminary defence, that the pursuers' action was incompetent, as involving a process for a general winding up of the company's affairs, such as was depending in the Bankruptcy Court in England. *Richardson & Others* v. *Gavin & Others*, 1853, 15 D. 434; 25 J. 253; 2 Stuart 245.

1161. Lis alibi pendens — Ordinary Action on Bill—Registration of Protest—Suspension.—The holder of a bill within the years of prescription raised an action in the sheriff court against the acceptor for payment, and it having fallen asleep, he, beyond the years of prescription, extracted the protest, and charged and imprisoned the acceptor thereon. Note of suspension and liberation *passed* on the ground of *lis alibi pendens*. *Denovan* v. *Cairns*, 1845, 7 D. 378; 17 J. 182.

1162. Lis alibi pendens — Commencement of an Action—Termination Thereof.—*Held* (1) that an action begins to be in dependence when the summons is executed; and (2) that an action does not cease to be in dependence when an interlocutor has been pronounced dismissing the summons as incompetent, and finding the pursuer liable in expenses, while questions as to the amount of expenses remain to be disposed of by the judge: therefore a plea of *lis alibi pendens* sustained, where a Court of Session summons was executed the day before decree was pronounced for the expenses as taxed, although judgment had been previously pronounced dismissing as incompetent an action relative to the same matter, and finding the defender entitled to expenses. *Aitken* v. *Dick*, 1863, 1 M. 1038; 35 J. 596.

1163. Lis alibi pendens — Counter Actions Raising same Issue.—An heir of entail having raised a declarator against the trustee on the sequestrated estate of the last heir that the entail was valid, the trustee raised an action to have it declared that the entail was invalid—the summons containing also conclusions for reducing the title made up by the defender. Plea of *lis alibi pendens*, in respect of the first action, *repelled*. *Howden* v. *Hawarden*, 1864, 2 M. 637; 36 J. 314.

1164. Lis alibi pendens—Action of Declarator in Court of Session Sisted —Action in Sheriff Court Asleep — Incidental Application in Actions of Declarator Craving for same Order on the Sheriff Court Petition—Abandonment of Sheriff Court Process.—Actions of declarator by a landlord against his tenants in mines, to determine their obligations in regard to the maintenance of certain levels, were sisted during the dependence of a reduction of certain decrees-arbitral. The landlord had also presented a petition to the sheriff to be allowed to put the levels in order at the sight

of the court, reserving the question of expenses; but this process had fallen asleep. *Held* that a summary petition to the Court of Session, narrating that the levels were getting further out of order, and were in danger of being destroyed, and injuring the mines, and praying the court to have them inspected and put in order at the landlord's expense, reserving the question of ultimate liability, was competent, as incidental to the declarators, on a minute being lodged abandoning the sheriff court process. *E. of Hopetoun* v. *Scots Mining Co.*, 1859, 21 D. 218; 31 J. 120.

1165. Lis alibi pendens — Action of Damages for Illegal Sequestration for Rent —Sequestration Process Pending—Advocation ob contingentiam.—A tenant raised an action of damages against his landlord for an illegal sequestration of his effects, which had been recalled, but the process remained in dependence as to expenses. The court *repelled* a preliminary defence of *lis alibi*, the pursuer having consented that an advocation *ob contingentiam* should be brought by the defender. *Aitchison* v. *E. of Mansfield*, 1830, 8 S. 562.

1166. Lis alibi pendens — Action in England against a Debtor in a Bond—Competency of Charging him on his Return to Scotland.—The dependence of proceedings in England against a Scotsman there for recovery of the sum in a Scots bond, does not render it incompetent to charge the debtor on the bond on his return to Scotland; it being in the discretion of the court to sist procedure, if they think fit, till the issue of the litigation in England. *Cochrane* v. *Paul*, 1857, 20 D. 178; 30 J. 81.

1167. Lis alibi pendens—Action for Exhibition of Deeds and for Sums Due Thereunder—Action for a Sum Contained in a Bond of Provision.—*Held* that a depending action before the commissaries, raised by a child against his father's representative for exhibition of all deeds in favour of the defender and for payment of all sums due to the pursuer thereunder, did not form a *lis alibi pendens* to exclude an action in the Court of Session for payment of a sum contained in a bond of provision in favour of the pursuer. *Thomson* v. *Thomson*, 1829, 2 J. 117.

1168. Lis alibi pendens—Action in an Inferior Court.—An action of damages before an inferior court for slander found a sufficient defence against a subsequent action of the same nature in the Court of Session. *Brown* v. *Gilfillan*, 1825, 4 S. 152.

1169. Lis alibi pendens — Interdict — Similar Application in Sheriff Court Refused.—*Question*, whether an application for interdict was excluded by a similar application in the sheriff court, wherein interdict had been refused, and the complainer alleged that the respondent was about to do the act complained of before the cause could be advocated. *Cathcart* v. *Sloss*, 1864, 3 M. 76; 37 J. 39.

1170. Lis alibi pendens—Actions between Landlord and Tenant—Contingency.—A landlord to whom a year's rent was due, and who was liable in an unascertained amount of indemnification to a tenant about to quit his farm, presented a petition to the sheriff, praying for a remit to reporters to estimate the indemnification, and stating his willingness to allow the amount to be deducted from the year's rent. The tenant thereafter raised an action before the Court of Session concluding for indemnification, which he libelled at four years' rent, and also brought an advocation of the sheriff's process. *Held* that the latter was not a *lis alibi* to exclude the action in the Court of Session; and *observed*, that the question of contingency was not affected by the latter action having been brought subsequently to that in the sheriff court. *Butchard* v. *Walker*, 1828, 7 S. 203.

1171. Lis alibi pendens — Action of Multiplepoinding by a Testamentary Trustee—Action against him as Trustee of the Deceased and as an Individual.—*Opinion*, that an action of multiplepoinding and exoneration by a testamentary trustee, as trustee, did not constitute *lis alibi pendens* so as to exclude an action by a legatee, called as a defender in the multiplepoinding, concluding for payment of the legacy against him "as trustee and executor of or as representing the deceased, and as an individual." *Longmuir* v. *Longmuir*, 1850, 12 D. 926; 22 J. 406.

1172. Lis alibi pendens — Representation.—The pursuer of a declarator having died, was succeeded by a person who did not represent him. *Held* that the latter was entitled to raise a new declarator at his own instance, and a plea of *lis alibi repelled*. *Fraser* v. *Emslie*, 1845, 17 J. 143.

1173. Lis alibi pendens—Supplementary Summons to Obviate Plea of "all Parties not Called."—A supplementary summons, brought to obviate the defence that all parties had not been called, contained the same conclusions as the original summons, and was directed against the defenders called in the original summons, as well as against the new defenders. The defenders in the original summons lodged defences to the supplementary summons, pleading *lis alibi pendens*; and that the second action was an unwarrantable *accumulatio actionum*, in respect of the dependence of the original action. Plea *repelled*. *Thomson's Trs.* v. *Livingstone*, 1863, 2 M. 114; 36 J. 52.

1174. Lis alibi pendens—Supplementary Summons—Increase of Sum Sued for.—Plea of *lis alibi pendens* stated against supplementary action, which had been brought for the purpose of increasing the pecuniary claim made in the original action, *repelled*. *Roy* v. *Hamiltons & Co.*, 1868, 6 M. 422; 40 J. 218.

1175. Lis alibi pendens — Note of Suspension Passed — Objection to Suspender's Title—Second Vote Presented—Withdrawal of First Vote.—After a note of suspension had been passed, in face of an objection to the suspender's title, the suspender

acquired another title, which he conceived not to be liable to objection; and he presented a "supplementary note of suspension," containing exactly the same statement of facts and prayer as the original note, and setting forth this title with the view of having the supplementary note conjoined with the original process. The respondent pleaded *lis alibi* in respect of the dependence of the former note. Conjunction *refused*; but on the suspender lodging a minute, agreeing to abandon the first suspension whenever the second note was passed, the court *passed* the second note. *Taylor* v. *Glasgow, Paisley, & Ardrossan Canal Co.*, 1852, 15 D. 14; 25 J. 16; 2 Stuart 8.

1176. Litigiosity—Transaction pendente processu.—A was bound by his father's bond to aliment or pay interest to his brother B. B having been alimented by his mother sued A for interest. After the action was raised, A paid the mother the sum spent by her in alimenting B, and got from her a discharge. *Held* that this discharge being obtained pending the action could not be founded on. *M'Culloch* v. *M'Culloch*, 1727, Robert. 611.

1177. Litigiosity — Multiplepoinding — Fund in medio—Liability to Diligence.—Where a decree in a multiplepoinding as to a deceased's estate had become final, *held* that one of the claimants therein who had decree of preference to part of the fund was not debarred from confirming as executor-creditor to the whole fund. *Observed*, that after litigiosity a competitor is entitled to better his position as much as he can, but cannot make his opponent worse than at the commencement. *Anderson* v. *Stewart*, 1831, 10 S. 49; 7 Fac. 42.

1178. Mandate — Disclamation — Remit to Sheriff to Examine and Report.—A party appearing facile, and giving both a disclamation and a mandate in a process, a remit made to the sheriff to examine him, and report. *Rankine* v. *Rankine*, 1825, 4 S. 127.

1179. Mandate — Form of, by English Company.—A mandate from an incorporated company in England, authenticated by the common seal and the signature of the secretary, is authority for the institution of an action in name of the company. *Great Northern Rly. Co.* v. *Laing*, 1848, 10 D. 1408; 20 J. 512.

1180. Mandate — Ranking and Sale.—Terms of a power of attorney *held* sufficient to authorise the mandatary to bring a ranking and sale under the Act, 1695, c. 24. *Smith* v. *Harris*, 1854, 16 D. 727; 26 J. 327.

1181. Mandate—Terms of—Appeal to Court of Session.—A mandate "to attend, vote, and act at all meetings under a sequestration," does not entitle the mandatary to appeal to the Court of Session. *Ewing* v. *Watson*, 1860, 22 D. 354; 32 J. 158.

1182. Mandate — Terms of — Whether Authorising Arrestment of Vessel jurisdictionis fundandæ causa.—*Held* that an Englishman holding a power of attorney from a person abroad, authorising him to prosecute certain claims against the master of a vessel, was entitled to arrest the vessel *jurisdictionis fundandæ causa*, and to raise an action in Scotland, and for these purposes to appoint a mandatary in Scotland. *Knight* v. *Freeto*, 1863, 2 M. 386; 36 J. 183.

1183. Mandatary — Caution.—A Scotsman domiciled in England, who was carrying on an action in the Court of Session, *held* bound to sist a mandatary, although he offered to find caution to be present at all the diets of court, on receiving reasonable notice. *Railton* v. *Mathews*, 1844, 6 D. 1348; 16 J. 576.

1184. Mandatary — Death of — New Mandatary—Liability for Past Expenses.—It is not competent, on the death of a mandatary in a process, to sist another, under protest that he shall not be liable for the previous expenses. *Pease, Wrays, & Trigg* v. *Smith & Jamieson*, 4 June 1822, F. C.; 1 S. 452.

1185. Mandatary—Action of Damages for Slander by Married Woman and her Husband as her Administrator-in-Law—Husband Abroad.—An action was raised by a married woman, and her husband as her administrator-in-law and for his interest, concluding for damages for the publication in a newspaper of slanderous statements regarding the wife. The husband was furth of Scotland. *Held* that the defender was not entitled to insist that *ante omnia* a mandatary for the husband should be sisted. *Gale* v. *Bennet*, 1857, 19 D. 665; 29 J. 307.

1186. Mandatary — Defender — Officer Serving in India.—A Scotsman, an officer in the army, when serving in India signed as cautioner a bond to an Indian Bank. He having come to Scotland on a two years' leave of absence, the bank raised an action against him in the Court of Session, which was defended. When the defender left Scotland to return to India the bank moved that he be ordained to sist a mandatary. Motion *refused in hoc statu*. *Simla Bank* v. *Home*, 1870, 8 M. 781; 42 J. 443.

1187. Mandatary—Defender and Firm—One Partner thereof Resident Abroad.—In an action at the instance of a company carrying on business under a descriptive firm, and the two individual partners, one of whom was abroad, motion by the defenders to have this partner ordained to sist a mandatary, *refused*. *Antermony Coal Co.* v. *Wingate & Co.*, 1866, 4 M. 544; 38 J. 278.

1188. Mandatary — Defender — Whether a Co-Defender a Sufficient Mandatary.—Where one of two defenders in an action went abroad, *held* that he was not entitled to sist his co-defender as his mandatary. *Barstow* v. *Smith*, 1851, 13 D. 854; 23 J. 388.

1189. Mandatary — Divorce — Wife Pursuer Resident Abroad.—*Held* that in an action of divorce, a wife absent from the country, pursuing her husband, who was resident in Scotland, could not be required to sist a mandatary either for expenses or the

proper conducting of the suit, although she had no separate estate from her husband; but *observed*, that the rule was not absolute, and that each case must be judged of according to its circumstances. *Campbell* v. *Campbell*, 1855, 17 D. 514; 27 J. 217.

1190. Mandatary — Divorce — Husband Defender Resident Abroad. — Where a husband, during the dependence of a process of divorce against him, leaves Scotland, the wife is entitled to have him ordained to sist a mandatary. *Tingman* v. *Tingman*, 1854, 17 D. 122; 27 J. 35.

1191. Mandatary—Effect of Mandant's Sequestration on Mandatary's Liability.—A pursuer's mandatary is not liberated from liability by the defender's having insisted on caution for expenses in respect of the pursuer's bankruptcy, and having afterwards taken judgment of absolvitor in respect of the pursuer's failure to find caution. The liability of a mandatary extends to expenses incurred after the bankruptcy of the party for whom he is mandatary, in connection with discussions relative to the bankrupt finding caution for expenses. *Cullen* v. *Brown*, 1860, 22 D. 1090.

1192. Mandatary — Foreign Pursuer — Death of Mandatary—Procedure.—A mandatary for a pursuer having died pending the process, which terminated in absolvitor with expenses, the court allowed interim extract against the pursuer, reserving the defender's claim against the representatives of the mandatary; and the defender having raised an action of constitution against them, and they having renounced, decree *cognitionis* pronounced. *Barclay* v. *Sir R. Barclay*, 1850, 12 D. 1253; 22 J. 127, 354, 605.

1193. Mandatary — Foreign Pursuer — Death of Pursuer pendente processu — Procedure. — Where a foreigner, who has sisted a mandatary, dies, the proper course is to intimate the proceedings to his representatives; and if they fail to appear, decree for expenses may be taken against the mandatary. *Marshall* v. *Connon*, 1848, 21 J. 63.

1194. Mandatary — Foreign Pursuer — Effect of Coming to Scotland to Reside there Permanently.—A pursuer, who was a domiciled Englishman, lodged a minute in process, to the effect that he had come to Scotland to reside there permanently, and would hold all notices in the cause sufficient if addressed to the office of his agent. *Held* that he was not bound to sist a mandatary. *Faulks* v. *Whitehead*, 1854, 16 D. 718; 26 J. 308.

1195. Mandatary—Foreign Holder of a Bill—Summary Diligence—Suspension.—It is competent to protest a bill, to register the protest, and charge the debtor on the extract, at the instance of a foreigner, without a mandatary; but if a suspension be brought, the foreigner will, if called on, be bound to sist a mandatary. *Ross* v. *Shaw*; *Ogilvy* v. *Scott*, 1849, 11 D. 984; 21 J. 349.

1196. Mandatary — Foreign Pursuer — Owner of Heritable Property in Scotland. —*Opinion*, that the question whether a landed proprietor furth of Scotland must sist a mandatary must be decided, in each case, *ratione habita* of the value of the property, and of the probable expenses of the action. *Caledonian & Dumbartonshire Rly. Co.* v. *Turner*, 1849, 12. D. 406; 22 J. 126.

1197. Mandatary—Foreign Defender—Owner of Heritable Estate—Title thereto in Dispute.—A party abroad, having a landed estate in this country, is bound to sist a mandatary when called as defender in a process of reduction of his title, in which the question raised is the right to the estate. *Sandilands* v. *Sandilands*, 1848, 10 D. 1091; 20 J. 391.

1198. Mandatary — Foreign Pursuer — Whether Express Mandate Necessary.—A person may be sisted as mandatary for a litigant abroad, without a mandate being produced signed by the litigant. *Elder* v. *Young*, 1854, 16 D. 1003.

1199. Mandatary — Foreign Pursuer — Withdrawal of Mandatary on Pursuer Coming to Reside in Scotland—Procedure on Pursuer Leaving Scotland.—A foreigner raised two actions, one a reduction of the titles made up by a singular successor to a heritable estate, and the other a declarator of legitimacy. The declarator was sisted until certain preliminary defences to the reduction should be disposed of. The pursuer had sisted a mandatary in both processes; but as he came to reside in Scotland, the mandatary was allowed to withdraw. The court sustained the defences in the reduction. The pursuer appealed, and left Scotland. The Lord Ordinary thereafter recalled the sist of the declarator, and the pursuer reclaimed. *Held* that the pursuer had no title to appear until he sisted a new mandatary. *Shedden* v. *Patrick*, 1853, 15 D. 379; 25 J. 231.

1200. Mandatary — Multiplepoinding — Claimant Going Abroad pendente processu. —In a multiplepoinding raised in 1848, a claimant who was a minor, and had a curator *ad litem*, was preferred, in terms of certain claims, by interlocutor pronounced in 1854, which was allowed to become final, but other claims in which he had interest were still to be discussed. He had four years before gone abroad as a mariner, and had latterly gone to the gold diggings in Australia. Motion to have him ordained to sist a mandatary, *refused*. *Buik* v. *Patullo*, 1855, 17 D. 568; 27 J. 242.

1201. Mandatary — Multiplepoinding — Foreign Claimant.—Where a claimant in a Scots sequestration is domiciled in England, he is bound to sist a mandatary. *Ford* v. *King*, 1844, 6 D. 1163; 16 J. 506.

1202. Mandatary — Petitioner Imprisoned outwith Scotland at Respondent's Instance.—A petitioner, imprisoned furth of Scotland at the instance of the respondent, *held* not bound to sist a mandatary. *Robertson* v. *De Salvi*, 1857, 19 D. 996; 29 J. 465.

1203. Mandatary — Mandate — Production of.—*Held* that when a litigant has been ordained to sist a mandatary, his opponent is entitled to demand that a mandate signed by the mandant be produced. *Gunn & Co.* v. *Couper*, 1871, 10 M. 116; 44 J. 74.

1204. Mandatary — Retiral of — Decree against him—Right to Carry on the Action.—A judicial mandatary having retired, and decree being pronounced against his constituent, and against himself for expenses, *found* not entitled to reappear and carry on the action, so as to show that no expenses were due. *Gordon* v. *Gordon*, 1823, 2 S. 572.

1205. Mandatary—Sist—Conditions.—A mandatary is not entitled to stipulate any conditions as to the effect of his sisting himself, but must do so simply, leaving the consequences to follow according to law. *Robertson & Co.* v. *Exley & Co.*, 1833, 11 S. 320.

1206. Mandatary — Failure to Sist — Procedure.—A party having failed to sist a mandatary, the opposite party put in a printed note stating the various steps of process, and craving decree. *Observed*, that the proper practice was to lodge a short written note for the President of the Division, reserving explanations to be made at the bar. *Ballinten* v. *Connon & Co.*, 1853, 15 D. 707; 25 J. 427; 2 Stuart 418.

1207. Mandatary — Failure to Sist — Decree in Terms of Jury's Verdict.—In an action for the price of potatoes at a contract price of £5, 5s. per ton, a verdict was returned finding for the defender on an issue whether the potatoes had been sold and delivered to the defender at the alleged contract price; but further, finding that the potatoes had been sold and delivered at the contract price of £4, 5s. per ton, which price had been stated in the pursuer's letter of offer by mistake for £5, 5s. Thereafter the defender, being a foreigner, failed to sist a mandatary. The court, on the motion of the pursuer, and no appearance being made for the defender, "in respect of the defender's failure to sist a mandatary," *decerned* against him for the price of the potatoes at £4, 5s. per ton. *Trodden* v. *Sweetman*, 1862, 24 D. 1360; 34 J. 656.

1208. Mandatary — Soldier. — A soldier, having his domicile in Scotland, but without a fixed home, and resident in England, *held* (*per* Lord Barcaple) bound to sist a mandatary. *Bruce* v. *Smith* (O. H.), 1865, 1 S. L. R. 53.

1209. Mandatary — Solvency of. — The mother of both parties in an action having been objected to as mandatary for the pursuer, who was in California, on the ground that she had no funds of her own, the court *repelled* the objection, as she was in the same rank of life as the pursuer. *M'Kinlay* v. *M'Kinlay*, 1849, 11 D. 1022; 21 J. 368.

1210. Mandatary—Mandatary Becoming Insolvent Pendente Processu.—When a judicial mandatary becomes insolvent, although not legally bankrupt, the opposite party is entitled to have a new mandatary sisted in his stead. *Harker* v. *Dickson*, 1856, 18 D. 793.

1211. Mandatary—Solvency of.—In a question as to the sufficiency of the mandatary of a person furth of the kingdom, it is enough if he be solvent, and of the same station with the mandant, and it is not relevant to inquire whether he may be able to pay the expenses of process. *Railton* v. *Matthews*, 1844, 7 D. 105; 17 J. 52.

1212. Mandatary — Sufficiency — Objection.—Circumstances in which objection to the sufficiency of a mandatary *repelled*. *Grant* v. *Macdonald*, 1867, 4 S. L. R. 189.

1213. Mandatary—Time Given for Sisting.—Circumstances in which additional time was allowed for receiving a mandate from a defender who was abroad. *Murray* v. *Murray*, 1845, 7 D. 1000; 17 J. 519.

1214. Mandatary — Trustees — One Abroad.—Motion that one of a quorum of trustees who had left Scotland be ordained to sist a mandatary *refused*. *Rob's Trs.* v. *Hutton*, 1866, 4 M. 546; 38 J. 278.

1215. Mandatary — Withdrawal of — New Mandatary—Caution for Past Expenses.—A pursuer who had raised action along with a mandatary, moved the court to allow him to withdraw the mandatary and sist a new one (to whose solvency no objection was stated), and offered to find caution for the past expenses, stating, as a ground for the motion, that the mandatary was related to both the presidents of the court, before whom the cause might come for jury trial, and they would be disqualified if the mandatary was not withdrawn. The court *declared* the mandatary free of all liability. *Anderson* v. *Bank of Scotland*, 1836, 14 S. 316.

1216. "Marking" — Case Marked to Second Division Heard by First.—A summons which had been marked as a Second Division cause was enrolled in the weekly printed roll as belonging to the First; but no interlocutors were pronounced in it in the First, and it was tried before a jury on circuit as a Second Division cause. An objection by the unsuccessful party, on a motion to apply the verdict, that the procedure in the case was invalidated by its having been enrolled as a First Division cause, *repelled*. *Laws* v. *Renwick*, 1846, 9 D. 237; 19 J. 80.

1217. Marking — Conjunction of Cases Marked to Different Divisions.—A party who had raised a reduction of bills, and marked it as a First Division process, afterwards suspended a charge upon one of the bills, but neglected to mark the Division to which the suspension was to belong. The respondent marked it as belonging to the Second, and reclaimed against an interlocutor passing the note to that Division, who adhered. The actions of reduction and suspension having been afterwards conjoined, the court *declared*

that they belonged to the First Division. *Currie* v. *M'Nair*, 1845, 7 D. 746 ; 17 J. 398.

1218. Marking—Note of Suspension.—Where an action had been enrolled as a First Division cause, and a decree in absence was opened by a note of suspension, marked Second Division, *held* that the proceedings following thereupon were to be considered as still in the First Division. *Greig* v. *Colquhoun*, 1851, 14 D. 111 ; 1 Stuart 75.

1219. Marking—Note of Suspension.—An interlocutor of the Lord Ordinary on the Bills passing a note of suspension, may be reviewed by either Division of the court, notwithstanding the note has been marked as belonging to the other Division—the Division not being fixed until the note is brought into court. *Graham* v. *N. B. Bank*, 1849, 11 D. 1165 ; 21 J. 458.

1220. Marking—No Marking to Division on partibus — Enrolment in First Division—Case thereafter Conjoined with Case Marked to Second Division. — The *partibus* of a summons did not specify the Division of court to which it was to belong, but the action was enrolled in the First Division roll. A second process was thereafter brought relating to the same matters, and also a wakening and transference of the original process, both of which were marked on the *partibus* as Second Division causes, and were proceeded with as such ; and this second action was remitted to and conjoined with the original process. *Held* that the actions belonged to the Second Division. *Boag* v. *Fisher*, 1848, 11 D. 129 ; 21 J. 22.

1221. "Marking"—Note of Suspension and Interdict—Reclaiming in Bill Chamber. — Notwithstanding the marking on a note of suspension and interdict, it is competent to the party aggrieved to resort by reclaiming note to either Division. *Gow* v. *Bell*, 1862, 1 M. 25 ; 35 J. 10.

1222. Marking—Partibus.—The *partibus*, and not the entry in the rolls, determines the Division of the court to which a case belongs ; and where a case was marked on the *partibus* "First Division," but was enrolled and afterwards treated as a Second Division case, a reclaiming note was found to belong to the First Division. *Brown* v. *Mason*, 1856, 19 D. 52 ; 29 J. 18.

1223. Marking—Suspension—Reclaiming Note as to Passing Note Marked to One Division — Competency of thereafter Marking Suspension to the Other Division. —*Gemmel* v. *Riddell*, 1847, 19 J. 295.

1224. Marriage—Competency of Proving Incidentally — Action by a Creditor of Woman against a Man as her Husband.—*Held* competent, in an action by creditors of a woman against a man as her husband, to prove the marriage, although there was a declarator by her against him depending before the commissaries. *Stevenson* v. *Ochiltree*, 1813, Hume 263.

1225. Marriage — Declarator of — Necessity for Incompetency of Proving Disputed Marriage Incidentally. — *Held* that in an action of assythment by persons claiming to be the widow and children of a deceased, when the defenders did not admit the marriage, it is incompetent to put in issue and prove before a jury marriage and legitimacy. *Lenaghan & Others* v. *Monkland Iron & Steel Co.*, 1857, 19 D. 975 ; 29 J. 467.

1226. Minor—Curator ad litem.—A party who had attained puberty while a process at the instance of his tutors was pending, sisted, and a curator *ad litem* appointed. *Mackenzie* v. *Mackenzie's Tutors*, 1846, 8 D. 964.

1227. Minor—Pupil—Curator ad litem. —A petition, in name of a minor and an infant, to have a curator *ad litem* appointed, in an action about to be raised, *refused*, in respect of there being no action actually in dependence. *Young*, 1828, 7 S. 220 ; 4 Fac. 262.

1228. Minor pubes—Curator ad litem.—A petition by a minor *pubes* for a curator *ad litem*, to enable him to complete a particular transaction, *refused*. *MacArthur*, 1854, 17 D. 61 ; 20 J. 499.

1229. Minor—Curator ad litem—Powers of Curator.—The law agent and curator *ad litem* of two minors, pursuers of an action of count and reckoning, entered into a transaction by which he agreed that they should discharge the action on payment of a sum, and the Lord Ordinary assoilzied the defenders, although the minors made appearance by counsel to repudiate it ; but the court, holding the curator *ad litem* had no power to discharge the action, altered and remitted to proceed with the cause. *Stephenson* v. *Lorimer*, 1844, 6 D. 377.

1230. Minor — Custody. — In a petition for the custody of a minor by a party alleging an appointment by the Court of Chancery, *held* unnecessary to appoint a tutor *ad litem*, the minor's tutor-at-law having made appearance. *Stuart* v. *Moore*, 1860, 23 D. 51.

1231. Minor — Pupil without Tutors — Tutor ad litem.—Where a pupil has no tutors, it is necessary that a tutor *ad litem* should be appointed, in order to render a decree against him effectual, and edictal citation of tutors and curators is not sufficient ; and therefore a decree in absence against a pupil of declarator of tinsel of his feu *reduced*, where there were no tutors, and no tutor *ad litem* appointed. *Bannatyne*, 14 Dec. 1814, F. C.

1232. Minute—Minute by Pursuer Consenting to Absolvitor on Certain Conditions — Decree in Terms of Minute — Recall thereof in Respect Defender had never Assented to Terms of Minute.—Where the pursuers of an action had given in a minute consenting to absolvitor with expenses, on the footing that the expenses should be imputed in extinction of certain liquid claims which they

held against the defender, and the Lord Ordinary had assoilzied in terms of the minute, the court recalled the interlocutor, in respect the minute had not been agreed to by the defender. *Anderson & Co.* v. *Taylor*, 1845, 7 D. 913; 17 J. 474.

1233. Multiplepoinding—Arrestment.—A process of multiplepoinding raised by an arrestee does not prescribe by the lapse of the period sufficient to prescribe the arrestment. *Boyes' Trs.* v. *Hamilton*, 1829, 7 S. 459; 4 Fac. 607.

1234. Multiplepoinding — Claim — Abandonment of.—In a multiplepoinding, where the question was, whether the fund belonged to a company or to the bankrupt estate of one of the partners, one set of company creditors lodged a claim, but took no further step, while another proceeded with the case, and having before a jury trial asked the first set if they would join in the trial, which they refused, and got a verdict finding that the fund was company property. The former body of creditors having thereafter claimed to be ranked upon a balance, the court, holding that they had abandoned their claim, preferred the trustee to the balance. *Gallie* v. *Wyllie*, 1845, 7 D. 301; 17 J. 154.

1235. Multiplepoinding — Claims — Amending—Amendment at Suggestion of Court—Remit from Inner House to Lord Ordinary. — In a multiplepoinding brought for exoneration of trustees, claimants acquiesced in an interlocutor pronounced by the Lord Ordinary, but the trustees reclaimed. *Held* that it was competent for the Inner House, being of opinion that the claims had not been so stated as to enable them to put the proper construction on the trust deed, to remit the case to the Lord Ordinary, with power to open up the record and allow the claims to be amended, in accordance with the views indicated by the court. *Ferguson's Trs.* v. *Hamilton, etc.*, 1862, 24 D. (H. L.) 8; 34 J. 659; 4 Macq. 397.

1236. Multiplepoinding—Claim—Amendment after Final Judgment. — The court having decided that one of the claimants in a multiplepoinding was not entitled to participate in the fund *in medio*, another party who had claimed upon the footing that the unsuccessful competitor was entitled to a share, craved to have the record opened up, so as to enable him to extend his claim. Motion *refused*. *Graham's Tr.* v. *Grahams*, 1868, 6 M. 820; 40 J. 452.

1237. Multiplepoinding—Claim—General Objection to all Claims.—A party proposed to sist himself as a contradictor to all the claimants in a multiplepoinding. *Held* that while it was competent, if he could instruct any claim, to appear as a claimant, the proposed compearance was anomalous and incompetent. *Crawfurd* v. *Crawfurd's Crs.*, 1845, 17 J. 172.

1238. Multiplepoinding — Claim — Order for—Objections to the Fund in medio.—It is competent in a multiplepoinding to order claims to be lodged before disposing of objections to the fund *in medio*. *Lord Strathallan* v. *M'Gregor*, 1847, 19 J. 690.

1239. Multiplepoinding — Claims—Order for—Form of.—In a multiplepoinding no parties are bound or entitled to appear as competing without an order for claims. Where a condescendence does not contain a claim, the party cannot be preferred to the fund *in medio*. Where judgment had been pronounced in a sheriff court, there having been no interlocutor sustaining the multiplepoinding, or finding the raisers liable in once and single payment, or allowing claims, the court *ordered* a new record. *Connell* v. *Ferguson*, 1861, 23 D. 683; 33 J. 332.

1240. Multiplepoinding — Claimant — Pendente lite nihil innovandum.—The rule *pendente lite nihil innovandum* means that after litigiosity one creditor cannot make his opponent's position worse than at the commencement, but that he is entitled to better his own situation as much as he can. Accordingly a claimant in a multiplepoinding who was (after it was raised) confirmed executor-creditor preferred to another creditor who had obtained decree in his favour. *D. of Atholl* v. *Anderson*, 1831, 10 S. 49; 7 Fac. 42.

1241. Multiplepoinding — Claim — Renewal.—A claim in a multiplepoinding may be renewed under a change of circumstances, although an interlocutor repelling it has become final. *Cameron* v. *Young, etc.*, 1873, 45 J. 272.

1242. Multiplepoinding—Riding Claim—Unconstituted Debt.—It is not competent for the alleged creditor in an unconstituted debt to lodge a claim in a multiplepoinding as a rider on a claim by his alleged debtor. *Royal Bank* v. *Stevenson*, 1849, 12 D. 250; 22 J. 51.

1243. Multiplepoinding — Claim — Whether a Riding Claim.—The fund *in medio* in a multiplepoinding consisted of the price of goods sold abroad by H and consigned by him in bank. The fund was claimed by C, H's correspondent in this country, who averred that the goods were his property and had been sold by H upon his account. The fund was also claimed by M, who had supplied the goods, as he averred, to C as agent for H. H made no claim in the multiplepoinding, and C objected to M's claim on the ground that it was merely a riding interest upon a possible claim by H. *Held* that M's claim was relevant. *City of Glasgow Bank* v. *Dall*, 1869, 6 S. L. R. 470.

1244. Multiplepoinding—Claims — Time of Lodging—Lodging after Decree of Preference—Expenses.—In a multiplepoinding in regard to a succession, which had gone on for five years, and in which a decree of preference had been pronounced, but no warrant for payment granted, certain parties who had not been called, and who averred that they had only recently heard of the succession,

craved to be allowed to lodge a claim as next-of-kin. They were allowed to do so, but only upon condition of repaying to the parties who had obtained a decree of preference, half the expenses incurred by them in resisting the claims of parties alleging propinquity to the deceased nearer than that alleged by the new claimants. *Morgan* v. *Morris*, 1856, 18 D. 797; 28 J. 263. 1858, 20 D. (H. L.) 12; 3 Macq. 347; 30 J. 528.

1245. Multiplepoinding—Closed Record.—A closed record in a multiplepoinding carries with it all the finality and effects of a closed record in an ordinary action. *Stevenson's Trs.* v. *Dumbreck*, 1861, 23 D. (H. L.) 1; 4 Macq. 86; 33 J. 269.

1246. Multiplepoinding—Competency.—A son and heir was confirmed executor-dative *qua* next-of-kin of his father. The estates of the son were afterwards sequestrated, and the creditors of the father raised a multiplepoinding in name of the son, for the distribution of so much of the executry as remained extant and distinguishable. *Held*, in a question with the trustee under the sequestration of the son's estate, that the multiplepoinding was competent, reserving all other questions. *Christie* v. *Allan's Creditors*, 1835, 13 S. 998; 10 Fac. 773.

1247. Multiplepoinding—Competency.—Where trustees were holders of a mixed fund, on which several claimants were competing, an objection by the trustees to the competency of a multiplepoinding in their name, *repelled*. *Dixon* v. *Dixon*, 1833, 11 S. 517.

1248. Multiplepoinding—Competency—Accounting.—It is not competent by a multiplepoinding to call a trustee to account for funds unrecovered, and which are not *in medio*. *Cameron's Trs.* v. *Anderson*, 1844, 17 J. 42.

1249. Multiplepoinding—Competency—Attempt to Invest the Possession of an Entailed Estate.—A trust deed provided that the trustees should pay an annuity to an heir of entail, and they did so for some years. A party who claimed to be the true heir then raised a multiplepoinding in name of the trustees to have the right to the annuity determined. *Held* that the multiplepoinding was incompetent as being truly an attempt to invest the possession of the entailed estate while the titles of the possessor were not reduced. *Paterson* v. *Paterson*, 1854, 17 D. 117; 27 J. 32.

1250. Multiplepoinding—Competency—Curator bonis.—A multiplepoinding raised in name of the *curator bonis* on a trust estate, *sustained*; and the nominal pursuer found liable only in once and single payment as holder of the fund *in medio*, reserving his right to claim on the fund as *quasi* trustee for an absent party whose right was founded on the trust deed, which it was the duty of the curator to defend. *Deuchar* v. *Mackenzie*, 1830, 8 S. 523.

1251. Multiplepoinding—Competency—Competition of Poindings—Debtor not Notour Bankrupt.—A multiplepoinding *held* incompetent, in respect that there was no fund *in medio*. A party poinded goods; another party poinding within sixty days raised a multiplepoinding as to these goods, alleging that the debtor was notour bankrupt and therefore that the first poinder was bound to communicate the benefit of his process. *Held* that as the debtor was not notour bankrupt there was no fund *in medio*, and the action *dismissed*. *Bald* v. *Gibb & Bruce*, 1859, 21 D. 473; 31 J. 257.

1252. Multiplepoinding—Competency—Dispute as to a Bill.—Circumstances in which objection to a multiplepoinding, on the grounds (1) that it put in the mouths of the nominal raisers statements which they denied, and were disputing in another relative process, and (2) that there was no double distress, were *repelled*. *Ranken* v. *Kirkwood*, 1845, 17 J. 292.

1253. Multiplepoinding—Competency—Double Distress.—One of two executors suing a party who had intromitted with the estate, for payment of his own share of the estate, was met by the plea of no title to sue. He thereupon raised a multiplepoinding in name of the defender in the other action, and called himself and the other executor as defenders. *Held* that the multiplepoinding was competent and a plea of no double distress *repelled*. *M'Target* v. *Monteith*, 1829, 7 S. 591.

1254. Multiplepoinding—Competency—Double Distress.—*Held* that a multiplepoinding raised by a debtor to the estate of a party deceased, for the purpose of determining the respective rights of his heir and executor to the debt, was not competently brought, in respect that there was no double distress; it not being alleged that any demand had been made for payment except by the executor. *Great North of Scotland Rly. Co.* v. *Gauld*, 1863, 1 M. 1053; 35 J. 603.

1255. Multiplepoinding—Competency—Double Distress.—A party suspended a charge given him by his sisters on a bond; and, on the letters being found orderly proceeded, paid the money to their agent, but immediately thereafter arrested the same in his hands on the dependence of a reduction and declarator against his sisters, and raised a summons of multiplepoinding in the name of the agent. The multiplepoinding *dismissed* as incompetent. *Stewart* v. *Stewart*, 1828, 7 S. 145.

1256. Multiplepoinding—Competency—Double Distress—Single Arrestment of Sum Due under Decree.—An action of multiplepoinding in which the fund *in medio* was a sum due by the raiser under decree *dismissed* as incompetent, there having, when the action was raised, been only one arrestment used against the fund. *Mitchell* v. *Strachan*, 1869, 8 M. 154; 42 J. 67.

1257. Multiplepoinding—Competency—Double Distress.—A having purchased certain articles of furniture for £156, for which he granted a promissory-note payable one month after date, his mother a few days afterwards

sold them to an auctioneer for £50. After delivery and before payment the auctioneer discovered the previous transaction, and received notice from the creditor in the promissory-note, which was dishonoured, that he must not pay over the £50. Arrestment was also used in his hands of any sum due by him to A; and instead of paying he raised an action of multiplepoinding. Action *dismissed*, on the ground that there was no double distress. *Dalgleish & Forrest* v. *Miller*, 1870, 8 S. L. R. 166.

1258. Multiplepoinding—Competency—Double Distress.—A, one of the partners in a bankrupt firm, handed over to B a sum of money for the purpose of buying off certain creditors who opposed an offered composition. This sum was in the first instance accepted by these creditors, but afterwards returned to B. A third party, C, claimed the money on the allegation that it had been handed by him to A, who was associated with him in business, for other purposes. C accordingly raised an action of multiplepoinding in the name of B, and called the trustee upon the estate of the bankrupt as defender. *Held* that the action was competent, and objection that there was no double distress *repelled*. *Smith* v. *Pendreigh*, 1872, 9 S. L. R. 476.

1259. Multiplepoinding—Competency—Double Distress.—Circumstances in which a process of multiplepoinding was dismissed, on the ground of there being no double distress. *Macintosh & Others*, 1844, 16 J. 297.

1260. Multiplepoinding—Competency—Double Distress.—*Held* that where there is no double distress, a multiplepoinding is an incompetent process to try whether the claimants of a sum of money are *in titulo* to grant a valid discharge. *Moncrieff* v. *Bethune*, 1844, 6 D. 1100; 16 J. 479.

1261. Multiplepoinding—Competency—Double Distress.—Circumstances importing double distress, so as to warrant an action of multiplepoinding. *White* v. *Spottiswoode*, 1846, 8 D. 952; 18 J. 479.

1262. Multiplepoinding—Competency—Double Distress.—A truster directed his trustees to pay to his widow a certain sum to be by her divided among her relations "as she shall think fit." She received the money and deposited it in her own name in bank. Her brothers and sisters raised actions against her, seeking to compel her to divide the fund, and then arrested upon the dependence of these actions in the hands of the bank, and raised a multiplepoinding. *Held* that there was no double distress, and that the action was incompetent. *Bank of Scotland* v. *Comrie*, 1871, 8 S. L. R. 419.

1263. Multiplepoinding—Competency—Double Distress—Church Funds—Split in Congregation.—A sum subscribed to build a chapel was deposited in bank in name of the pastor, and two laymen as trustees. The congregation split into two parties, each claiming the fund. A multiplepoinding *held* competent, the competing claims amounting in law to double distress. *Connell* v. *Ferguson*, 1857, 19 D. 482; 29 J. 228.

1264. Multiplepoinding—Competency—Double Distress—Claim by Trustee against Trust-Estate—Right of Resigned Trustee to Judicial Exoneration.—A trustee intimated to his co-trustees a personal claim against the trust-estate. The beneficiaries intimated to the trustees that they did not recognise the claim, and called upon the trustees to raise a multiplepoinding. The trustees were three in number. One of them resigned before the multiplepoinding was raised. After the summons was signeted, and before it was called, he withdrew his resignation. The summons was in the name of all three trustees as pursuers and real raisers. The trustee who had intimated the personal claim objected to the competency of the multiplepoinding, in respect (1) that there was no real raiser, the resigning trustee not being entitled to appear as real raiser, and there thus not being a majority of trustees insisting in the action; and (2) that there was no double distress. Objections *repelled*. *Blair's Trs.* v. *Blair, etc.*, 1863, 2 M. 284; 36 J. 139.

1265. Multiplepoinding — Competency—Double Distress — Competition between Heirs of Entail.—The court having refused a petition by one of two claimants for an entailed estate for sequestration of the rents pending the competition, the petitioner raised a multiplepoinding in name of one of the tenants. *Held* that the other competitor being, in virtue of the former decision, entitled to the privileges of an heir-apparent, the raiser of the multiplepoinding was not in a position to distress the tenant: therefore multiplepoinding *dismissed*, on the ground that there was no double distress. *E. of Wemyss* v. *Campbell*, 1864, 2 M. 461; 36 J. 220.

1266. Multiplepoinding — Competency—Double Distress—Dispute as to Freight.—The owners of a vessel freighted the ship by a charter-party, which stipulated that freight should be paid by a third party, on production by the owners of the vessel of a certificate of the quantity shipped per bills of lading. The freighters also put money into the third party's hands to meet the claim for freight. On production of the certificate, the freighters directed the third party not to make payment, on account of counter claims against the shipowners. *Held* that there was not such double distress as entitled this third party to insist in an action of multiplepoinding. *Dennistoun* v. *Stewart & Co.*, 1853, 16 D. 155; 26 J. 72.

1267. Multiplepoinding — Competency—Double Distress — Judicial Factor. — A multiplepoinding at the instance of a judicial factor to obtain exoneration, there being no averment of double distress, is incompetent. *Campbell* v. *Campbell*, 1870, 8 M. 988; 42 J. 615.

1268. Multiplepoinding — Competency—Double Distress — Rent—Consignation.—

Pending a reduction by a landlord of a mineral lease, the tenant consigned in bank certain sums as rent due under the lease, which sums were placed to his credit by the bank. Against the landlord the tenant had obtained decree for certain expenses, which, if deducted from the consigned money, left a balance still due the landlord. Of that balance the landlord granted an assignation. *Held* that a multiplepoinding at the instance of the assignee was incompetent, there being no double distress in the proper sense of the term, and that the landlord's right to exact the rents pending the reduction was a question proper to be tried by a direct action. *Russel* v. *Johnston*, 1859, 21 D. 886; 31 J. 490.

1269. Multiplepoinding — Competency— Double Distress—Rent Due by Tenant—Claim for Landlord's Assessments. — A tenant being due a certain sum to his landlord, was sued by the landlord for payment, and also by a collector of assessment for assessment due by the landlord. The tenant raised an action of multiplepoinding, but the summons did not allege that the landlord disputed his own liability for the assessment, or offered any opposition to the tenant deducting it from his rent. *Held* that there was no double distress. *Logan* v. *Wilkie*, 1855, 17 D. 485; 27 J. 203.

1270. Multiplepoinding — Competency— Double Distress—Trust-Estate—Legitim Claim.—A testator by his will disposed of his whole movable estate, appointed an executor, and bequeathed various legacies. After his death a son claimed *legitim*, and brought an action of multiplepoinding in the name of the executor. *Held* that there was not in the circumstances any competition to warrant the action. *Crokat* v. *Lord Panmure*, 1853, 15 D. 737; 25 J. 443; 2 Stuart 448.

1271. Multiplepoinding — Double Distress — Only one Arrestment.—Although there be only one arrestment, yet, if there be competing interests for a debt, a multiplepoinding is competent. *Scott* v. *Drysdale*, 1287, 5 S. 689.

1272. Multiplepoinding — Competency— Exoneration — Trustee — Extrajudicial Discharge.—A trust not having been wound up for more than sixteen years after the truster's death, one of the two trustees raised a multiplepoinding and exoneration in name of himself and his co-trustee. *Held*, with reference to objections by the co-trustee, that as the active management had all along been in his hands, as such a length of time had elapsed without steps being taken to wind up the trust, and as no extrajudicial discharge had been tendered to the raiser, the latter was entitled to insist in the process, notwithstanding that there were no claims made against the estate, and that the process had been disclaimed by the residuary legatees. *Dunbar* v. *Sinclair*, 1850, 13 D. 54; 23 J. 6.

1273. Multiplepoinding — Competency— Fund in medio Paid Away. — *Question*, whether a multiplepoinding be competent after the holder of the fund has extrajudicially paid it to one of the parties interested in it. *Allardice* v. *Lautour*, 1845, 7 D. 362; 17 J. 175.

1274. Multiplepoinding — Competency— Heritable Bond.—In a question between an executor and heir as to the right to an heritable bond, a multiplepoinding is competent. *M'Intyre's Trs.* v. *Belch*, 1829, 7 S. 636; 4 Fac. 896.

1275. Multiplepoinding — Competency— Holders of the Fund—Trustees not Duly Assumed but Acting as Trustees. — *Held* that certain persons suing as the acting trustees under a testamentary trust deed and deeds of assumption, but who were found not to have been competently or effectually assumed as trustees, had, as holders of the estate, a title to sue a multiplepoinding. *Kelland, etc.* v. *Douglas, etc.*, 1863, 2 M. 150; 36 J. 58.

1276. Multiplepoinding — Competency— Judicial Factor Raising Multiplepoinding Instead of Petitioning for Discharge.—A judicial factor, instead of presenting a petition for exoneration and discharge in the usual form, brought an action of multiplepoinding and exoneration. *Question* raised as to the competency of the action. *Campbell* v. *Grant, etc.*, 1869, 8 M. 227; 42 J. 100.

1277. Multiplepoinding—Competency— Judicial Factor—Averments Made in the Summons by Real Raiser against Nominal Raiser.—A beneficiary under a trust deed raised a multiplepoinding in name of a judicial factor appointed to manage the estate on the failure of the trustees, concluding for decree in ordinary form, but setting forth various acts of malversation on the part of the trustees, and misconduct on the part of the factor. The court *dismissed* the action as irregular and incompetent. *Question* as to the competency of a multiplepoinding, where the real raiser makes, in the name of the nominal raiser, statements which the latter has a material interest in denying. *Wren* v. *Todd*, 1853, 15 D. 473; 25 J. 282; 2 Stuart 283.

1278. Multiplepoinding—Competency— No Divisible Fund.—A truster directed his trustees, *inter alia*, to pay his widow the whole free proceeds of the trust estate, and, after her death, to pay the capital to "my own nearest heirs and successors." A multiplepoinding raised during the life of the widow, by a party claiming as in right of the nearest heir and sole next-of-kin, was objected to by the trustees as incompetent, there being at the time no divisible fund. Objection *sustained*. *Nimmo* v. *Murray, etc.*, 1863, 1 M. 791; 35 J. 476.

1279. Multiplepoinding—Competency— Subsistence of a Sequestration.—The subsistence of a sequestration does not render incompetent a multiplepoinding to determine whether individual creditors arresting, or the trustee, in virtue of a supplementary sequestration, be preferable on a new acquisition

of the bankrupt. *Davidson* v. *Kerr*, 1832, 11 S. 6.

1280. Multiplepoinding—Competency—Trust Funds in the Hands of Agent for Trustees—Agent himself a Trustee.—The agent of a trust raised a multiplepoinding for the purpose of distributing the balance of the trust funds in his hands at the close of his agency. He himself was one of the trustees and he brought the action in his character of trustee and not of agent. *Held* that the action was incompetent, as the money was in his hands as agent, not as trustee, and he was as such simply a debtor to the trust-estate, and would be exonerated by a discharge from the trustees. *Ferrier* v. *Campbell*, 1870, 8 S. L. R. 43.

1281. Multiplepoinding — Consignation.—A landlord uplifted rents arrested by a creditor, and a furthcoming was raised by the creditor and a multiplepoinding by the tenants: the landlord lodged defences in the furthcoming and a claim in the multiplepoinding, and the processes were conjoined. *Held* that he was bound to consign the uplifted rents in the multiplepoinding, payable to the party who should be preferred in that process. *Colville* v. *E. of Fife*, 1830, 8 S. 1012.

1282. Multiplepoinding—Decree of Preference—Effect as Regards Third Parties.—A decree of preference in a multiplepoinding is final as between appearing claimants; but even payment under such a decree will not protect the creditor who receives it from the demand of any other creditor, not a party to the process, who can instruct a better right and insists on repetition. *Anderson* v. *Stewart*, 1831, 10 S. 49; 7 Fac. 42.

1283. Multiplepoinding—Effect of—Diligence against Fund in medio.—The raising of a multiplepoinding for distribution of the residue of a trust-estate among the creditors of the beneficiary, who was dead, *held* not to prevent a claimant proceeding with diligence to attach the fund by confirmation as executor-creditor. *Smith's Trs.* v. *Grant & Others*, 1862, 24 D. 1142; 34 J. 571.

1284. Multiplepoinding — Executry Estate—Multiplepoinding Raised by Executor—Funds in Hands of Agent—Sist of Agent—Consignation—Reservation of Lien.—Where an action of multiplepoinding of executry funds was raised in name of the executrix as holder, while the funds were actually in the hands of her agent, who had undertaken a certain obligation to the cautioner of the executrix and also to parties having a claim against the funds, the actual holder having been sisted as a party to the action, *held* that it was competent to ordain him to make consignation in the hands of the clerk of court, reserving to him all claims of lien. *Lang* v. *Downie*, 1872, 9 S. L. R. 308.

1285. Multiplepoinding — Exoneration of Trustee.—If the beneficiaries under a trust settlement refuse to exoner a trustee extra-judicially, he is entitled to bring a process of multiplepoinding for his exoneration, though he has not been exposed to double distress. *Comb's Trs.* v. *Noble*, 1836, 14 S. 817; 11 Fac. 691.

1286. Multiplepoinding—Fund in medio—Consignation—Trust Funds—Annuities.—The surviving trustee under a trust-settlement raised a multiplepoinding and exoneration, under which the Lord Ordinary found a certain claimant entitled to the whole fund *in medio*, but that it was the duty of the trustee, before paying over the fund, to provide for certain liferent annuities. The claimant, on the ground that he was entitled at once to payment of the whole fund, under burden of the annuities, reclaimed; and moved for consignation of a large portion of the fund. *Held* that the claimant was not entitled to get consignation. *Kerr* v. *James*, 1857, 19 D. 750; 29 J. 349.

1287. Multiplepoinding—Fund in medio — Consignation. — Circumstances in which the nominal raisers of a multiplepoinding were ordered to consign the alleged fund *in medio*, although they denied that they held any such fund. *Clow* v. *King*, 1850, 13 D. 132; 23 J. 32.

1288. Multiplepoinding—Fund in medio—Consignation.—An executor is bound, in a multiplepoinding, to consign the fund *in medio*, and produce the vouchers, although decree discharging be not then granted. *Farquharson* v. *King*, 1823, 2 S. 230.

1289. Multiplepoinding—Foreign Assets Received by Bond of Indemnity to Foreign Court—Responsibility of Preferred Parties therefor.—A mercantile firm in Bombay were instructed to take out letters of administration to the funds of a person who had died there; but instead of doing so, they obtained payment by granting a bond of indemnity to the registrar of the court, who had taken possession of them, and they remitted them to this country. In a multiplepoinding raised for the distribution of them, the Bombay firm insisted that the parties preferred should give them security against liability under the bond, but this the court *refused*. *Forbes & Co.* v. *Campbell & Co.*, 1845, 7 D. 1068; 17 J. 552.

1290. Multiplepoinding—Fund in medio—Funds Unrecovered.—*Opinion* that it is incompetent in a multiplepoinding to call a trustee to account for funds which are unrecovered and which are not *in medio*. *Anderson* v. *Cameron's Trs.*, 1844, 17 J. 42.

1291. Multiplepoinding—Fund in medio—Future Rents.—*Observed* that it is incompetent to raise a multiplepoinding as to rents to become due. *Pentland* v. *R. Exchange Assurance Co.*, 1830, 9 S. 164.

1292. Multiplepoinding—Fund in medio—General Estate of a Testator—Reduction of Settlement quoad Heritage—Removal thereof from Condescendence of Fund in medio.—The trustees of a deceased proprietor brought an action of multiplepoinding for the

distribution of his estate. During the dependence of the action the trust deed was reduced at the instance of the truster's heir-at-law *ex capite lecti* as to part of the heritage. In a separate record subsequently closed as to the fund *in medio*, the heir-at-law pleaded that the heritage to which the reduction applied should not have been included in the condescendence. *Held* that the trustees had no title to the heritage in question, and that it ought to be omitted from the condescendence. *Dunn's Trs.* v. *Barstow, etc.*, 1870, 9 M. 281; 43 J. 149.

1293. Multiplepoinding—Fund in medio—Title of Claimant Preferred secundo loco to Insist on Certain Deduction being made on the Fund in medio.—The raiser of a multiplepoinding as to a fund in his hand having claimed no deduction for property tax, and decree of preference *primo loco* being pronounced in favour of a claimant for certain annuities, who drew the same without deduction on the annuities, *held* that another claimant, who was preferred to the balance, had neither title nor interest to reduce the decree of preference, to the effect of having the amount which the raiser might have deducted and retained as property tax repeated and restored to the fund *in medio*. *Pedie* v. *Moir's Trs.*, 1834, 12 S. 617.

1294. Multiplepoinding—Prescription.—A process of multiplepoinding raised by an arrestee does not prescribe by the lapse of the period sufficient to prescribe the arrestment. *Boyes' Trs.* v. *Hamilton*, 1829, 7 S. 459; 4 Fac. 607.

1295. Multiplepoinding — Trustees — Competency. — Trustees under a settlement being directed to pay off debts, and invest the residue of moveable funds in land within two years of the testator's decease, *held* entitled to bring a multiplepoinding *quoad* the moveable estate, though not actually subject to double distress, and though a reduction as to heritage conveyed had been brought by the heir-at-law. *M'Dougal's Trs.* v. *M'Dougal*, 1830, 8 S. 1036.

1296. Multiplepoinding—Trustees.—*Held* that the dependence of a multiplepoinding, limited to a specific purpose, did not create litigiosity so as to bar the trustees from dealing with the trust estate without the authority of the court. *Miller's Trs* v. *Miller*, 1848, 10 D. 765; 20 J. 268.

1297. Non-Entry—Declarator of—Incompetency of Using this Action to Determine Dispute as to Superiority.—A party claiming the superiority of lands brought a reduction-improbation with declarator of non-entry against another party also claiming the superiority, but neither stated the titles under which he claimed the superiority, nor called for reduction of any titles of the defender, nor set forth any specific reasons of reduction. *Held* that the summons was truly a declarator of non-entry, and incompetent for trying the question of right to the superiority. *E. of Fife's Trs.* v. *Sir G. Sinclair*, 1844, 6 D. 1194; 16 J. 517.

1298. Partibus—Division.—A summons was marked as a Second Division cause in the *partibus*. The clerk in the Outer House put upon it and the whole subsequent steps of process the mark of a clerk in the First Division, with whom a reclaiming note was lodged. On the reclaiming note appearing in the roll of single bills in the Second Division, it was objected that it had not been properly lodged. Objection *repelled*. *Ledingham* v. *Elphinstone*, 1859, 21 D. 844; 31 J. 468.

1299. Partibus—Failure to State the Character in which Defender Sued—Extract.—The pursuers of a declaratory adjudication obtained decree. The extract adopted the words of the *partibus* and roll, which bore to be "against John Ker, residing," etc., but omitted to state the character in which he was called, viz. as "eldest son and heir of the deceased John Ker," etc. Authority *granted* to the extractor to insert in the extract the words omitted in the *partibus* and roll. *M'Kellar*, 1856, 19 D. 34.

1300. Partibus—Necessity of Stating all Parties.—An action was raised, concluding against a pupil as representing his father, and against his father's trustees *nominatim* (who had by the father been appointed tutors, and had accepted). It was, in terms of warrant in the will, executed against the pupil, and his tutors and curators, if he any had; but in the *partibus* there was no mention of tutors and curators. A joint defence was given in in name of the pupil and of the trustees *eo nomine*. *Held* that the pupil was not made a party to the action, and the interlocutors pronounced in it *quoad* him reduced. *E. of Craven* v. *Lord Elibank's Trs.*, 1854, 16 D. 811; 26 J. 403.

1301. Petition — Competency — Arrestments—Recall of—20 and 21 Vict. c. 56, s. 4.—The provision of 20 and 21 Vict. c. 56, s. 4, that all summary petitions, etc., "shall be brought before the junior Lord Ordinary," and in particular all petitions falling under certain specified descriptions, *held* not to apply to a petition of recall of arrestments and discharge of inhibitions. *Matthew* v. *Patullo*, 1858, 21 D. 18; 31 J. 1.

1302. Petition—Competency—Contract — Completion of — Application for Authority to Complete Work which a Contractor had Intimated he would not Perform. — A sub-contractor on a railway in the course of formation having refused to proceed to finish his part of the line, *held* incompetent to apply to the Court of Session by summary petition for authority to complete the work. *Sykes* v. *Nicol*, 1848, 10 D. 1499; 20 J. 567.

1303. Petition—Competency—Judicial Factor—Order as to Distribution of the Estate.—A person seeking to have the income of an estate, which has been placed under a judicial factor, applied in a particular way, ought, before asking the intervention of the court, to bring the matter under the consideration of the judicial factor; and it is

incompetent in such a case to petition the court to ordain the factor to apply the income in the way desired, without having first asked his judgment in the matter. *Mackay* v. *Ewing*, 1867, 5 M. 1004; 39 J. 565.

1304. Petition—Competency—Warrant to Judicial Factor to Pay over Portions of Estate.—A judicial factor was appointed on the failure of trustees, "for the interim management and preservation of the estate of the deceased A. B., with the usual powers." Certain of the heirs and next-of-kin of the deceased obtained decree of reduction of the trust deed, and declaring the whole estate to belong to them and other two individuals (one insane and the other absent) as the heirs and next-of-kin. They then presented a petition, stating that they had agreed to a scheme of division which would give a larger sum to the lunatic and the absentee than they would lawfully be entitled to, and praying for warrant on the factor to pay over their portions of the estate, leaving in his hands the shares of the lunatic and the absentee. *Held* that the petition was competent, and edictal service on absentee, and service on the judicial factor and *curator bonis* of the lunatic, ordered. *Couper*, 1863, 1 M. 286; 35 J. 193.

1305. Petition—Competency—Application by Factor loco tutoris to Expede Service in Favour of the Pupil—Pupils Protection Act, 1849.—*Held* that it is competent to apply by petition for special powers to a factor *loco tutoris* to expede service in favour of the pupil; and that the form of application by note, with an opinion from the accountant of court, introduced by the Pupils Protection Act, is not imperatively prescribed by the statute in regard to those matters in which special powers were, according to existing practice, in use to be granted by the court. *Mackenzie*, 1862, 24 D. 844; 34 J. 422.

1306. Petition—Competency—Petition by an Interim Factor for an Order on a Postmaster to Detain all Letters from a Bankrupt.—A bankrupt under sequestration having refused to authorise his creditors to take up his letters at the post office, and then left the country, ordering the postmaster to send his letters after him, and some letters being speedily expected to arrive from abroad covering remittances, a petition to the Court of Session by the interim factor for an order against the postmaster to detain all letters from the bankrupt, and deliver them to the petitioner, or at least such foreign letters as appeared to cover remittances, *held* incompetent. *Ure*, 1829, 8 S. 63; 5 Fac. 72.

1307. Petition—Competency—Application for Liberation on the Ground of Ill-Health—Necessity for a Suspension and Liberation.—Where a party had been imprisoned upon failure to implement an interim decree of the court ordering him to find caution, the court *refused* to entertain a petition praying for his liberation (on the ground of bad health), observing that he must bring a suspension and liberation. *Sinclair's Exrs.* v. *Sinclair*, 1846, 8 D. 963; 18 J. 491.

1308. Petition—Competency—Preservation of Subjects in Dispute—Declarator as to Obligations of Parties Sisted Pending a Reduction of a Decree-Arbitral.—Actions of declarator by a landlord against his tenants in mines, to determine their obligations in regard to the maintenance of certain levels, were sisted during the dependence of a reduction of decrees-arbitral. The landlord had also presented a petition to the sheriff to be allowed to put the levels in order at the sight of the court, but in this process nothing had been done for several years. *Held* that a summary petition to the Court of Session, praying the court to have the levels inspected and put in order at the landlord's expense, reserving the question of ultimate liability, was competent, on a minute being lodged abandoning the sheriff court process. *E. of Hopetoun* v. *Scots Mining Co.*, 1859, 21 D. 218; 31 J. 120.

1309. Petition—Competency—Railway—Railway Clauses Consolidation Act, 1845, s. 83—Railway and Canal Traffic, 1854, ss. 2 and 3.—*Held* that a petition presented against a railway company and founding upon the provisions of both these statutes and praying the court to find that the preference complained of "was a contravention of the statutes and in particular of the Railway and Canal Traffic Act, and to interdict the railway company from continuing such contravention of the said Act," was competent. *Hosie* v. *Edinburgh & Glasgow Rly. Co.*, 1856, 19 D. 65; 29 J. 22.

1310. Petition—Competency—Petition to Define Right of Way.—Competency of petition to define right of way after verdict applied and decree of declarator extracted. *Home Drummond, etc.*, 1868, 6 M. 896; 40 J. 503.

1311. Petition—Competency—Summary Petition.—A summary petition to an inferior court, for warrant to compel a party to deliver money to another, entrusted to him for that purpose, *held* competent. *Knox & Sons* v. *Dunn*, 1823, 2 S. 124.

1312. Petition—Competency—Construction of a Trust Deed—Power to Borrow.—*Question*, whether a summary petition is the proper mode of raising the question, whether a trust deed by construction or implication contains power to borrow money on the security of the trust-estate. *Kinloch*, 1859, 22 D. 174; 32 J. 73.

1313. Petition—Competency—Authority Craved to Cite Witnesses Resident in England before Arbiter.—A petition praying the court to grant warrant to cite a person residing in England to give evidence before an arbiter in Edinburgh, *dismissed* as incompetent. *Highland Rly. Co.* (Petitioners), 1868, 6 M. 896; 40 J. 499.

1314. Petition—Curator bonis—Special Powers—Reference to Original Petition.—

In an application by a *curator bonis* for special powers, the name and date of the original petition ought to be stated. *Scott*, 1856, 18 D. 323.

1315. Petition—Custody of Child—Steps of Procedure.—Procedure in petition for removal of child from the custody of its mother when petition presented on last day of session—Remit to sheriff to inquire, with power to report *ad interim* to Lord Ordinary on the Bills in vacation, to whom power was given to pronounce any interim order that might be necessary — Contempt of court — Refusal to obtemper order and give information necessary for the ends of justice. *Muir* v. *Milligan*, 1868, 6 M. 1125; 40 J. 631.

1316. Petition — Dependence—Transient Provision—Distribution of Business Act, 1857.—A petition for the appointment of a judicial factor intimated before the passing of 20 and 21 Vict. c. 51, is a depending cause in the sense of that statute, and must be presented to the Inner House. A petition for special powers by a judicial factor appointed before the Act, is not incident to a depending cause in the sense of the statute, and must be presented to the Lord Ordinary. *Taylor's Trs.*, 1857, 20 D. 52; 30 J. 27.

1317. Petition — Falling Asleep — Distribution of Business Act, 1857, s. 4.—Cases arising out of applications to the court on petitions brought under 20 and 21 Vict. c. 56, before the junior Lord Ordinary, or in time of vacation before the Lord Ordinary on the Bills, do not fall asleep. *Wemyss*, 1860, 22 D. 556; 32 J. 196.

1318. Petition—"Presented"—When is a Petition Presented—16 Geo. II. c. 11.—16 Geo. II. c. 11 provides that petitions against a burgh election "must be presented to the court" within two months of the election. *Held* that the petition must be presented to and moved in court within this time. *Henderson* v. *Lang*, 3 July 1821, F. C.; 1 S. 99.

1319. Petition—Petition for Protection by Wife under the Conjugal Rights Amendment Act, 1861 — Citation of Husband — Intimation.—On a petition by a wife for protection of her property under the Conjugal Rights Act, 16 and 17 Vict. c. 20, intimation on the walls and minute-book is ordered. When the husband is abroad, edictal citation proceeds on *inducice* of twenty-one days. When he is resident in Scotland, fourteen days' warning is required. *Walker*, 1862, 24 D. 300; 34 J. 714.

1320. Petition—Junior Lord Ordinary—Remit.—A petition by a factor *loco tutoris* and judicial factor for discharge was, in 1850, remitted to Lord Anderson, when junior Lord Ordinary, by name; and on his ceasing to be junior Lord Ordinary, it was on his report remitted to Lord Curriehill, as junior, in the same way. On his ceasing to be junior Lord Ordinary, a remit was made *nomine officii* to Lord Deas as junior Lord Ordinary, and on his report to Lord Benholme as junior Lord Ordinary; and on his ceasing to be junior Lord Ordinary, the case went before Lord Neaves as junior, who appointed parties to be heard; and when the debate was partly heard, he likewise ceased to be junior Lord Ordinary. *Held* that the case must go to his successor in the office of junior Lord Ordinary. *Kirkwood*, 1855, 17 D. 416.

1321. Petition—Service—Prayer for.—The prayers of petitions ought not to crave the court to order intimation "to be made to such parties and in such manner as your Lordships shall think fit," but should set forth the parties to whom, and the manner in which, intimation was to be made. *D. of Northumberland*, 1854, 16 D. 803.

1322. Petition—Petition by Trustees for Authority to Sell Bank Stock—Incompetency of Deciding Incidental Questions.—A trustee having been ordained to consign a sum of money to meet a particular debt declared to be due by the trust-estate, presented a petition for warrant to sell bank stock belonging to the estate, on the ground that there were no other trust funds in his hands out of which he could implement the order for consignation. The petition was opposed by a party who claimed right to the bank stock, in a multiplepoinding raised by the trustee, and in a declarator. *Held* that the petition was an incompetent form for trying the question, whether the bank stock could be applied in the manner prayed for—that it could not be dealt with as incidental to the multiplepoinding; and opinion, that the proper form was a suspension of the decree for consignation. *Ogilvy* v. *Cuming*, 1848, 21 J. 88.

1323. Petition and Complaint—Breach of Arrestment—Contempt of Court.—It is incompetent to include in the prayer of a petition and complaint for breach of arrestment, as for a contempt of court, a prayer for payment to the arrester of expenses caused to him through the act complained of. *Inglis & Bow* v. *Smith & Aikman*, 1867, 5 M. 320; 39 J. 139.

1324. Petition and Complaint — Bankruptcy — Mal-Administration of Trustee and Commissioners.—A petition and complaint against the trustee and commissioners on a sequestrated estate, founded on alleged disqualification and acts of mal-administration, laid on the 71st section of the former Bankrupt Act, and praying for their removal, and the election of a new trustee and commissioners, *held* not to be competent, that section not being kept in force by the 1st section of the 2 and 3 Vict. c. 41. *Baillie* v. *Anderson*, 1844, 6 D. 1376; 16 J. 560.

1325. Petition and Complaint—Board of Supervision—Parochial Board—Dispute as of Appointment of Inspector of the Poor.—*Held* competent for the Board of Supervision to bring the proceedings of a parochial board under the review of the court by summary petition and complaint. *Board of Supervision of the Poor* v. *Parochial Board of Glasgow*, 1850, 12 D. 627; 22 J. 228.

1326. Petition and Complaint—Breach of Interdict—Concurrence of Lord Advocate.—A petition for breach of interdict with penal conclusions is incompetent without the concurrence of the Lord Advocate. *D. of Northumberland* v. *Harris*, 1832, 10 S. 366; 7 Fac. 275.

1327. Petition and Complaint—Chancery—Competency.—A petition and complaint is an incompetent mode of procedure against a private party alleged to have taken irregular steps to obtain an extract given out of Chancery, as of a retour therein existing and recorded, he not having yet made use of it by claiming to be enrolled in a Court of Freeholders. *Campbell* v. *Murray*, 1829, 7 S. 890; 4 Fac. 1201.

1328. Petition and Complaint—Competency of Pecuniary Conclusion.—A petition and complaint, concluding simply for payment of a sum of money (fees of counsel alleged to be illegally withheld), without any conclusion for censure of the conduct of the respondent, *dismissed* as incompetent. *Bell* v. *Jameson*, 1848, 10 D. 1413; 20 J. 514. Cf. *Keay* v. *A. B.*, 1837, 9 J. 353; 15 S. 748.

1329. Petition and Complaint—Necessity for the Concurrence of the Lord Advocate.—*Observed*, that a petition and complaint cannot at common law proceed without the concurrence of the Lord Advocate. *Bell* v. *Gow*, 1862, 1 M. 84; 35 J. 73.

1330. Petition—Petition and Complaint—Alleged Misconduct of Town-Clerk—Concourse of Lord Advocate.—A petition and complaint against a town-clerk for violating the A. S. 6 Mar. 1783, which bore to be with concourse of Her Majesty's Advocate, *held* incompetent, such concourse not having been obtained. *Mackenzie* v. *Thomson*, 1843, 5 D. 771.

1331. Petition and Complaint—Removal of Tutor-at-Law.—In a petition and complaint for the removal of a tutor-at-law, as suspect, for alleged malversations in office, *observed*, that in cases of extreme urgency the court might interpose on a summary petition; but as this case did not require such dispatch, the court *ordered* an ordinary action to be repeated, and in the meantime sisted the complaint. *Butchart* v. *Butchart*, 1851, 13 D. 1258; 23 J. 595.

1332. Petition and Complaint—Sheriff—Procurators—Dispute as to Nomination of Poor's Agent—Stat. 1424, c. 24—A. S. 11 July 1837, s. 134.—The procurators before a sheriff court appointed as agent for the poor one of their number who resided twenty miles from the seat of court, and without the county; and the sheriff disapproving of the nomination, called upon them to make a new appointment, which they refused to do. *Held* that it was competent for the sheriff to bring the question before the court by a petition and complaint against the procurators. *Colquhoun* v. *Paterson*, 1850, 12 D. 851; 22 J. 370.

1333. Pleading—Alternative—Two Actions Based on Inconsistent Grounds Conjoined—Alternative Issues.—The owner of cargo sued A, the owner of a ship, for the loss of the cargo, alleging that A had undertaken to deliver it. In his answers, A averred that the ship at the time in question was hired to B, and the pursuer raised a supplementary summons against B, alleging that he had undertaken to deliver the cargo. The actions were conjoined. An issue was allowed against A raising the question whether he had undertaken to deliver the goods; and a similar issue was allowed against B, although the defender objected that the pursuer's actions were inconsistent. *London & Caledonian Marine Insurance Co.* v. *London & Edinburgh Shipping Co., etc.*, 1867, 5 M. 982; 39 J. 540.

1334. Pleading—Action of Damages for Wrongous Apprehension—Privilege—Necessity of Pleading on Record.—In an action of damages for wrongous apprehension, *held* that at the trial the defender was not entitled to raise a plea of privilege on grounds not stated on record. *Smith* v. *Green*, 1854, 16 D. 429; 26 J. 202.

1335. Pleading—Action of Damages for Fraud against Husband and Wife—Alternative Statements.—A husband and wife, with joint consent, sold certain bank shares belonging to the wife, to whom the price was paid. The bank shortly afterwards stopped payment. The purchaser brought a reduction of the sale, on the allegation that, at its date, the defenders, "or at least" the husband, who was a director of the bank, and employed a broker to sell the said shares for himself and his said wife, or one or other of them, knew that the shares were worthless, and that they, "or at least" the husband, fraudulently took advantage of the pursuer's "ignorance, which was known to them, or at least to the" husband, and they fraudulently concealed from him the insolvent state of the bank in effecting the sale. *Held* that the action was not relevant against the wife. *Question*, whether it was so against the husband. *Finnie* v. *Logie, etc.*, 1859, 21 D. 825; 31 J. 473.

1336. Pleading—Excise Offence—Statement of Statute Contravened.—*Held* that, in an information before a justice of peace court for an excise offence, it is not necessary to specify the statute alleged to be contravened. *Morgan* v. *Cooper*, 1861, 24 D. 57; 34 J. 34.

1337. Pleading—"Denied in so far as Inconsistent, etc."—What is the effect of closing a record under a denial by the pursuer of the statements of the defender, in so far as inconsistent with those in the summons? *Campbell* v. *Campbell*, 1863, 1 M. 217; 35 J. 163. *Andersons* v. *Low*, 1863, 2 M. 100; 36 J. 45.

1338. Pleading—Action against Directors for Issuing False Reports—Quotation of Reports.—In an action of damages against bank directors for (*inter alia*) issuing false reports to the shareholders, *held*, in point of pleading, that it was right to narrate merely the substance of the reports complained of, without quoting them *verbatim*. *Tulloch* v.

Davidson, 1860, 22 D. (H. L.) 7; 3 Macq. 783; 32 J. 363.

1339. Pleading—Divorce — Specification of Acts of Adultery.—An averment that the defender in an action of divorce had committed adultery with the co-defender "in hotels and public-houses in Glasgow, the particular places being to the pursuer unknown," *held* too wide to be remitted to probation. *Walker* v. *Walker*, 1869, 41 J. 502.

1340. Pleading—Incorporating in Condescendence by Reference.—It is irregular to refer to a pamphlet in a condescendence, and hold it as insert. *Connel* v. *Ferguson*, 1861, 23 D. 683; 33 J. 332.

1341. Pleading—Infringement of Patent—Objection of Discrepancy between the Title and the Specification—No Notice of Objection on Record.—In an action by a patentee for infringement of his patent, *held* that the defender could not competently raise at the trial an objection of discrepancy between the title and the specification, of which objection no notice had been given on record, and therefore that the objection could not be competently stated as a ground for entering up the verdict for the defenders. *Kerr* v. *Clark & Co.*, 1868, 7 M. 51; 41 J. 34.

1342. Pleading—Statement of New Plea—Advocation.—In an advocation, a plea stated at the bar for the first time, and raised neither in the inferior court nor in a note of additional pleas in law lodged in the Court of Session, *held* to be excluded. *Ralston, Goodwin, & Co.* v. *M'Lean*, 1857, 19 D. 878; 29 J. 455.

1343. Pleading—Pleas in Law.—*Observed*, that the statement of mere general pleas is not sufficient compliance with the provisions of the statute requiring parties to append a note of pleas in law to a condescendence. *Young & Co.* v. *Graham*, 1860, 23 D. 36; 33 J. 17.

1344. Pleading — Preliminary Plea — No Process.—The plea of "no process" is a preliminary plea and can only be discussed *in initio litis*, the enactments of the Judicature Act, 1825, s. 5, and relative Act of Sederunt, 1828, as to the discussion of dilatory defences, not being repealed by the Court of Session Act, 1868. *Cowie* v. *Airdrie Mineral Oil Co.*, 1869, 7 S. L. R. 131.

1345. Pleading—Reduction of Sentence of Deposition against Schoolmaster — Specification of Irregularities in Procedure—General Averments.—A summons of reduction of a sentence of deposition pronounced against a schoolmaster, after setting forth specifically several irregularities in the procedure of the presbytery, contained a general averment that the "whole procedure of the presbytery from first to last was illegal and irregular." *Held* that the pursuer was entitled, under this general averment, to found upon the objection that the sentence of the presbytery contained no statement of the charges against him, although that objection was not one of those specifically set forth. *Sutherland* v. *Presbytery of Dornoch*, 1850, 13 D. 190; 23 J. 67.

1346. Pleading — Reference to a Document for its Terms—Admission of its Existence. — In an action the defenders averred that they had a certain warrant. The pursuer answered, "Reference is made to the alleged warrant for its terms." *Opinions*, that this was not an admission of the existence of the warrant alleged. *Pringle* v. *Bremner & Stirling*, 1867, 5 M. (H. L.) 55; 39 J. 414.

1347. Pleading—Relevancy—Action by Bank against Director for Fraudulent Intromission.—A summons by a bank, setting forth a detail of facts, imputing to the defender, one of the directors, illegal and fraudulent intromission with the funds, and exercise of the credit of the bank, by his influence as a director, *held* relevant; but the defender allowed to appeal. *North of Scotland Bank* v. *Thomson*, 1852, 1 Stuart 904.

1348. Pleading—Relevancy—Conspiracy.—Allegations which *held* not to amount to a relevant averment of conspiracy. *Mackay* v. *Chalmers*, 1859, 21 D. 443; 31 J. 243.

1349. Pleading — Relevancy — Disconformity between Summons and Document Founded on.—A summons concluded for loss and damage, arising out of refusal to take delivery of 200 shares, "purchased by parole agreement, of which a note was made at the time." The note was in these terms: "I agree to take 1000 shares of the N. B. A. Company at 50s. per share, or any proportion of the above-quantity." Objection to relevancy, that the conclusions of the summons were disconform to the document founded on, *repelled*. *Wilson* v. *Walker*, 1856, 18 D. 673; 28 J. 291.

1350. Pleading—Relevancy—Documents Produced but not Referred to on Record—*Observed* (1) that in judging of relevancy, documents produced cannot be looked at, unless by reference or otherwise they are by the pursuer made part of the record; (2) that calls for production of documents should not appear in a closed record. *Gordon* v. *Davidson, etc.*, 1864, 2 M. 758; 36 J. 376.

1351. Pleading—Relevancy—Action for Penalties under a Railway Statute.—A summons concluding for penalties under a railway statute, and alternatively for damages, having been dismissed as regards the penalties, was insisted in under the alternative conclusion, to recover special damage under the Railway Clauses Act, which was not libelled on. *Held* that the summons was defective in specification of facts on which the claim was grounded, and action *dismissed*. *Carruthers* v. *Caledonian Rly. Co.*, 1854, 16 D. 425; 26 J. 202.

1352. Pleading — Relevancy — Quantum meruit—Summons.—An action concluding for a specific sum as payment for trouble or outlay, in order to be competent, must give room for inquiry *quantum meruit*. Terms of summons which held to preclude such inquiry,

and action in consequence dismissed. *De Bernardy* v. *Dennistoun*, 1858, 20 D. 423; 30 J. 225.

1353. Pleading—Relevancy—Action for Rent.—A summons for rent *held* irrelevant, in respect it did not set forth the pursuer's title to sue, nor in what character the rent was due by the defender. *Hutchison* v. *Ferrier*, 1846, 8 D. 1228; 18 J. 587.

1354. Pleading—Relevancy—Vagueness.—Averments which *held* irrelevant, as not distinguishing between a joint right of property and a joint right of use. *Young* v. *Tennant & Co.*, 1860, 22 D. 1415; 32 J. 705.

1355. Pleading — Removing — Libelling Acts of Parliament and Acts of Sederunt.—In an action of removing, it is not necessary to libel specially on the Act of Parliament; and although the Act of Sederunt be libelled on, the provisions of s. 29 of 16 and 17 Vict. c. 80 are not excluded. *Granger* v. *Geils*, 1857, 19 D. 1010; 29 J. 479.

1356. Pleading—Action for Repayment of Money Paid to the Defender on the Faith of Contract — Finding by Court that the Contract was Null—Incompetency of Pursuer Claiming Repayment on the Ground of there being no Contract.—A party libelled a summons on the ground of a contract having been entered into between him and the defender; that on the faith of it he paid money to the defender, but that the latter refused to implement; and therefore concluded for repetition of the money. It having been found that the contract was null by statute, *held* that he could not thereafter plead that he was entitled to repetition on the ground of there being no contract at all. *Barr* v. *Bruce*, 1846, 9 D. 222; 19 J. 73.

1357. Pleading — Specification — Averment that Contract Entered into "in England."—A defender denied the existence of a contract, and the pursuer averred on the record that it was entered into "in England." *Held* by the Lord Ordinary that this was not sufficiently specific, and that an issue for a jury trial could not be granted. *Jackson* v. *E. of Cassilis*, 1833, 11 S. 908.

1358. Pleading — Specification — Action of Damages for Inducing Workman to Leave Employment and Reveal Trade Secrets.—In an action of damages by a leather japanner against another for seducing a workman from his employment, and bribing or inducing the workman to reveal secrets connected with his employer's trade, the pursuer must specify the nature of the secrets in question. *Rutherford* v. *Boak*, 1835, 14 S. 732; 11 Fac. App. 32.

1359. Pleading—Specification—Fault.—A pursuer of an action of damages for injury to the person was ordered to lodge a minute, stating "precisely and specifically" what was "averred as to the cause of the accident, and the fault imputable to the defender." On considering the minute, the court added it to the record and *found* the summons relevant, but *refused* to award to the defender the expenses of the discussion and of the minute. *Donald* v. *Brand*, 1862, 24 D. 295; 34 J. 135.

1360. Pleading—Whether Summons and Condescendence may be Read together in Dealing with Question of Relevancy.—A party sued for damages on account of a written slander, the terms of which were quoted in the summons, which bore that the letter was written and delivered, but in the condescendence it was only stated that the letter was written, but not that it was delivered or dispatched. *Held* that these statements were relevant to entitle the pursuer to an issue. *M'Coll* v. *Gibson*, 1868, 5 S. L. R. 267.

1361. Pleading—Summons—Revised Condescendence — Inconsistency in. — A summons for recovery of the contents of a bill set forth that it had been indorsed to the pursuers by the defender. In the condescendence it stated that the bill was indorsed to a bank by the defender and thereafter retired by the pursuers. The action was *dismissed* as irrelevant. *Ewing's Trs.* v. *Farquharson*, 1829, 7 S. 464; 4 Fac. 600.

1362. Pleading—Summons—Condescendence—Inconsistence.—A pursuer libelled on a bill as "drawn by him," but admitted on record that the drawer's name was not written by him, and stated that it was filled up by the writer of the bill at the time of writing it, and was so filled up when delivered to the pursuer by the acceptor—action *dismissed*. *Muir* v. *Braidwood*, 1831, 10 S. 83; 7 Fac. 68.

1363. Pleading — Libelling Statutes — Temporary Statute Continued by a Subsequent Statute.—Where a temporary statute is continued by a subsequent statute passed before the temporary period of endurance has expired, *held* that a summons which libelled the first statute alone was well laid; and that the summons might be competently amended to the effect of inserting a reference to the continuing statute. *Rankine* v. *Brown*, 1858, 20 D. 672; 30 J. 342.

1364. Pleading — Statute — Libelling. — It is not necessary to libel a public general statute. *Glasgow, Airdrie, & Monkland Rly. Co.* v. *Tennent*, 1848, 11 D. 212; 21 J. 50.

1365. Pleading—Vagueness.—A claim of right to "the free use" of a muir, as in times past, is too vague a claim to be the subject of action. *Henderson* v. *E. of Minto*, 1860, 22 D. 1126; 32 J. 519.

1366. Pleading—Vicennial Prescription—Competency of Pleading after Proof.—In an action for payment of a sum of money, founded on three documents alleged to be holograph, a proof *prout de jure* was allowed as to the authenticity of the documents. The proof was taken and reported. *Held* that the vicennial prescription of holograph documents, which limits the proof to oath of party, could not thereafter be pleaded. *Wyse* v. *Wyse*, 1847,

9 D. 1405 ; 19 J. 626. Cf. *M'Donald* v. *Burden*, 1829, 7 S. 306.

1367. Pleading — Written Agreement Libelled—Admission that no such Agreement Existed — Dismissal of Action. — A summons which libelled on a written agreement for three years, but which it was admitted did not exist, *dismissed*. *Home* v. *Cossar*, 1847, 19 J. 656.

1368. Præmaturity — Dismissal. — A summons for payment of a sum of money *dismissed*, in respect it was raised six months before the money fell due; and an offer refused to restrict the conclusions to the effect that payment should only be exigible at the end of the six months, and that extract should be superseded till that time. *Dundee Marine Insurance Co.* v. *Brown*, 1847, 9 D. 637 ; 19 J. 273.

1369. Preliminary Pleas. — *Question*, whether it is competent to reserve a plea of no jurisdiction to be discussed with the merits of an action. *Muir* v. *Collett*, 1862, 24 D. 1119 ; 34 J. 558.

1370. Preliminary Pleas — Disposal of, before Record Closed.—*Held* that preliminary defences affecting the competency of the action ought to be disposed of before the record is closed. *Renton* v. *Goldie*, 1864, 3 M. 76 ; 37 J. 39.

1371. Preliminary Plea—Waiver.—In a petition by a railway company for warrant to sell goods in payment of tolls, the sheriff, under reservation of all pleas and of consent, granted the warrant, and, in the same interlocutor, ordered a condescendence and defences. One of the pleas was that the petition was incompetent. *Held* that this plea was waived when parties consented to the warrant of sale. *N. B. Rly. Co.* v. *Carter*, 1870, 8 M. 998 ; 42 J. 411.

1372. Printing—Advocation Reported to Inner House on Respondent's Motion—Failure of Respondent to Print—Right of Respondent to Proceed at Expense of Advocator.—On the motion of the respondent in an advocation, the Lord Ordinary reported the cause, and ordered the record, etc., to be printed. The respondent became bankrupt before obtempering the order to print. *Question*, whether the advocator was entitled to print at the respondent's expense. *Miller* v. *Logan*, 1858, 20 D. 522 ; 30 J. 271. Cf. *Gibb* v. *Guild*, 1867, 5 M. 1142 ; 39 J. 629.

1373. Printing—Advocation—Failure of Advocator to Obtemper Order as to Printing—Duty of Respondent to Print.—Where an advocator fails to obtemper an interlocutor of the Lord Ordinary, appointing him to print and box the record to the court, the proper course for the respondent, in order to have the case proceeded with, is to print and box the Lord Ordinary's interlocutor with the note of advocation ; and on the case appearing in the single bills, the court will send the case to the roll. In the event of no appearance for the advocator when the case is called, the advocation will then be dismissed. The court will not dismiss the advocation without the respondent printing and boxing the Lord Ordinary's interlocutor and note of advocation, nor until the case appears in the roll. *Dow* v. *Jamieson*, 1867, 5 M. 1001 ; 39 J. 553.

1374. Printing — Appeal — Reasonable Excuse for Failure to Print — A. S. 10 March 1870, s. 3. — *Held* that it was a reasonable excuse on the part of an appellant for failing to print and box an appeal within fourteen days, that he lived in Uist, and that his agent lived in Skye, and that communication between them was difficult. *Macquian* v. *Macdonald*, 1871, 9 M. 743 ; 43 J. 409.

1375. Printing—Cessio.—Defenders in a *cessio held* bound to print their own proof, and the pursuer's deposition, but not his proof. *Grassick* v. *Ruxton*, 1860, 22 D. 646 ; 32 J. 246.

1376. Printing—Petition for Citation of Next-of-Kin — Choosing of Curators. — A petition for dispensation of citation of next-of-kin must be printed. *Duthie*, 1854, 17 D. 143.

1377. Printing—Date of Lodging Papers.—The dates of lodging papers and pleadings in process ought to be printed. *Mackenzie* v. *Boutelleau*, 1855, 17 D. 943 ; 27 J. 481.

1378. Printing—Several Defenders—Distribution of Expense among.—Each of seven defenders *found* liable in one-eighth of the cost incurred by the pursuer in printing the record. *Wilson* v. *Douglas & Others*, 1860, 32 J. 362.

1379. Printing — Documents — Correspondence as to an Extrajudicial Settlement.—Where a correspondence and other papers which had passed between the agents in a cause, in reference to an extrajudicial settlement not carried into effect, had been printed as an appendix, the court *ordered* them to be withdrawn. *Williamson* v. *Taylor*, 1845, 7 D. 842 ; 17 J. 438.

1380. Printing — Documents — Correspondence—Pursuer's Comments.—The pursuer having, in printing a correspondence which formed part of the proof in the case, inserted in the letters remarks and comments of his own, the court *ordered* a reprint of the whole to be made. *Lockyer* v. *Sinclair*, 1845, 8 D. 1 ; 18 J. 1.

1381. Printing—Proposed Counter Issue for Defender Reported to Inner House—Duty of Pursuer or Defender to Print.—An issue for a pursuer having been adjusted before the Lord Ordinary in common form, but parties differing as to a counter issue proposed by the defenders, the Lord Ordinary reported the case to the Inner House, and appointed the record and issues to be printed and boxed. *Held* that the defenders could not be compelled to print and box the record and issues ; and *observed*, that the pursuer had the means of forcing on the case, by himself printing and boxing the record and issues. *Hoyle* v. *Devon Iron Co.*, 1857, 20 D. 70.

1382. Printing—Proof—Order on Order to Pay Half Cost.—Circumstances in which an order granted against defenders for half the cost of printing a proof taken before a Lord Ordinary under the Evidence Act, 1866. *Hendry* v. *Grant & Jamieson*, 1867, 6 M. 178; 40 J. 102.

1383. Printing — Reclaiming Note — Record.—A reclaiming note in a conjoined process of reduction and suspension of an inferior court decree, *held* competent, although the inferior court record was not appended. *Logan* v. *Kermode & Co.*, 1850, 12 D. 925; 22 J. 408.

1384. Printing — Reclaiming Note — Record.—A reclaiming note against an interlocutor, circumducing the term for reporting a proof, *held* competent, although boxed without printed copies of the record. *M'Connochie* v. *Binnie*, 1848, 11 D. 89; 21 J. 12.

1385. Printing — Reclaiming Note — Record.—A reclaiming note in a multiplepoinding had not the whole record as closed by the Lord Ordinary appended. An objection being stated to the competency, the reclaimers averred (and it was not denied) that the claim and pleas which had been omitted had no bearing upon the point brought before the court by the reclaiming note. Objection *repelled*. *Scottish Missionary Society* v. *Bell & Others*, 1856, 19 D. 30; 29 J. 22.

1386. Printing — Reclaiming Note — Record—Appendix to.—A reclaiming note *held* competent, although an appendix of documents to the record, but which were not referred to by the Lord Ordinary in his interlocutor, was not printed. *Wilson* v. *Macara*, 1847, 9 D. 903; 19 J. 395.

1387. Printing — Reclaiming Note — Record—Cases.—A reclaiming note boxed, without having the cases appended to it, *held* incompetent, although the objection was not stated till it came on for judgment in the ordinary roll. *Moffat* v. *Drummond & Co.*, 1849, 11 D. 1200; 21 J. 475.

1388. Printing — Reclaiming Note — Record—Cases Ordered by Lord Ordinary.—Circumstances in which the court received a reclaiming note, although the cases were appended to only the five copies boxed for the judges of the Division to which it was presented. *Barclay*, 1848, 11 D. 67; 21 J. 8.

1389. Printing — Reclaiming Note — Record—Record Boxed within Two Years — Failure to Refer thereto — Judicature Act, s. 18—A. S. 11 July 1828, s. 77.—*Held* that where a record has been boxed with a previous reclaiming note, the omission to refer to that note or record (as enjoined by the Acts of Sederunt) does not render a second note boxed without the record incompetent. *Maxtone* v. *Muir*, 1848, 10 D. 1040; 20 J. 384. *Thomson* v. *Forbes*, 1847, 9 D. 1061; 19 J. 457. *Fraser* v. *Lovat*, 1858, 26 D. 1185; 30 J. 708. *M'Queen* v. *M'Lean*, 1866, 4 M. 464; 38 J. 210.

1390. Printing — Reclaiming Note — Record—Passages Scored out.—An objection to the competency of a reclaiming note, that the printed copies of the summons appended to it contained passages which had been scored out, *repelled*. *Hamilton* v. *Morison*, 1847, 10 D. 165; 20 J. 48.

1391. Printing — Reclaiming Note — Record—Pleas in Law.—A reclaiming note by defenders against a judgment proceeding on a record closed on summons and defences, with pleas in law for the pursuer, having been presented, without having the pleas in law appended thereto, *held* incompetent. *Carter* v. *Johnston*, 1847, 9 D. 598.

1392. Printing — Reclaiming Note — Record — Supplementary Summons not before Lord Ordinary.—The pursuer of a reduction having boxed with a reclaiming note a supplementary summons which had not been before the Lord Ordinary, the court *ordered* it to be withdrawn. *Shedden* v. *Patrick*, 1849, 11 D. 1057; 21 J. 503.

1393. Printing.—A petition to dispense with calling the next-of-kin furth of Scotland, in an action for making up tutorial inventories, must be printed. *Spottiswode*, 1833, 5 J. 426.

1394. Printing — Reclaiming Note — Divorce—Summons.—A reclaiming note in an action of divorce in which a record had been made up by revisal *refused* as incompetent, in respect the summons was not appended. *Miller* v. *Simpson*, 1863, 2 M. 225; 36 J. 115.

1395. Printing — Reclaiming Note — Documents Referred to by Lord Ordinary.—A reclaimer is bound, along with his reclaiming note, to print all documents referred to by the Lord Ordinary. *Birnie* v. *Sibbald*, 1855, 18 D. 33; 28 J. 4.

1396. Printing — Reclaiming Note — Minute Closing Record.—A record having been closed by a joint minute on summons and defences, "the pursuer denying the statements in the defences, in so far as inconsistent with the summons," *held*, with reference to an objection to the competency of a reclaiming note, that the minute was not a part of the record which was required to be printed and boxed with the note. *Cullen* v. *Morrison*, 1850, 12 D. 465; 22 J. 134.

1397. Printing — Reclaiming Note — Revised Condescendence and Answers — Summons and Defences.—A reclaiming note *refused* as incompetent where the revised condescendence and answers were appended, and not the summons and defences. *Brown* v. *Moodie*, 1845, 17 J. 568.

1398. Printing—Reclaiming Note—Revised Condescendence.—Objection to the competency of a reclaiming note, that the condescendence appended to the summons was not printed, but only the revised condescendence, *repelled*. *Forrest* v. *Campbell*, 1853, 15 D. 379; 2 Stuart 213.

1399. Printing — Reclaiming Note — Summons—Opponent's Copies.—*Held* that the omission to print the summons in the appendix to the copies of a reclaiming note delivered to the respondent's agent is not fatal to the competency of a reclaiming note. *Mags. of Hamilton* v. *Hart's Trs.*, 1853, 15 D. 670 ; 25 J. 406 ; 2 Stuart 395.

1400. Printing — Reclaiming Note — Suspension—Omission to Print Answers—A. S. 11 July 1828, s. 75.—A reclaiming note in a suspension, to which a copy of the answers to the suspension was not appended, *refused* as incompetent, in respect that it failed to comply with the provisions of the A. S. 11 July 1828, s. 75. *Brown* v. *Johnstone*, 1866, 2 S. L. R. 3.

1401. Procurator-Fiscal—Action against—Notice of Action — Game (Scotland) Act, 1832, s. 17. — An action of damages against a procurator-fiscal having been raised without giving him notice a month before its commencement, in terms of 1 and 2 Will. IV. c. 68, s. 17, *held* that it was incompetent. *Russell* v. *Lang*, 1845, 7 D. 919 ; 17 J. 476.

1402. Production of Documents—Documents Lodged in Process Required in a Relative Action—Clerk of Process Prohibited from Delivering.—The court, on the petition of the Officers of State, prohibited the clerk to a process in which final judgment had been pronounced, from delivering up productions made therein by a private party, which were called for to be improved as forged in a relative action of reduction-improbation, or were required as evidence in that action. *Officers of State* v. *E. of Stirling*, 1833, 11 S. 625.

1403. Productions — Papers Produced under Warrant of Court of Session—Inventory.—It was directed by the presiding judge at a trial, that when keepers of records, or clerks of inferior courts, produce papers under authority of a warrant of the Court of Session, they should produce these papers with a relative signed inventory, so as to avoid the expense of adducing them as witnesses to the fact that the papers were so produced by them. *Morris* v. *Brymer*, 1854, 16 D. 869 ; 26 J. 417.

1404. Productions — Productions after Record Closed—Documents in Possession of Party Producing them—Judicature Act, s. 3—A. S. 11 July 1828, s. 55.—Production of a letter addressed to the defender in an action, and admittedly all along in the defender's possession, allowed to be made in the course of the defender's proof, it being alleged to be necessary in order to meet a point made for the first time in the course of the pursuer's proof. Interlocutor allowing the letter produced, and a deposition by a witness that it was in her handwriting, "to form part of the defender's proof," "altered to the effect of finding that the letter may be referred to, in the course of the discussion on the merits, so far as it is sufficiently proved, or is otherwise competent evidence." *Irvine* v. *Irvine*, 1857, 19 D. 284 ; 29 J. 139.

1405. Productions — Productions after Record Closed—Res noviter—Judicature Act, s. 3 — A. S. 11 July 1828, s. 55. — A record being closed, the defenders, under a diligence, recovered documents, and produced them, to cut down the title of the pursuer. *Held* that, to meet these, the pursuers were entitled to produce a sasine in their favour all along in their own possession. *N. B. Rly. Co.* v. *Brown, Gordon, & Co.*, 1857, 19 D. 840 ; 29 J. 393.

1406. Productions—Lodging Productions after Record Closed.—Although a suspender, after the record was closed, objected that the charge (being his own acceptance and the diligence thereon) had not been produced, the court *allowed* it to be produced. *Wright* v. *Brown, M'Indoe, & Co.*, 1852, 14 D. 1041 ; 24 J. 637 ; 1 Stuart 1086.

1407. Productions—Lodging Productions Founded on with Summons—Judicature Act, s. 3.—In an action of damages at the instance of the liquidator of a banking company against a former director, for losses alleged to have been caused to the company by the defender's neglect of his duty as a director, the pursuer in his summons alleged that the defender grossly and culpably neglected to examine the books. *Held* that the 3rd section of the Judicature Act, requiring production with the summons or defences, of writings founded on by the parties, so far as in their possession or power, applied to jury causes ; and that the books of the bank, as well as the contract, etc., were "founded on" in the sense of the statute, and ought to have been produced with the summons : therefore a preliminary plea that the pursuer was bound *ante omnia* to produce the books and documents founded on, *sustained*. *Western Bank* v. *Baird*, 1863, 2 M. 127 ; 36 J. 66.

1408. Productions—Lodging Documents after Judgment by Lord Ordinary — Res noviter.—After judgment by the Lord Ordinary, and reclaiming note against it, documents *noviter venientes ad notitiam* allowed to be produced. *Hunter* v. *Mailler*, 1852, 15 D. 88 ; 25 J. 67.

1409. Productions—Lodging Productions in Custody of Party Founding thereon.—A writing in the possession of a party, but which he did not found upon or produce before closing the record in an action in a commissary court, not allowed to be put in as evidence at a late stage of a proof, nor in an advocation of the judgment of the commissary after the record in advocation had been closed. *Anderson* v. *Gill*, 1850, 20 D. (H. L.) 7 ; 3 Macq. 180 ; 30 J. 497.

1410. Productions—Lodging—Letters of Second Diligence.—An action by a joint stock company for payment of money advanced to the defenders to enable them to purchase stock in the company, was defended on the ground of fraud, concealment, and misrepresentation as

to the state of the company's affairs. Issues having been adjusted, the defenders obtained a diligence for the recovery of writs; and having failed in recovering under the diligence certain documents which they said were essential to their defence, and had been traced into the possession of the pursuers, *held* (1) that they were not entitled to an order upon the pursuers to produce; (2) that letters of second diligence were not an appropriate remedy against a haver into whose possession any such documents had been traced, and who could or would give no satisfactory explanation in regard to them; (3) that the defenders were not entitled to absolvitor in respect of the non-production of such writs. *National Exchange Co.* v. *Drew & Dick*, 1858, 20 D. 837; 30 J. 484. Affg. 22 D. (H. L.) 9; 32 J. 482.

1411. Productions—Lodging Productions in Custody of Party Founding thereon—Judicature Act — Act of Sederunt. — In a suspension of a charge on an extract decree at the instance of the Lord Advocate for recovery of a debt due to the Crown, it being alleged by the respondent, and denied on record by the suspender, that the agent acting for the Crown, on whose affidavit of danger the decree had been obtained, was a revenue officer, a proof before answer on that subject was allowed to the respondent. *Held* that documents proving his appointment, within the custody of the agent when the record was closed, were not within the power of the Lord Advocate, in the sense of the Judicature Act and relative Act of Sederunt, and therefore might competently be produced in the course of the proof. *Borthwick* v. *Lord Advocate*, 1861, 24 D. 130; 34 J. 69.

1412. Productions—Lodging Productions in Custody of Party Founding thereon—Judicature Act — Act of Sederunt.—*Held* (1) that the production during the proof, and after the record had been closed, of any documents which had been in the custody or within the power of the party at the time of completing the record, was contrary to the provisions of the Judicature Act and Act of Sederunt, and was inadmissible; (2) that the last-mentioned rule was not applicable to a book which, although it had passed into the hands of a friend of the party calling for its production, was still legally within the power of another party as its proper custodier. *Longworth* v. *Yelverton*, 1862, 24 D. 696; 34 J. 348.

1413. Proof or Jury Trial?—Accounting.—An action of count and reckoning, in which there were questions of fact apart from the accounting to be ascertained, sent to a jury. Form of issue *adjusted*. *Forbes* v. *Campbell*, 1857, 19 D. 1008; 29 J. 443.

1414. Proof or Jury Trial?—Action of Accounting.—In an action of accounting against a company having office-bearers in Scotland, and doing business in Australia, issues were adjusted, and a remit made to the Lord Ordinary to hear parties on the mode of investigation to be adopted in the cause, and to proceed as to his Lordship should seem just. *Held* that, there being no evidence to be taken abroad, the proper course was to proceed by jury trial, the pursuer desiring it, but the defenders, who had little parole evidence to lead, objecting. *Wemyss* v. *Australian Co. of Edinburgh*, 1857, 19 D. 400; 29 J. 186.

1415. Proof or Jury Trial?—Damages for Breach of Contract. — Circumstances in which it was *held* that sufficient cause had been shown why an action of damages for breach of contract should not be sent to a jury. *Jackson* v. *Cowie & Sons*, 1872, 9 S. L. R. 617.

1416. Proof or Jury Trial? — Action against Cautioners for the Faithful Discharge of an Office.—In an action against cautioners for the faithful discharge of an office, concluding for payment of a balance due by the principal, a jury trial and (not a proof) *allowed*. *Mags. of Glasgow* v. *Hopkirk's Trs.*, 1839, 2 D. 61.

1417. Proof or Jury Trial?—Questions of English Law.—*Rutherfurd* v. *Carruthers*, 1838, 1 D. 111.

1418. Proof or Jury Trial?—Enumerated Cause—Action by one Riparian Proprietor to Prevent another from Interfering with the Alveus.—An action by a riparian proprietor to prevent an opposite proprietor from interfering with the channel of a private river by erecting buildings on a portion of the alveus belonging to himself, is an action on account of injury to land, and, where the title is not in question, falls under the class of "actions" appropriated for jury trial by the Judicature Act. *Bicket* v. *Morris*, 1866, 4 M. (H. L.) 44; 38 J. 547; L. R. 1 Sc. Apps. 47.

1419. Proof or Jury Trial?—Enumerated Cause — Suspension and Interdict.—*Held* that a suspension and interdict brought by the magistrates of a burgh to prevent the respondent continuing to build a wall on ground alleged by them to form part of the *solum* of a public road under their charge, which allegation was denied by the respondent, who claimed to have right to the ground, was not an action appropriated to jury trial by s. 28 of 6 Geo. IV. c. 120. *Mags. of Rothesay* v. *M'Kechnie*, 1865, 4 M. 214; 38 J. 114.

1420. Proof—Jury Trial—Issue—Wrongous Possession of Testator's Estate.—Where the issue to try a cause was in these terms—"It being admitted that on 8th July 1816" a party deceased executed a testamentary deed by which she appointed the defender her executor, "and that on the 4th August 1821 she executed a last will and testament by which the pursuer was declared to be her sole executor—whether the defender, knowing or believing the existence of the will and testament last mentioned," wrongfully took or retained possession of the property of the testatrix, or wrongfully excluded the pursuer from the possession of the same. *Held* that it was necessary for the pursuer to prove knowledge or belief, on the part of the defender, of the existence of the will, of the date described in the admission,

and that it was not enough for him to prove that the defender knew the existence of a will of some date or other posterior to that of 8th July 1816. But it was enough if he knew of the will of 4th August 1821, although he did not have knowledge of its date. *Cleland* v. *Weir*, 1847, 6 Bell 70; 19 J. 450. Revg. 9 D. 199; 19 J. 450.

1421. Proof or Jury Trial?—Question as to Value of Farm Stock—Remit to Valuators.—It having been stipulated in a lease "that the stock should be taken off the tenant's hands at such valuation as should be put upon it by mutual referees"; and the stock was given up without a valuation; and an action was several years thereafter brought for the value, —*held* that the landlord was not entitled to a remit to the Jury Court, but that the value must be ascertained by valuators, although it was alleged that this could now be done only by inquiries at others. *Monro* v. *Mackenzie*, 1823, 2 S. 593.

1422. Proof or Jury Trial?—Action of Damages by Tenant against Landlord.—It is not imperative upon the court to remit an action of damages against a landlord, for failure to put buildings in repair, to a jury. *Harrold* v. *Pollexfen*, 1844, 6 D. 1103.

1423. Proof or Jury Trial?—Legitimacy.—In a reduction of a confirmation as executor-dative *qua* nearest of kin to a defunct at the instance of a person alleging himself to be a nephew of the deceased, but whose legitimacy was denied, and who condescended on no celebration of marriage between his parents, but merely on their being, and living together as, man and wife, *held* (1) that the question of legitimacy ought not to be sent to trial by a jury under the issue, whether the pursuer was the only son of the only brother of the defunct, and next-of-kin of the defunct; but (2) that the defender consenting, and the pursuer declining to bring a separate action to establish his legitimacy, a proof before answer upon that point, to be taken by commission, should be allowed. *Swinton* v. *Swinton*, 1862, 24 D. 833; 34 J. 424.

1424. Proof or Jury Trial?—Action by the Liquidators of a Bank against a Director for Loss Occasioned by his Alleged Neglect.—A banking company raised an action against a person who had once been a director of the bank, concluding for payment of the sum of £299,736, 7s. 6d., or of such other sum, more or less, as should be found in the course of the process "to be amount of loss and damage due by the defender to the pursuers as at the date when he ceased to be a director." The pursuers set forth three specific sums alleged by them to have been lost by neglect of duty on the part of the defender and his co-directors, being loss sustained (1) by advances made to customers upon accounts current; (2) by discounts; and (3) by payment of premiums upon policies of insurance on the lives of debtors to the bank. *Held* (1) that the action was in no proper sense an action of damages, and was not one of the "enumerated causes"; (2) that it was expedient, before further answer, that a remit should be made to an accountant to examine the books of the bank, and report. *Western Bank* v. *Baird's Trs.*, 1866, 4 M. 1071; 38 J. 557.

1425. Proof or Jury Trial?—Declarator of Marriage.—Circumstances in which the court *held* it inexpedient, and therefore refused, to remit to a jury to try the question as to the genuineness of a document founded on by the pursuer in an action of declarator of marriage, and in regard to which evidence had been led before the sheriff-commissary. *Question*, whether in such circumstances it be competent to remit to a jury. *Mackenzie* v. *Stewart*, 1847, 9 D. 906; 19 J. 412.

1426. Proof or Jury Trial?—Matters of Fact—Usage of Trade.—Where matters of fact are in dispute, the rule is, that they shall be tried by jury, unless special cause be shown why a proof on commission should be allowed. *Cameron* v. *Kerr*, 1861, 23 D. 1257; 33 J. 631.

1427. Proof or Jury Trial?—Case Tried by Jury — Jury Discharged without Arriving at Verdict—Motion to have Case Disposed of by Court—New Trial Ordered.—After a trial by jury had so far taken place, that the jury were, after being enclosed for two hours, unable to arrive at a unanimous verdict, and were discharged by the withdrawal of a juror without undergoing the twelve hours' confinement appointed by the statute, a motion to have the case decided by the court, without a jury, *refused*. *Kirkpatrick* v. *Lord William Douglas*, 1847, 9 D. 849; 10 D. 367; 19 J. 694; H. L., 7 Bell 186; 22 J. 634.

1428. Proof or Jury Trial?—Petitions for Service — Questions of Pedigree. — In general, questions of pedigree are sent to trial by jury. *Mackintosh, etc.* v. *Ross*, 1873, 11 M. 636; 45 J. 402.

1429. Proof or Jury Trial?—Reduction of Antenuptial Contract of Marriage on the Ground of Essential Error.—In an action of reduction on the grounds of force and fear, and of fraud, and also of essential error, the court *held* the averments irrelevant to support the reduction on any of the grounds except essential error; and as to that ground, allowed a proof before answer to be taken on commission. *Mackenzie* v. *Hutcheson*, 1857, 19 D. 495; 29 J. 235.

1430. Proof or Jury Trial?—Reduction —Policy of Life Insurance.—In an action brought by an insurance company for reduction of a policy of life insurance on the ground (1) of breach of warranty, and (2) of concealment of material facts, motion by the pursuers for a proof before answer in lieu of jury trial *granted*, although it was resisted by the defenders, who claimed right to have the action tried by a jury. *Life Association of Scotland* v. *Foster, etc.*, 1873, 11 M. 351; 45 J. 240.

1431. Proof or Jury Trial?—Reduction of a Service.—*Held* that a remit for jury trial

in the reduction of a service was competent, but inexpedient in the particular case; and a proof by commission allowed. *Mathew* v. *Wighton's Trs.*, 1843, 6 D. 305; 16 J. 188.

1432. Proof or Jury Trial?—Question as to the Right of a Riparian Proprietor to Throw out Piers in the Alveus—Motion for a Remit to Engineers.—In an action as to the right of a proprietor of lands adjoining a navigable river to throw out piers or jetties into the channel of the river, a motion for a remit to engineers to inspect and report, on the ground that jury trial would not be beneficial or applicable in the circumstances, *refused*, in respect that the case ought to be disposed of by jury trial. *Mags. of Perth* v. *E. of Zetland*, 1843, 5 D. 545; 15 J. 286.

1433. Proof or Jury Trial?—Public Right of Way or Servitude Road.—*Held* that an action concluding alternatively for declarator of a public right of way or of a servitude road was of too complex a nature to be tried by jury. *Macfie* v. *Stewart*, 1872, 10 M. 408; 44 J. 190.

1434. Proof or Jury Trial?—Question as to the Position of a Street which was the Boundary of Certain Subjects in Dispute.—In a question as to the position of a street, which was the boundary of subjects conveyed in a contract of ground-annual, as delineated on a plan, and whether the disponee had encroached upon it, the court *refused* to remit to surveyors, and sent the case for jury trial. *Fleming* v. *Baird*, 1843, 6 D. 101; 16 J. 90.

1435. Proof — Additional Proof — After Judgment of Lord Ordinary on Concluded Proof in Declarator of Marriage.—After a concluded proof in an action of declarator of marriage in which the defender (the alleged husband) adduced no evidence, the Lord Ordinary on 5th January 1869 pronounced judgment against him chiefly in respect of a written acknowledgment proved to be in his handwriting. The defender reclaimed, and on 25th May 1869, before the cause was put out for hearing, moved the First Division for leave to adduce evidence to show that the acknowledgment founded on by the pursuer was not in the defender's handwriting. Motion *refused*. *Forster* v. *Forster*, 1869, 7 M. 797; 41 J. 425. Affg. 10 M. (H. L.) 68; L. R. 2 Sc. App. 244.

1436. Proof — Additional Proof — After Judgment of Inner House.—An application to amend a record, and an offer of proof after judgment had been delivered, although no interlocutor had been signed, *refused*. *Mackenzie* v. *Munro*, 1869, 7 M. 676; 41 J. 374.

1437. Proof—Additional—Identification.—Circumstances in which, in an action of divorce on the ground of adultery, after the Lord Ordinary had pronounced a decree of divorce, the court *refused* to allow the pursuer to lead additional evidence for the purpose of identifying the defender with a woman proved to have had carnal intercourse with the co-defender. *Gray* v. *Gray*, 1867, 5 M. 355; 39 J. 181.

1438. Proof — Additional Proof — Res noviter—Advocation.—In an action in the sheriff court for the price of twenty kegs of iodine, the defence was, that it was a condition of the contract, that the pursuer should, during the currency thereof, deliver no iodine to any other person, and that this had been violated. Of this defence the defender led proof at great length, endeavouring to establish delivery of iodine by the pursuer to two individuals. Of consent, after nearly six months, circumduction was pronounced against him. In an advocation he moved to be allowed to lead further proof, on the ground of *res noviter*, stating that he had recently discovered that the pursuer had delivered iodine to another individual. He, however, refused to pay any part of the previous expenses. Motion *refused*. *Paterson* v. *Mackenzie*, 1856, 18 D. 663; 28 J. 284.

1439. Proof—Res noviter.—There is no absolute rule that a recorded deed can in no case be founded on as *res noviter*. *Maitland* v. *M'Clelland*, 1857, 19 D. 945; 29 J. 436.

1440. Proof — Additional Proof — Evidence to Show that Witnesses had made Statements Different from their Depositions.—The advocator of a sheriff court action tendered a minute craving to be allowed to adduce evidence to show that certain of the respondent's witnesses had made statements on a particular occasion, and to parties specified, different from what they had deponed to in evidence. The court, in respect sufficient ground had not been stated for opening up the proof, *refused* the motion. *Taylor* v. *Provan*, 1864, 2 M. 1226; 36 J. 611.

1441. Proof—Additional Proof—Divorce—Question of Identity.—The pursuer of an action of divorce allowed to lead further evidence of the identity of the defender with a person deponed to as seen by certain witnesses, although he had closed his proof. *Forbes* v. *Forbes*, 1861, 24 D. 145.

1442. Proof—Additional Proof—Divorce—Insufficiency of Proof as to Marriage—In Divorce, as to Fact of Marriage.—*Held* that it was competent for the Lord Ordinary to allow the pursuer of a divorce to supplement his proof as to the fact of the marriage between him and the defender after the proof had been closed but before the Lord Ordinary had pronounced judgment. *Lacy* v. *Lacy*, 1869, 7 M. 369; 41 J. 215.

1443. Proof — Additional Proof — Proof Taken on Commission. — On 20th March 1868 an interlocutor was pronounced allowing proof in an action of declarator of marches, to be taken by commission. On 12th March 1869 the pursuer declared his proof-in-chief closed, "under a reservation to lead further proof if at any time competent," to which the defenders objected. The defenders' proof-in-chief and the pursuer's conjunct proof were then led and closed. The commission was then reported,

but before circumduction the pursuer moved for leave to examine two witnesses in New Zealand. *Held* that the additional proof could only be allowed on payment to the defenders of expenses. *Cameron* v. *Hay, etc.*, 1869, 41 J. 465.

1444. Proof — Additional Proof — Payment of Commission on Sales—Remit to Man of Skill to Examine Books.—In an action to recover payment of commission on sales said to have been effected by the pursuer for the defender, after a proof was led and probation renounced, the sheriff found the pursuer entitled to be remunerated in proportion to the services performed. *Held* that a remit to persons of skill to examine the books in which the transactions had been entered by the pursuer, was not excluded by the Act of Sederunt, as further proof after the parties had renounced probation. *Howie* v. *Howie*, 1850, 22 J. 360.

1445. Proof — Admissions — Counsel. — Agreements and admissions judicially made by counsel in one action *held* not to be binding as a matter of agreement between the same parties in a subsequent action raised in consequence of a discovery that the prior action did not include the matters, to which such agreements and admissions related, beyond a certain date. *Wauchope* v. *N. B. Rly. Co.*, 1863, 2 M. 326; 36 J. 158.

1446. Proof—Allowance of—Terms of Interlocutor.—*Observations, per* Lord Justice Clerk, on proper form of interlocutor, where a proof is allowed to both parties of their respective averments. *Mags. of Edinburgh* v. *Warrender*, 1862, 1 M. 13; 35 J. 10. Cf. *Strang* v. *Steuart*, 1862, 24 D. 955; 34 J. 474.

1447. Proof — Allowance of — "Before Answer."—In a declarator by a proprietor against certain feuars for a yearly payment by them for the use of certain roads and bridges under their feu-contracts, *held* a proper course for the Lord Ordinary, before answer, to order proof of the practice since the date of the feu-contracts. *Kerr* v. *Hamilton*, 1857, 19 D. 322.

1448. Proof — Allowance of — "Before Answer."—*Observations* as to the import of the words "before answer." *Macvean* v. *Maclean*, 1873, 11 M. 506; 45 J. 470. *Thomson* v. *Fraser*, 1868, 7 M. 39; 41 J. 28. *Stuart* v. *Stuart*, 1869, 7 M. 366; 41 J. 213. *Robertson* v. *Murphy*, 1867, 6 M. 114; 40 J. 61.

1449. Proof—Cancellation of—Action of Divorce.—*Opinion* that, after a proof has been taken, the court cannot authorise it to be cancelled, although both parties consent. *M'Farlane* v. *M'Farlane*, 1847, 9 D. 500; 19 J. 200.

1450. Proof — Circumduction — Appeals. —In an action of divorce, a conjunct probation was allowed, in the course of which the defender entered various appeals. The day after the proof was concluded, the Lord Ordinary pronounced an interlocutor of circumduction, "in respect the counsel for the defender declines to be heard on his appeals." The effect was to exclude certain witnesses. Circumduction *recalled* on the ground that the appeals had not been disposed of, and remit made to the Lord Ordinary to hear the appeals. *Ritchie* v. *Ritchie*, 1857, 19 D. 285.

1451. Proof—Conduct of—Hearing on Evidence.—Where a proof is taken before the Lord Ordinary under the Evidence Act, 1866, the whole proceedings are to be conducted as at a jury trial, and counsel ought to address the judge immediately after the evidence has been led, and no adjournment for that purpose ought to take place except in special cases. *Birrell* v. *Beveridge*, 1868, 6 M. 421; 40 J. 201.

1452. Proof—Conjunct Probation—Leading of.—In a proof by commission of allegations that the pursuer had been induced by misrepresentations to enter into an agreement, the court found that the pursuer must commence his proof by leading evidence that the misrepresentations had been made. The pursuer having to some extent done so, *held* (1) that a *prima facie* case was enough to entitle him to go into the proof of the falsehood; (2) that he had made out such a case; and (3) that the defender was not entitled to lead conjunct probation as to the making of the representations, before the pursuer should be allowed to go on with his evidence of the falsehood. *Buchanan* v. *Cullen*, 1863, 1 M. 848; 35 J. 506.

1453. Proof—Proof by Commission—Competency of, in Cause Appropriated to Jury Trial—Court of Session Act, 1868, s. 27.—*Held* that it was incompetent under this section to appoint the proof to be taken by commission in one of the class of causes enumerated by the Judicature Act, and excluded from proof by commission by 13 and 14 Vict. c. 36, s. 49, as "actions for libel or for nuisance, or properly and in substance actions of damages." *Nicol* v. *Britten & Owden*, 1872, 10 M. 351; 44 J. 211.

1454. Proof—Commission—Declarator of Legitimacy—Poverty.—Proof on commission *allowed* of a marriage in a declarator of legitimacy, in respect of the poverty of the parties. *Adair* v. *Adair*, 1827, 5 S. 488.

1455. Proof—Proof by Commission—Action of Divorce.—In a question of domicile with reference to the jurisdiction of the court in an action of divorce, a proof by commission was allowed instead of remitting to a sheriff-commissary under 6 and 7 Will. IV. c. 41. *Tulloh* v. *Tulloh*, 1861, 23 D. 639; 33 J. 314.

1456. Proof—Proof by Commission—Divorce.—Circumstances in which the court authorised the Lord Ordinary to grant commission to the sheriff of Aberdeen to lead a proof in an action of divorce. *A. B.*, 1839, 1 D. 466; 14 Fac. 517.

1457. Proof—Proof by Commission—Enumerated Cause—Action of Damages against Bank Directors.—In an action by the representatives of a shareholder against the representatives of a bank director, concluding (1) for payment of the sum paid for bank shares bought in consequence of false and fraudulent representations by the directors; (2) for damages sustained in consequence of fraudulent misappropriation of the bank's funds, and of fraudulent concealment of the true state of the bank's affairs—*held* that the proof in the first branch of the action might competently be taken on commission, but that the second part of the case could only be dealt with by a jury, and a motion for a proof on commission *refused*. *Gordon* v. *Davidson*, 1864, 2 M. 1275; 36 J. 713. Cf. *Bairds* v. *Harper*, 1865, 3 M. 543; 37 J. 272.

1458. Proof—Commission—Enumerated Cause.—Under s. 49 of the Act 13 and 14 Vict. c. 36, *held*, where issues were adjusted by the Lord Ordinary, that it was competent for him to report one of the "enumerated causes," and for the court to allow proof on commission. *Livingstone* v. *Mathew*, 1852, 14 D. 456; 1 Stuart 403.

1459. Proof—Commission for Recovery of Documents—Proof Ordered by Division and Remitted by Lord Ordinary to Take—Evidence Act, 1866, ss. 1 and 3.—When the court, under the 3rd section of the Evidence Act, 1866, remit to a Lord Ordinary to take a proof under the 1st section, he has no power to grant a commission and diligence for the recovery of documents; but when the parties require such a diligence, the court will grant the necessary powers to the Lord Ordinary in the interlocutor remitting. *E. Fitzwilliam* v. *Lancaster & Freeland*, 1867, 5 M. 303; 39 J. 133.

1460. Proof — Commission — Action of Reduction.—The court *refused* to allow the proof in a reduction on the ground of facility, fraud, and circumvention to be taken on commission. *Watt* v. *Watt*, 1857, 19 D. 787; 29 J. 364.

1461. Proof—Commission—Reduction.—A case of reduction on the head of death-bed *allowed* to be tried by proof on commission. *Craig* v. *Jack*, 1857, 19 D. 862.

1462. Proof — Consistorial Cause — Circumduction.—In a consistorial proof, circumduction ought not to be pronounced until all appeals are disposed of. *Hook* v. *Hook*, 1851, 14 D. 39; 24 J. 9; 1 Stuart 24.

1463. Proof — Consistorial Cause — Competency of taking Proof in the Country.—It is competent for the sheriffs authorised to take proof in consistorial cases, or for the Lords Ordinary, to appoint the proof to be taken in the country in any case they shall think proper. *Jamieson* v. *Stuart*, 1837, 15 S. 805.

1464. Proof—Consistorial—Question as to Domicile—Remit to Judge Ordinary or to Sheriff-Commissaries.—*Held* that, in an action of divorce, a remit might be made to the Judge Ordinary of the bounds, to take the evidence as to a question of domicile, on which the defence depended, and that it was not necessary to remit to the sheriffs-commissaries. *Shaw* v. *Shaw*, 1850, 12 D. 1239; 22 J. 554.

1465. Proof — Consistorial Cause — By whom Taken.—In consistorial causes, the proof must be taken by a commissary-sheriff. *Browne* v. *Burns*, 1842, 4 D. 1425; 14 J. 516.

1466. Proof—Default in Reporting Proof—Circumduction.—*Held* that an order circumducing the term for proving, and an order circumducing the term for reporting a proof, mean the same thing, and that after the term appointed not only could no more proof be led before the commissioner, but that at that date the proof must be reported to the court. *Gunn* v. *Bremner*, 1865, 1 S. L. R. 68, 87.

1467. Proof — Desertion — Proof as to Date of Desertion—No Date Stated in Decree of Adherence.—In an action of divorce on desertion, the extract decree of adherence did not set forth the date of desertion. *Held* that it was competent to and incumbent on the pursuer to prove that date. *Maxwell* v. *Hunter*, 1851, 14 D. 126; 1 Stuart 93.

1468. Proof—Divorce—Conjugal Rights Amendment Act, 1861, s. 14.—In a process of divorce in dependence at the date of the Conjugal Rights Act coming into operation, and in which proof had partly been led, *held* that the remainder of the proof must be taken in the new way provided by the statute. *Donald* v. *Donald*, 1861, 24 D. 25; 34 J. 47.

1469. Proof—Divorce—Question as to Jurisdiction—Proof by Commission.—In an action of divorce, *held* that the mode of taking proof in a preliminary question of jurisdiction was not governed by the provisions of the Conjugal Rights Amendment Act, and that the proof ought to be taken by commission. *Hume* v. *Hume*, 1862, 24 D. 1006; 34 J. 494.

1470. Proof—Divorce—Oath of Calumny—Taking of on Commission.—In an action of divorce, while the case was at avizandum in the Inner House on an objection to the jurisdiction, the court, on a note stating that the pursuer was a soldier, and obliged to return to India, administered the oath of calumny. *Hook* v. *Hook*, 1862, 24 D. 488; 34 J. 245. *Orde* v. *Murray*, 1846, 8 D. 535; 18 J. 249. *A. B.*, 1838, 16 S. 1143; 13 Fac. 784.

1471. Proof—Divorce—Oath of Calumny—Taking of to Lie in retentis.—Where the pursuer of an action of divorce on the head of adultery was obliged to sail on a protracted voyage before the summons could be called in court, warrant *granted* to take the oath

de calumnia on due notice to the defender, to lie *in retentis* till the summons should be called in court. *Potts*, 1839, 2 D. 248; 15 Fac. 239.

1472. Proof — Evidence — Husband and Wife — Marriage — Mid-Impediment — Legitimation per subsequens matrimonium —Excerpts from Lectures of a Professor of Law Lodged after Consulted Judges' Opinions Given.—Circumstances in which the court *allowed* a party, after the opinions of the consulted judges had been returned, to lodge extracts from unauthenticated copies of lectures of a deceased professor of law in the University of Edinburgh, with the view of contradicting a statement of some of the consulted judges, that the opinion expressed by the lecturer was of a different nature than what had been assumed by their lordships. *Kerr* v. *Martin*, 1840, 12 J. 354.

1473. Proof—Evidence—Excerpts from Books.—In an action for an account for goods sold, the only plea stated in defence was non-liability. After a proof and production of partial excerpts from the pursuer's books, *held* incompetent to refer to these excerpts as establishing payment. *Ralston, Goodwin, & Co.* v. *M'Lean*, 1857, 19 D. 878; 29 J. 455.

1474. Proof—Exhibition—Petition for.—A person alleging himself to be the immediate younger brother of one entitled to claim certain estates in Scotland, commenced a suit in Chancery for perpetuating testimony, and in a petition to the Court of Session obtained an order for the examination of certain witnesses. He now petitioned the court for an order on these witnesses to search for and exhibit certain documents (titles and family papers). Petition *refused*. *Campbell* v. *E. of Breadalbane & Others*, 1868, 6 M. 632; 40 J. 329.

1475. Proof—Incompetency of Proving Incidentally a Disputed Marriage—Necessity of Separate Action.—*Held* by the presiding judge, that in an action of assythment by persons claiming to be the widow and children of a deceased, when the defenders did not admit the marriage, it is incompetent to put in issue and prove before a jury marriage and legitimacy, and trial put off to enable the pursuers to prove their relationship in competent form. *Leneghan & Others* v. *Monkland Iron & Steel Co.*, 1857, 19 D. 975; 29 J. 467.

1476. Proof — Lead — Right of Way — Onus.—Pursuers of a right of way sought reduction of a warrant of the justices under the stat. 1661, c. 41, and decree of declarator of right of way. The defender alleged in defence that the road in question had been made for a special purpose of his own, and was not in its origin a public road, and that any use of it by the public was by sufferance merely. *Held*, while reserving the question of the onus of proof, that the terms of this defence did not invert the ordinary rule that the pursuers must lead in the proof. *Anderson, etc.* v. *Colville*, 1868, 6 S. L. R. 24.

1477. Proof — Marriage — Incidental Proof of Marriage in a Multiplepoinding—Competency.—A proof before answer *allowed* in a multiplepoinding of a claimant having entered into a second marriage by habit and repute, whereby her claim as the widow of her first husband would be rejected. *Downie* v. *Douglas*, 1792, Hume 251. *Pirie* v. *Ochterlony*, 1787, Hume 248.

1478. Proof — Preliminary — Whether Action Excluded by Reference.—Where issues, prepared for a jury trial, involved a question which was affected by a pending submission, the court *directed* a preliminary defence, founded on the subsistence of the submission, to be discussed before sending the issues to the jury. *Campbell* v. *M'Farlane*, 1835, 13 S. 641; 10 Fac. 419.

1479. Proof — Production — Lodging. — Where a party, in a closed record, founded upon an instrument of protest of a bill as being a valid protest for non-acceptance, and it had been discovered to be a protest for non-payment merely, *held* that he was not entitled to have the cause delayed, in order that he might produce a protest for non-acceptance. *Welsh* v. *Milne*, 1844, 7 D. 213; 17 J. 101.

1480. Proof — Lodging Productions. — After a record was closed, a party and his trustees who were claimants in a multiplepoinding, proposed to produce a lease on which their claim depended, but which they admitted had been in possession of one of the trustees, who alleged that, after a laborious search, he had, since the record was closed, accidentally found it in his repositories. *Held* that this was not *res noviter*, and that they were not entitled to produce it. *E. of Fife's Trs.* v. *Pirrie*, 1852, 14 D. 331; 24 J. 159; 1 Stuart 271.

1481. Prorogation of Time for Lodging Papers.—The Lord Ordinary has power to prorogate the period for lodging a paper or closing the record without consent, whether the application be made before or after the lapse of the period first appointed. *Burden* v. *Mitchell*, 1856, 18 D. 339; 28 J. 160.

1482. Proof—Prorogation—Circumduction.—The prorogation of a commission for conjunct proof expired on a box-day in vacation. The pursuers' evidence alone had been then led, and appeals had been taken, and were undisposed of. At the meeting of the court, the defender moved for a prorogation, which he obtained; and this having been renewed, without his having commenced his proof, circumduction was then granted. *Held* that, the commission having expired, the subsequent prorogation was incompetent: therefore interlocutor of circumduction recalled. *Aikman* v. *Cockburn*, 1857, 19 D. 279; 29 J. 137.

1483. Proof—Pursuer in Prison—Warrant for Bringing him to Court.—Warrant

granted for bringing a prisoner from the jail of Edinburgh, to enable him to appear personally in support of an action before the Court of Session. *Rennie*, 1850, 12 D. 994.

1484. Proof—Reference to Oath—Non memini—Admission.—A party who, on reference to oath, deponed *non memini* in regard to a *factum proprium* of a recent date, *held* as confessed, and oath found affirmative of the reference. *Crow* v. *Fowlie*, 1865, 1 S. L. R. 86.

1485. Proof—Reference to Oath—Competency of Same after Judgment of House of Lords.—A motion to delay signing an interlocutor applying the judgment of the House of Lords, until a petition to be allowed a reference to oath had been disposed of, *refused* as incompetent, it being the duty of the court to sign the judgment they have pronounced, and it being competent to tender the reference at any time before extract. *Longworth* v. *Yelverton*, 1865, 3 M. 645; 37 J. 322.

1486. Proof—Reference to Oath—Constitution of Alleged Debt Referred—Constitution Admitted—Resting-Owing Denied—No Reference as to Resting-Owing.—In an action for the recovery of an alleged loan the constitution but not the resting-owing was referred to defender's oath. The defender admitted the constitution but denied the resting-owing, alleged that he had subsequently made in the same course of dealing a larger advance to the pursuer, and that accounts between them had been settled. *Held* that the oath was negative. *Mackay* v. *Monro*, 1871, 8 S. L. R. 438.

1487. Proof—Reference to Oath—Open Record.—Interlocutor allowing reference to oath of party on an open record recalled; but, in special circumstances of the case, before answer, the oath allowed to be taken, to lie *in retentis*. *Riley* v. *M'Laren*, 1853, 16 D. 323; 26 J. 151.

1488. Proof—Reference to Oath—Partial Reference.—The defender in an action for payment of a bill having, *inter alia*, pleaded compensation, and this plea having been repelled, proposed to refer the other grounds of defence to the oath of the pursuer. *Held* that the minute of reference should in form be general of the whole cause without qualification. *Rankin* v. *Buchanan*, 1866, 1 S. L. R. 168.

1489. Proof—Reference to Oath—Party Referred to Adduced as a Witness.—*Held* that it was no objection to a reference to oath that the party referred to had been adduced as a witness in the cause and cross-examined by the party making the reference. *Melrose* v. *Spalding*, 1868, 6 S. L. R. 14.

1490. Proof—Reference to Oath—Referring one Conclusion to Defender's Oath—Effect on Alternative Conclusion.—A summons in the sheriff court concluded alternatively (1) for payment of £40 as due on a "promissory-note" payable "to A or B, or their order"; or otherwise (2) for payment of £40 as the amount of various advances made in loan. The sheriff assoilzied the defender from the first conclusion of the summons. The second conclusion was then referred to the defender's oath, which was held by the sheriff to be negative of the reference. *Held* in an advocation praying for recall of the sheriff's judgment, assoilzieing the defender from the first conclusion (1) that the document founded on was not entitled to the privileges of a promissory-note, in respect of uncertainty as to the payee; and (2) that even if the document were a promissory-note, as both conclusions referred to the same debt, the pursuer, by his reference to oath, must be held to have renounced his claim upon the promissory-note. *Thomson* v. *Philp*, 1867, 5 M. 679; 39 J. 344.

1491. Proof—Reference to Oath—Verbal Contract Varying Written Agreement.—Damages being sought for breach of a parole agreement alleged to have been entered into previous to a written lease—*held* that the reference must specifically set forth the contract alleged, and a form approved which referred to certain articles of the condescendence. *Stewart* v. *Clark*, 1870, 8 S. L. R. 524.

1492. Proof—Renunciation of—Minute of Admissions—Admissions on Record—Admitted Documents.—Where parties gave in a joint minute as to the facts disputed on record, and renouncing further probation, the court in determining the cause are not limited to the consideration of the facts set forth in the minute but may also consider the admissions of parties made on record and all documents in process of which the genuineness was admitted. *Nisbet* v. *Cairns*, 1864, 2 M. 863.

1493. Proof—Undefended Cause—Preservation of Evidence.—Proof in an undefended declarator of right of property *allowed* in order to preserve evidence. *Russel's Trs.*, 1865, 3 M. 850; 37 J. 442.

1494. Proof—Trial on Issues before Lord Ordinary—Whether Verdict Consistent with Record.—In an action for damages for injury to the person of a pursuer, by being knocked down and injured by loaded waggons running down an incline on a tramway along a public path, on the ground of negligence of the person in charge, an issue was tried by a Lord Ordinary without a jury. Terms of findings which held not inconsistent with the pursuer's averments, therefore not objectionable as opposed to the rule. *Finlay* v. *Limerigg Coal Co.*, 1861, 23 D. 874; 33 J. 444.

1495. Proof—Vicennial Prescription.—In an action for payment of a sum of money, founded on three documents alleged to be holograph, a proof *prout de jure* was allowed as to the authenticity of the documents. The proof was taken and reported. *Held* that the vicennial prescription of holograph documents, which limits the proof to oath of party, could

not thereafter be pleaded. *Wyse* v. *Wyse*, 1847, 9 D. 1405; 19 J. 626.

1496. Protestation — Pursuer Sequestrated after the Execution of the Summons. —A pursuer's estates were sequestrated after the execution of the summons and the defender took out protestation for not calling. *Held* that he was not barred from doing so by the sequestration. *Love* v. *Menzies*, 1830, 8 S. 380; 5 Fac. 318.

1497. Protestation—November Sittings. —*Held* that protestation might be put up during the sittings formerly held by the Lords Ordinary in November (under 2 and 3 Vict. c. 36, s. 9) before the meeting of the court. *Graham* v. *Graham*, 1852, 15 D. 19; 25 J. 18; 2 Stuart 28.

1498. Proving the Tenor—Act, 1593, c. 179—Names of Witnesses.—The tenor of a bond *held* to be proved although it was not shown that the bond contained the names of the writer and witnesses. *Blackwood* v. *Hamilton*, 1718, Robert. 211.

1499. Proving the Tenor—Adminicles—Specification of.—In a proving of the tenor, the adminicles must be specified in the summons; and an amendment to that effect *allowed*. *Jenkinson* v. *Campbell*, 1850, 12 D. 854; 22 J. 370.

1500. Proving the Tenor—Adminicles—Drafts.—In a proving of the tenor of an assignation and translation of a bond, which had been delivered to a party now dead, the scrolls *sustained* as adminicles, and a proof *allowed* of the *casus amissionis* that the principals were not found in his respositories. *Watson* v. *Erskine*, 1847, 19 J. 523.

1501. Proving the Tenor—Additional Proof after Circumduction.—Circumstances in which, in an action of proving the tenor of a settlement, alleged to have been destroyed through facility of mind on the part of the maker, the pursuer was, after circumduction, *allowed* a further opportunity of leading proof. *Kennedy* v. *Macdonald*, 1867, 5 M. 557; 39 J. 271.

1502. Proving the Tenor—Bill of Exchange.—The court *refused hoc statu* to allow a proving of the tenor of a bill. *M'Farlane* v. *M'Nee*, 1826, 4 S. 509.

1503. Proving the Tenor—Burgh Charter —Evidence.—The tenor of the charter of erection of a royal burgh, of date 1598, *held* proved, on the evidence (1) of the recorded precept under the Privy Seal for issuing the charter; (2) of the admission of the burgh, in 1600, as a member of the Convention of Royal Burghs; (3) of its being represented in Parliament in 1621; (4) of a copy of the charter preserved in Lord Fountainhall's MS. in the Advocates' Library. The proof of the tenor of the precept of sasine relative to the charter *held* insufficient. *Mags. of Sanquhar* v. *Officers of State*, 1864, 2 M. 499; 36 J. 242.

1504. Proving the Tenor—Casus amissionis. — A proving of the tenor of a bill *dismissed* where no *casus amissionis* was condescended on. *Carson* v. *MacMiken*, 14 May 1811, F. C.

1505. Proof of the Tenor—Casus amissionis Alleged to be Destruction of a Will by a Testator while Insane—Insufficiency of Evidence.—A proof allowed before answer in a proving of the tenor of a testament, that the *casus amissionis* was that, after execution of the deed, the testator became, and continued insane till her death, and had destroyed it in that state of mind; but, on the evidence, *held* that although the testator was subject to hallucinations, the insanity was not so clearly proved as to warrant a decree of proving the tenor of the testament. *Laing* v. *Bruce*, 1838, 1 D. 59; 14 Fac. 40.

1506. Proving the Tenor—Casus amissionis—Deed Lost on Dissolution of Partnership of Law Firm.—The mere changing of his chambers by an agent, since which time the deed whose tenor was sought to be proved had not been seen, is not a sufficient *casus amissionis*. Circumstances in which the *casus amissionis held* proved where the deed had not been seen since the dissolution of partnership of a law firm who had the charge of it. *M'Kean* v. *Miller*, 1857, 19 D. 448; 29 J. 149. Cf. *Russell's Trs.* v. *Russell*, 1862, 24 D. 1141; 34 J. 516.

1507. Proving the Tenor—Casus amissionis — Destruction of Deed by Party Bound by it—Dispensing with Adminicles. —An antenuptial marriage-contract, the sole purpose of which was to exclude the husband's *jus mariti* and right of administration having been destroyed by him, she raised an action of proving the tenor, in which a draft of the deed was produced as an adminicle to establish its terms. During the dependence of this process the draft was lost, and the pursuer then raised a new action founding on a copy of the draft contained in the certified copy of the summons in the former process. *Held* that the circumstance of the deed having been destroyed by the wrongful act of the person upon whom alone it was obligatory, entitled the pursuer to prove its tenor without the production of any proper written adminicle. *Ritchie* v. *Ritchie*, 1871, 9 M. 820; 43 J. 443.

1508. Proving the Tenor—Casus amissionis—Necessity of Stating Efforts Made to Recover Document. — A summons of proving the tenor must state specifically that every effort has been made, but unsuccessfully, to recover the missing document, and ought to set forth the nature of the efforts made to recover it. *M'Clelland* v. *Sim*, 1855, 17 D. 512; 27 J. 218.

1509. Proving the Tenor—Casus amissionis—Proof of.—A deed of entail having been produced to satisfy the production in an action of reduction of it as forged, it appeared that it wanted the greater part of the testing clause, which had been torn off; and the party producing it having raised an action of proving the tenor, but failed to condescend on a specific

and relevant *casus amissionis*, the court *dismissed* the action. *Graham* v. *Graham*, 1847, 10 D. 45 ; 20 J. 26.

1510. Proving the Tenor—Casus amissionis—Proof.—In an action of proving the tenor of a codicil to a trust deed, the *casus amissionis* averred was, that the codicil had been destroyed by the truster's law agent, after the death of the truster. The law agent admitted that he had destroyed the codicil after the truster's death, but stated that it had been put into his hands for the purpose of destroying it. *Opinion*, that this latter statement was not an intrinsic qualification of the admission, but that the admission might be read without it. *Falconer* v. *Stephen*, 1848, 11 D. 220 ; 21 J. 53.

1511. Proving the Tenor—Casus amissionis—Proof thereof.—The tenor of a deed *held* proved by the production of the instrument of sasine on the deed and references in other deeds ; proof of a *casus amissionis* not being required in respect that the right conferred by the deed was not such as to be destroyed by cancellation or retiral of the deed. *Cunninghame* v. *Cunninghame*, 1717, Robert. 187.

1512. Proving the Tenor—Composition Agreement by Creditors—Adminicles.—The character of the adminicles required must vary with the nature of the writ to be proved ; and in a proving the tenor of a composition agreement by creditors, letters and bills showing its existence and nature *sustained*. Allegation of *casus amissionis* which held sufficient. *Winton & Co.* v. *Thomson & Co.*, 1862, 24 D. 1094 ; 34 J. 148, 561.

1513. Proving the Tenor—Contract of Ground-Annual—Evidence.—Procedure in proving the tenor of a contract of ground-annual, and of a relative plan endorsed thereon. *Hyndman* v. *M'Gourlay & Others*, 1864, 2 M. 1304 ; 36 J. 652.

1514. Proving the Tenor—Conveyance of Property—Clause of Warrandice.—In a proving of the tenor of a disposition, the deed was produced much mutilated by damp ; part of a clause of warrandice remained legible, but not enough to show whether its terms were absolute. The court *refused* to allow the blank to be filled up with "at all hands, and against all deadly." *Cousin, etc.* v. *Gemmell, etc.*, 1862, 24 D. 758 ; 34 J. 383.

1515. Proving the Tenor—Deed Recorded in Register of Sasines.—In an action of proving the tenor of a deed recorded in the Register of Sasines, *held* that, notwithstanding such recording, the pursuer had a sufficient interest to entitle him to sue. *Browne* v. *Orr, etc.*, 1872, 10 M. 397 ; 44 J. 225.

1516. Proving the Tenor—Defenders—Calling the Lieges as Defenders.—An action of proving the tenor of documents, as to which no person other than the pursuers had any interest, *held* to be rightly directed (following the form of a declarator of *ultimus hæres*) against the lieges, as defenders. *Mitchell Innes* v. *The Lieges*, 1852, 24 J. 662.

1517. Proving the Tenor—Disposition by Trustee on a Sequestrated Estate—Casus amissionis.—The tenor of a disposition granted by a trustee on a sequestrated estate, said to have been lost by the agent of the disponee, *found* proved, although the *casus amissionis* was not specifically stated. *Walker* v. *Brock*, 1852, 14 D. 362 ; 24 J. 172 ; 1 Stuart 305.

1518. Proving the Tenor—Inner or Outer House.—Actions of proving the tenor are to be proceeded with before the Inner House, notwithstanding the provisions of the Act 13 and 14 Vict. c. 36, for making up the record by summons and defences in the Outer House in all cases coming into court by a summons. *Paul* v. *Inch*, 1855, 17 D. 1138 ; 27 J. 587.

1519. Proving the Tenor—Mutual Settlement by Spouses—Casus amissionis—Title to Sue—Spes successionis.—A mutual settlement by spouses in favour of the survivor was found, on the death of the husband, in the repositories of himself and his wife, with the wife's signature and that of the instrumentary witnesses cancelled. In a proving of the tenor at the instance of the party having a *spes successionis* under the provision relative to the estate of the survivor, the widow deponed that in a fit of passion she had, without her husband's knowledge, cancelled the signatures. *Held* that it was incumbent on the pursuer to prove that the cancellation took place in some way which did not affect the validity of the deed, that uncorroborated testimony of the widow was insufficient, and therefore that the pursuer had failed to prove the *casus amissionis*, and that the action ought to be dismissed. *Winchester* v. *Smith*, 1863, 1 M. 685 ; 35 J. 395.

1520. Proving the Tenor—Necessity for—Action on a Lost Document.—*Observed* (*per* Lord Cowan), that an action of proving the tenor is an essential preliminary to any action on a lost document. *Gordon* v. *Robertson*, 1873, 11 S. L. R. 35.

1521. Proving the Tenor—Necessity for—Document on which the Title to Sue did not Depend.—Circumstances in which the tenor of a document, not being a document on which the title to sue depended, was *allowed* to be proved incidentally. *Wilson* v. *Leckie*, 1870, 7 S. L. R. 563.

1522. Proving the Tenor—Proof—Prepared State of.—In a proving of the tenor, the court *refused* to dispense with a prepared state. *Christie* v. *Todd*, 1850, 12 D. 1172.

1523. Proving the Tenor—Proof—Remit to Sheriff to Open a Grave in which the Missing Deeds were Believed to be.—In an action of proving the tenor, a proof before answer as to the sufficiency of the adminicles and the *casus amissionis* was allowed, in the course of which it appeared that a parcel,

the contents of which were unknown, had been found in the repositories of a party deceased, who was alleged to have been in possession of the missing deeds, and that this parcel, in pursuance of instructions left by him, had been buried along with him in his coffin. The court made a remit to the sheriff of the county to have the grave opened, and to search for the parcel; and on receiving his report, *sustained* the adminicles and *casus amissionis*, and *found* the tenor proved. *M'Leod* v. *Leslie*, 1865, 3 M. 840.

1524. Proving the Tenor—Settlement—Sufficiency of Proof.—A holograph letter, containing a recommendation to the writer's executrix to pay certain legacies, having been destroyed by that executrix, after having been read at a meeting of the writer's relations, at opening her repositories after her death, *held* that the tenor was proved by two witnesses deponing to its contents, by a draft which one of them had made out from memory of its tenor, shortly after its destruction, and by the minute drawn up at opening the repositories. *Lillie* v. *Smith*, 1832, 5 J. 145.

1525. Proving the Tenor—Subvaluation of Teinds—Decree in Absence.—Evidence on which a decree of proving the tenor of a report of subvaluation in 1629 was passed in absence. *E. of Haddington* v. *Balfour*, 1830, S. (Teinds) 242.

1526. Proving the Tenor—Trust Deed—Cancellation by Agent in Mistake.—In an action of proving the tenor of a deed of instructions relative to a trust deed, which had been rendered *ex facie* improbative by the agent for the granter having, on the execution of a new deed of instructions, drawn his pen through the signature and written the word "cancelled" on the back of the deed, the court *sustained* as adminicles the cancelled deed, the relative trust deed, and the later deed of instructions, which contained no revocation of the former deed; and the agent having deponed that he had received no instructions from the testator to cancel the former deed of instructions, and that he had done so in a moment of inconsideration, the court *found* the tenor proved. *Cunningham* v. *Mouat's Trs.*, 1851, 13 D. 1376; 23 J. 640.

1527. Proving the Tenor—Title to Sue.—Circumstances in which it was held that a party had *hoc statu* no title to pursue an action of proving the tenor of a royal charter of *novodamus* containing a grant of the honours of peerage, along with certain lands in Scotland and America. *Alexander* v. *Lord Advocate*, 1830, 8 S. 634.

1528. Proving the Tenor—Valuation of Teinds—Report of Subcommissioners.—A report of the subcommissioners appointed for the valuation of the stock and teind of the lands within the presbytery of Argyll, dated in 1629, had been repeatedly given effect to in approbations and localities. Part of the original document had become illegible, apparently from damp, and part appeared to have been worn away. A copy of the entire document, supposed to be made about 1720, was preserved in the teind office, but the writer was not known. From this copy, which was not in all respects a faithful transcript, the deficiencies in the original could be supplied. In an action of proving the tenor of a portion of that part of the report which had been destroyed, *held* (1) that in the circumstances no special *casus amissionis* need be proved; and (2) that the tenor had been sufficiently instructed by the proceedings in the localities, etc., together with the copy produced. *D. of Argyll* v. *Campbell*, 1873, 11 M. 611; 45 J. 383. Cf. *Richmond* v. *Officers of State*, 1869, 7 M. 956; 41 J. 539. *Lynedoch* v. *Liston*, 1841, 3 D. 1078; 10 Fac. 1121.

1529. Proving the Tenor—Will—Casus amissionis—Insufficiency of Proof.—Circumstances in which *held* that the *casus amissionis* in an action of proving of the tenor was not proved, and defender assoilzied. *Reid* v. *Reid*, 1868, 5 S. L. R. 492.

1530. Proving the Tenor—Will—Casus amissionis—Specification.—The pursuers in an action of proving the tenor of four testamentary writings, which they founded on as containing their title to sue an action of reduction of another testamentary writing, averred that the writings had been destroyed by the maker of them, or by others under her directions, when she was in an unsound state of mind, or without her authority. The defenders pleaded insufficient specification. The court *allowed* a proof before answer. *Kennedys* v. *Macdonald*, 1866, 2 S. L. R. 171.

1531. Proving the Tenor—Writer or Witnesses.—The tenor of a deed *found* proven, although it was not shown who the writer or witnesses were. *Ronald* v. *Sang*, 1852, 14 D. 357; 24 J. 168.

1532. Pupil—Tutor ad litem—Appeal.—Pending an appeal to the House of Lords, in a multiplepoinding, a child was born who had an interest in the questions decided by the judgment under appeal. A motion to receive a claim for the child, and appoint a tutor *ad litem* to protect his interests in the House of Lords, *refused*, it being competent for a party to make appearance in a suit for the first time in the House of Lords. *Ferguson's Trs.* v. *Hamilton*, 1861, 23 D. 1290; 33 J. 646.

1533. Pursuers—Accumulation of—Creditors.—An agreement was entered into by a number of creditors (to whom various debts of different amounts were due), and certain other parties who had possession of funds to pay these debts, whereby their mutual rights and interests were regulated. *Held* that the creditors had a joint interest under the agreement to enforce consignation and distribution of the funds, by an action at their instance against the holders, although the summons did not state the amount of each creditor's claim. *M'Lachlan's Exrs.* v. *Crawford*, 1850, 12 D. 467; 22 J. 138.

1534. Pursuers — Accumulation of — River Pollution.—In an action at the instance of four persons, as proprietors of different lands on the banks of a river, against three sets of defenders, paper manufacturers, having their works at different places on the banks of the river, grounded on alleged pollution of the stream by the defenders discharging noxious matter into it from their respective works, and seeking to have such pollution interdicted, *held* that there was such a community of interest between the pursuers as entitled them to sue jointly against all the alleged wrong-doers. *D. of Buccleuch, etc.* v. *Cowan & Sons, etc.*, 1864, 2 M. 653; 36 J. 311.

1535. Pursuers — Accumulation of — Separate Wrongs.—When two persons allege injury by one calumnious statement, it is competent for both to insist for damages in one summons, if the damage due to each be separately concluded for; but each must take a separate issue. *Harkes* v. *Mowat*, 1862, 24 D. 701; 34 J. 348.

1536. Pursuers — Accumulation of — Separate Wrongs.—The respective creditors in two bonds granted by the same parties at the same time over the same subjects raised an action of damages against the law agent of the borrowers, on the allegation that the defender had delivered the bonds to the pursuers in the knowledge that certain of the signatures attached thereto were forged. The summons concluded for payment of one sum of damages. *Held* that the action was incompetent, in respect there was no community of interest between the two sets of pursuers. *Gibson* v. *Macqueen*, 1866, 5 M. 113; 39 J. 56.

1537. Pursuer—Addition of New Pursuers —Amendment.—*Held* that the 29th section of the Court of Session Act of 1868 authorising amendment of "any error or defect in the record or issues in any action or proceeding," etc., did not authorise an amendment of a summons raised in name of A B as owner of a vessel to the effect of introducing new pursuers into the action as joint-owners of the vessel. *Andersen* v. *Harboe*, 1871, 10 M. 217; 44 J. 133.

1538. Pursuer—Assignee of Share—Companies Clauses Consolidation Act, 1845, s. 16.—*Held* that the provision of the Companies Clauses Act, 1845, excluding the purchaser of a share from receiving any share of the profits of the undertaking until registered as a shareholder, did not debar the assignee of a shareholder before registration from insisting in an action raised by his cedent for the purpose of determining the validity of an arrestment on the share used by the company. *Anderson* v. *Scottish N.-E. Rly. Co.*, 1866, 1 S. L. R. 116.

1539. Pursuer — Suing under an Assumed Name.—*Held* that a person may sue under a new name assumed by himself, even though assumed without any royal or judicial authority. *Kinloch* v. *Lourie*, 1853, 16 D. 197.

1540. Pursuer—Action at Instance of Crown — Commissioners of Woods and Forests — Lords of the Treasury. — A summons was raised in name of the Commissioners of Woods and Forests, and called in their name after the intermediate passing of an Act, declaring the right to sue in such matters to be in the Lords of the Treasury; and the latter having craved to be sisted, *held* that the summons was incompetently called in name of the commissioners, and that there was consequently no process in which the Lords of the Treasury could be sisted. *Lords of the Treasury* v. *Campbell's Trs.*, 1836, 14 S. 657; 11 Fac. 556.

1541. Pursuer — Defenders — Designation of.—The proper designation of a person is his present occupation and residence. *Joel* v. *Gill*, 1859, 22 D. 6; 32 J. 8.

1542. Pursuer—Death of—Public Office—Competency of Deciding the Case before his Successor Appointed—Judicial Factor. —In an action for payment of a legacy for behoof of the poor of a parish, the pursuers were the minister, the sheriff-substitute, and the sheriff-clerk-depute of the district. When the case was at avizandum, the minister died, and the settlement of his successor was disputed. All parties to the suit concurred in craving judgment without waiting for the induction of a minister, or otherwise for the appointment of a judicial factor to represent the minister of the parish. The court *refused* the note. *Boe* v. *Anderson*, 1861, 23 D. 726.

1543. Pursuer—Designation—"Trustees of A."—"The trustees of A" (without any specification of the individuals) is not a name under which parties can sue or defend. *Bell* v. *Trotter's Trs.*, 1841, 3 D. 380; 16 Fac. 348.

1544. Pursuer—Designation and Address of.—Motion in a declarator of marriage to have the pursuer ordained to furnish her present address *refused*. *Sceales* v. *Sceales*, 1866, 4 M. 300; 38 J. 156.

1545. Pursuer — Designation — Pursuers Designed as Heirs of Provision of the Original Granter Instead of his Widow.—A party disponed property to his widow, whom failing, to substitutes; these substitutes brought a reduction of a deed executed by the widow on death-bed, describing themselves as heirs of provision of the original granter, whereas it appeared from the deed narrated in the summons that they were heirs of provision of the widow. The court *refused* to sustain the action or a supplementary summons, reserving to the pursuer to bring a proper action. *M'Indoe* v. *Lyon*, 1826, 5 S. 92; 2 Fac. 60. 1830, 4 W. & S. 391.

1546. Pursuer — Designation — Party Claiming to be a Peer.—A summons being raised by a party claiming a peerage (but whose right thereto had never been recognised by any competent tribunal), under the style and title of a peer, *allowed* to proceed, con-

trary to a previous judgment. *E. of Stirling* v. *Officers of State*, 1831, 9 S. 413.

1547. Pursuer — Suing as Executor of Deceased without any Title — Decree in Absence—Suspension. —A next-of-kin, suing as executor of a person deceased, obtained decree in absence. At the date of the decree he had no title in that character. *Held*, in a suspension of the decree, that the pursuer had no title to sue; and decree accordingly suspended. *Malcolm* v. *Dick*, 1866, 5 M. 18; 39 J. 17.

1548. Pursuer—Justice of the Peace—Reduction of Quarter Sessions Judgment—Averment of Title.—Objection *repelled*, that the title of a justice of the peace to bring under reduction a judgment of the quarter sessions at which he had been present, and from which he had dissented, had not been relevantly set forth in the summons; and *observed*, that the title was to be sought not merely as set forth in the beginning of the summons announcing the character in which the pursuer appeared, but in the narrative of the introductory part of the summons. *E. of Minto* v. *Roxburgh*, 1846, 8 D. 481; 18 J. 216.

1549. Pursuer — Married Woman — Husband's Concurrence—Action Relating to Property from which jus mariti Excluded.—*Held* that a married woman is entitled to sue in her own name an action relating to a subject from which her husband's *jus mariti* is excluded; and that if resident in Scotland herself she is not bound to sist a mandatary, although her husband be absent from the country. *Mackay* v. *Allan, etc.*, 1868, 40 J. 221.

1550. Pursuer — Married Woman — Defender's Averment — Sist of Alleged Husband. — The pursuer of an action had gone through a ceremony of marriage which she and her alleged husband stated to have been a nullity. The defender pleaded that the pursuer had no title to sue, in respect that her husband did not concur. A minute was lodged in process by the alleged husband, craving to be sisted as a party for any interest he might have. The court sisted him in terms of the minute, and *held* the defender's objection to be obviated. *Lynch* v. *Stewart*, 1871, 9 M. 860; 43 J. 522.

1551. Pursuer — Poor Rates — Parochial Board—Collector or Treasurer or Inspector. —A parochial board appointed two persons as interim joint collectors of assessments, one of whom was to act as collector, and the other as treasurer. *Held*, in a suspension of diligence for recovery of arrears at the instance of the former alone, that he, and not the inspector, was the proper party to raise such diligence; and that, having regard to the terms of the appointment, it was not necessary that the diligence should be at their joint instance. *Leys* v. *Riddell*, 1851, 13 D. 630; 23 J. 281.

1552. Pursuer — Sist of Assignee as Pursuer—Terms of Assignation.—A party who had executed inhibition on a depending action, in which he obtained decree, raised a reduction of a conveyance by the debtor of heritable property *spreta inhibitione*, and thereafter assigned the decree, "and diligence thereon," and all that was competent to follow on the decree, to a third party, after which he went abroad. *Held* that the assignation was sufficient to entitle the assignee to be sisted either as mandatary or assignee, although there was no specific mention of the reduction. *Stewart* v. *Kidd*, 1852, 14 D. 527; 24 J. 266; 1 Stuart 492.

1553. Pursuer—Sist of New Pursuer—Objection to Title of New Pursuer Excluded by Interlocutor Sisting.—An original pursuer of an action, whose title to sue was objected to as depending on his survivance, died *pendente processu*; and a party holding a general disposition by him was sisted as pursuer in his place. *Question*, whether an objection to the title of the new pursuer, that the contingent interest of her alleged author had fallen by his death, was not excluded by the interlocutor sisting. *Campbell* v. *Campbell*, 1865, 3 M. 360; 37 J. 186.

1554. Pursuer—Sist of New Pursuer—Assignee. — An assignation of stock of a railway company which had been arrested by the company in their own hands, *held* to give the assignee right to insist in an action of reduction of the arrestments instituted by the cedent, although it had been dismissed in so far as the original pursuer was concerned, the assignee having been previously sisted "as a party in the action, as in right of the said stock." *Watt* v. *Scottish N.-E. Rly. Co.*, 1866, 4 M. 318; 38 J. 252.

1555. Pursuer—Three Pursuers—Action of Declarator — Death of one Pursuer—Right of Remaining Pursuers to Maintain the Action without Sisting Representatives of Deceased.—Where one of three pursuers of an action of declarator and damages died abroad in the course of the proceedings, *held* that the other two parties having a sufficient title to pursue the declaratory conclusions of the libel, to the extent of their own rights and interests, might proceed to the effect of ascertaining their rights, without sisting the deceased pursuer's heirs. *Butchart* v. *Prophet*, 1841, 3 D. 1040; 16 Fac. 1085.

1556. Pursuer — Title — Letters of Administration—Production—Sist until Produced. — A party libelled upon letters of administration to a party deceased as his title to sue, but did not produce the letters. The court *superseded* procedure till the title was produced. *Horne & Rose* v. *Ram*, 1848, 11 D. 141; 21 J. 23.

1557. Pursuer — Title to Sue—Conclusions in Favour of Pursuer's Children.— A married woman raised a declarator against her children and grandchildren, in which she sought to have it declared that, in virtue of her marriage-contract, a right to certain property had vested in her children. *Held* that as the summons contained no conclusions

in her own favour, she had no title to sue. The objection was taken by the court, and the defenders were willing to waive it. *Baillie* v. *Seton*, 1853, 16 D. 216; 26 J. 112.

1558. Pursuer—Title to Sue—Action of Damages for Infringement of Copyright—Interlocutor Repelling Plea of no Title not Reclaimed against.—A defender in an action of damages for infringement of copyright, having allowed an interlocutor of a Lord Ordinary repelling a plea of no title to sue, in so far as preliminary, to become final, *held* precluded from objecting to the title on the closed record. *Graves & Co.* v. *Logan*, 1868, 7 M. 204; 41 J. 126.

1559. Pursuer—Title to Sue—Infeftment after Action Raised.—The pursuer of an action of declarator of right to a stream alleged possession of the ground adjoining. After raising the action, he completed his title by infeftment. Title to sue *sustained*. *Welsh* v. *Robertson*, 1857, 19 D. 404.

1560. Pursuer—Title to Sue—Police Commissioners—Minority of.—Against a resolution of a majority of police commissioners, the minority, designing themselves ratepayers and also police commissioners—but not stating that they were a minority—brought a suspension and interdict, and afterwards a declarator, containing various conclusions as to the duties of the commissioners. *Held* that they had libelled a good title to sue, and that it was not necessary, before discussing the merits, to sist the acting, in respect the proprietors and occupiers of houses in streets to which the conclusions of the action related had not been called. *Taylor* v. *Commrs. of Police for Kilmarnock*, 1858, 20 D. 501; 30 J. 268.

1561. Pursuer—Title to Sue—Necessity for Defender Specifying Objections to Pursuer's Title.—A general plea, striking at the pursuer's title, can apply only to the objections specified in the record, and cannot embrace objections the knowledge of which has admittedly emerged only after the record has been closed. *Observed*, parties are bound to specify objections to title, and have no right, under a general plea, to maintain objections of which notice has not been given. *N. B. Rly. Co.* v. *Brown, Gordon, & Co.*, 1857, 19 D. 840; 29 J. 393.

1562. Pursuer—Title to Sue—Necessity of Setting Forth.—A party not having the title set forth by him, process *dismissed* without deciding whether the title actually possessed by him was sufficient. *Pollock* v. *Mather*, 1829, 7 S. 675.

1563. Pursuer—Reduction—Title to Sue—Party Having a jus quæsitum under Deed.—Any party having a *jus quæsitum* under a deed has a title to sue a reduction of another deed granted in prejudice thereof. *M'Gowan* v. *Robb*, 1862, 1 M. 141; 35 J. 72.

1564. Pursuers—Title to Sue—Proprietors of One-Half of a Property Held pro indiviso—Delay in Stating Plea—Bar.—In an action at the instance of the proprietors of one-half of a property held *pro indiviso* for declarator as to the boundaries of the property, after a proof had been allowed and taken, the defenders objected that the pursuers had no title to sue, in respect the other *pro indiviso* proprietors did not concur in the action. *Held* (1) that the defenders, by going to proof, had waived the objection; and (2) that it was also incompetent for them to plead the objection, in respect they had stated no plea against the pursuer's title. *Lade, etc.* v. *Largs Baking Co.*, 1863, 2 M. 17; 36 J. 16.

1565. Pursuer—Title to Sue—Action of—Reduction of Document—Father Acting for Behoof of Son.—In an ordinary action on and a reduction of a document in these terms—"Crieff, 26 May 1832,—I acknowledge to have received from Mr. Alexander Fisher, and in behoof of his son, John Fisher, heir to the said Alexander, the sum of £100 sterling, to be sunk in the stock of Amulree farm, occupied by me, and for which sum I hereby become bound, my heirs and executors, to refund to them, with interest yearly from this date. Joseph M'Laren," — *held* that Alexander Fisher had a good title to pursue, but that it was proper the son should be made a party. *Campbell* v. *Fisher*, 1838, 16 S. 1279.

1566. Pursuer — Title to Sue — Reduction of a Matriculation of Arms.—An action of reduction of a matriculation of arms is incompetent where the pursuer does not set forth that he has right to the arms. *M'Donnell* v. *Macdonald*, 1826, 4 S. 371; 1 Fac. 220.

1567. Pursuer—Title to Sue—Reduction of Heritable Title—Both Pursuer's and Defender's Title Defective—Defender in Possession.—The pursuer and defender in an action of reduction ultimately derived right to heritage from a common author who was not infeft. The pursuer's reduction was based on the ground that the defender in connecting herself with the common author had served as nearest heir in place of heir of provision to an intermediate possessor of the subjects. *Held* that, although the defender's title was defective, yet the pursuer, as he could not connect himself with any ancestor who was infeft, had no title to sue. *Irving* v. *Irving*, 1837, 15 S. 993; 12 Fac. 926.

1568. Pursuer—Trustee—Averments as to Title.—A summons at the instance of "A. B., writer in Elgin, pursuer," contained conclusions directed to his obtaining, as trustee under the settlement of a party deceased, certain subjects in the possession of the defenders. There was also a conclusion for "payment to the pursuer" of damages for violent profits. His title was stated in the condescendence. On an objection that the title was not properly set forth in the summons, a minute of amendment was put in, proposing, before the word "pursuer," to insert his designation as trustee under the settlement. Amendment *sustained*, and objection *repelled*. *Anderson* v. *Duncan, etc.*, 1861, 23 D. 258; 33 J. 118.

1569. Pursuer — Voluntary Association —Building Society—Rules Providing that Society to Sue and be Sued in Name of Preses and Treasurer.—Where the office-bearers of a society have, by the articles thereof, power to sue, they must set forth that title in their libel, and that the defender has become a party to these articles. *Gillies* v. *Hunter*, 1831, 9 S. 257; 6 Fac. 170.

1570. Pursuer — Voluntary Association Committee of Management of a Coffee-Room.—An action at the instance of individuals, as "a majority of the committee of management of the Greenock Coffee-room," against the minority, to have the furniture, etc. delivered to them, and authority to sell for payment of the debts of the society, *held* incompetent, although it was alleged that individually they had an interest in the suit. *Wilson* v. *Kippen*, 1823, 2 S. 378; and 1822 1 S. 304.

1571. Pursuer —Kirk-Session—Corporation.—A summons at the instance of a kirk-session and of the members thereof individually, *held* incompetent, as a kirk-session is not a corporation; but an amendment allowed by consent, so as to make the summons at the instance of the individual members of the session for themselves, and as composing the kirk-session. *Kirk-Session of North Berwick* v. *Seine*, 1839, 2 D. 23. See *Forbes* v. *Town Council of Glasgow*, 1837, 15 S. 628; 1839, M'L. & R. 530.

1572. Pursuer—Voluntary Association—Preses and Treasurer.—An action was raised by the preses and treasurer of an unincorporated society, against a member, concluding for sums due to the society; and on an objection to the title, the other members were sisted as pursuers, on paying ten shillings of expenses, which sum the defender's agent uplifted. *Held* in a reduction of the decree, that the defender could not object to the original instance as null. *Wood* v. *M'Caul*, 1833, 12 S. 50.

1573. Pursuer — Voluntary Association —Religious Societies.—Legacies being left to societies for promoting religion, *found* that they could pursue for them either in their own names or in that of their officers. *Somervail* v. *Edinburgh Bible Society*, 1830, 8 S. 370.

1574. Pursuer—Voluntary Association—Masonic Lodge—Treasurer.—*Leslie* v. *Sproat*, 1829, 7 S. 312.

1575. Pursuer — Voluntary Association —Unincorporated Society for Building a Town-house—Committee.—The members of an unincorporated society of subscribers for building a town-house, etc., bound themselves by articles to pay a subscription by five instalments to a committee, and authorised the committee to uplift the subscription. *Held* that two of the members who had paid two instalments were not entitled to object to the title of the committee to pursue for the remaining instalments. *Gemmel* v. *Barclay*, 1830, 9 S. 33; 6 Fac. 28.

1576. Quarter Sessions — Appeal from Petty Sessions—Re-Examination of Witnesses—7 and 8 Geo. IV. c. 53.—*Held* that justices in quarter sessions had acted illegally in refusing to allow a witness examined at the petty sessions to be re-examined. *Allice* v. *Scott*, 1863, 1 M. 406.

1577. Railway and Canal Traffic Act, 1854, ss. 2 and 3—Preference to Traders—Petition or Summons.—An application to the court under the above sections is intended to be a summary proceeding and must be by way of summons, not petition. *Anderson* v. *Scottish N. E. Rly. Co.*, 1863, 1 M. 910; 35 J. 541.

1578. Reclaiming Note—Cessio—Intimation—Cessio Act, 1836, s. 8—A. S. 24 Dec. 1838, s. 13.—*Mackay*, 1866, 1 S. L. R. 174.

1579. Reclaiming Note—Competency—Advocation—Final or Interlocutory Judgment?—In a petition for interdict against operations on two drains, the sheriff refused the interdict as to one of them, and ordered minutes of debate as to the other. *Held* that his judgment refusing the interdict was final, and not interlocutory; and that therefore an interlocutor of the Lord Ordinary on the Bills in an advocation might be reviewed by the court. *Macfie & Sons* v. *Mags. of Greenock*, 1850, 12 D. 1033; 22 J. 454.

1580. Reclaiming Note—Competency—Appointment of Arbiter under Lands Clauses Acts—Ministerial Act of Lord Ordinary.—A reclaiming note from a judgment of the Lord Ordinary, refusing to recall the appointment of an oversman, in a reference under the Lands Clauses Act, on the ground that he had no power under the Act to do so, the person at first appointed by him not being disqualified, is incompetent. *Mackenzie* v. *Inverness & Ross-shire Rly. Co.*, 1861, 24 D. 251; 34 J. 125.

1581. Reclaiming Note—Competency—Approval of Issue—Personal Bar.—*Held* that where an issue had been approved of by the Lord Ordinary, and one of the parties then moved him, under s. 40 of 13 and 14 Vict. c. 36, to fix the day for trial, such motion inferred the finality of the issue so approved of, and that it was incompetent for that party thereafter to reclaim against the interlocutor approving of the issue or to move the court to vary its terms. *Craig* v. *Jex-Blake*, 1871, 9 M. 715; 43 J. 363.

1582. Reclaiming Note—Competency—Bill Chamber—Judgment Passing the Note.—After an objection to the competency of an advocation had been disregarded in the Bill Chamber, and the note passed, *held* incompetent to reclaim against an interlocutor of the Lord Ordinary in the Outer House repelling the objection. *Henderson* v. *Smith*, 1849, 11 D. 1014.

1583. Reclaiming Note—Competency—Bill Chamber—Bill for Loosing Arrestments.—A bill for loosing arrestment on a vessel having been passed, letters of loosing

were executed, and the vessel sailed from this country. On the day of the vessel's departure, the arresters presented a reclaiming note against the interlocutor passing the bill. *Held* that it was competent. *Ballinten* v. *Connon*, 1848, 11 D. 26; 20 J. 583.

1584. Reclaiming Note—Competency—Burial-Grounds (Scotland) Act, s. 10.—*Held* (1) that under s. 10 of the Burial-Grounds (Scotland) Act an appeal is competent to any Lord Ordinary against a judgment of the sheriff as to the suitability of a proposed burial-ground, and that the right of appeal is not limited to questions arising between the parochial board and the owner of the ground; and (2) that the judgment of the Lord Ordinary is final. *Campbell* v. *Dunlop & Wilkie*, 1864, 2 M. 503; 36 J. 248.

1585. Reclaiming Note—Competency—Decision of Lord Ordinary as to Expenses under the Lands Clauses Act.—*Question*, whether the decree of the Lord Ordinary for expenses, under s. 82 of the Lands Clauses Consolidation Act, 8 and 9 Vict. c. 19, can be reviewed by the Inner House; but *held* that his judgment is reviewable where he has awarded expenses not authorised by the statute. *Graham* v. *Caledonian Rly. Co.*, 1848, 10 D. 495; 20 J. 151.

1586. Reclaiming Note—Competency—Decree in Absence—Court of Session Act, 1850, s. 11.—A decree in respect of no defences, in a cause where the summons had been taken out to see, and which had been twice continued on motions by the defender's counsel, is a decree not by default, but in absence, and the defender may be reponed against it at any time before extract. *Marjoribanks* v. *Borthwick*, 1857, 19 D. 474; 29 J. 219.

1587. Reclaiming Note—Competency—Dilatory Pleas—Judicature Act, s. 5.—A reclaiming note by a defender against an interlocutor repelling preliminary pleas *refused* as incompetent, in respect that the defender had not given notice of his intention to reclaim. *Smith* v. *Goldie*, 1863, 2 M. 99; 36 J. 48.

1588. Reclaiming Note—Competency—Error in Name of Reclaimer.—A reclaiming note in a suspension bore to be in name of "John," while the name of the charger and reclaimer was "James." *Held* that the error was not fatal to the competency of the reclaiming note, and correction of it allowed. *Mackenzie* v. *Cameron*, 1853, 15 D. 664; 15 J. 404; 2 Stuart 392.

1589. Reclaiming Note—Competency—Failure to send Copies for Opponent.—Objection to the competency of a reclaiming note to be reponed against a judgment by default, that six copies had not been served on the respondent, *repelled*. *Mitchell* v. *Douglas*, 1855, 17 D. 772; 27 J. 388.

1590. Reclaiming Note—Competency—Failure to Send Copies to the Respondent's Agent.—An objection to a reclaiming note, that six copies had not been delivered to the respondent's agent, having been proved, the note *refused* as incompetent. *Taylor* v. *M'Donald*, 1844, 6 D. 637; 16 J. 302.

1591. Reclaiming Note—Competency—Implement.—An interlocutor which has been voluntarily implemented cannot be reviewed. *Menzies* v. *Menzies*, 1863, 1 M. 1025; 35 J. 590.

1592. Reclaiming Note—Competency—Interlocutor Extracted.—*Held* by the whole court, that where a Lord Ordinary had, in respect of no appearance by the pursuer, sustained one of the defences, assoilzied and allowed the decree of absolvitor to be extracted *ad interim*, a reclaiming note, presented by the pursuer within the reclaiming days, was competent, although the decree had been previously extracted. *Johnstone* v. *Johnstone*, 1845, 8 D. 23; 18 J. 17.

1593. Reclaiming Note—Competency—Interlocutor in Terms of Remit from Inner House.—A reclaiming note against an interlocutor of a Lord Ordinary, pronounced in consequence of a remit from the Inner House, *held* competent, to the effect of enabling the court to determine whether the interlocutor had been pronounced in terms of the remit or not, but to no other effect. *Munro* v. *Sir P. M. T. Budge*, 1845, 7 D. 1044; 17 J. 534.

1594. Reclaiming Note — Competency — Interlocutor Passing Note of Suspension.—The interlocutor passing a note of suspension may be reclaimed against within fourteen days. *Mackenzie* v. *Cameron*, 1853, 15 D. 664; 15 J. 404; 2 Stuart 392.

1595. Reclaiming Note — Competency — Interlocutor Pronounced by Lord Ordinary after Advising with Inner House.—An interlocutor pronounced by the Lord Ordinary on the Bills, on advising with the Inner House, may be reviewed by a reclaiming note. *Farrell* v. *Willox*, 1849, 11 D. 565; 21 J. 163.

1596. Reclaiming — Competency — Interlocutor Reclaimed against Implemented.—*Held* incompetent to reclaim against an interlocutor requiring an accountant to say whether he was in a situation to make an available and satisfactory report, without access to documents, the production or exhibition of which had been objected to, and the judgment upon which objections was under appeal; or whether any report he could then make might be affected in its import or results by access to these documents, if ultimately allowed. *North British Bank* v. *Collins*, 1853, 16 D. 205; 26 J. 102.

1597. Reclaiming Note — Competency — Interlocutor in Absence—Court of Session Act, 1850, s. 11.—In a multiplepoinding, the first interlocutor being pronounced in absence may be reclaimed against within twenty-one days. *Salmond* v. *Young*, 1860, 23 D. 146; 33 J. 68.

1598. Reclaiming Note — Competency — Interlocutor on the Merits — Court of

Session Act, 1850, s. 11.—In a suspension of a decree in absence in an action at the instance of several parties, pleas—(1) of incompetency, in respect the respondents had no joint interest; and (2) that the interest of each was under £25—*held* to be on the merits of the suspension: therefore that a judgment on them could be reclaimed against within twenty-one days. *Henderson* v. *M'Millan*, 1857, 20 D. 149; 30 J. 84.

1599. Reclaiming Note — Competency — Interlocutor on the Merits — Court of Session Act, 1850, s. 11.—Judgment "conform to the conclusions of the libel," pronounced by default against a defender in the debate-roll, is a judgment disposing of the merits, which may be competently reclaimed against within twenty-one days. *Young* v. *Mackenzie*, 1859, 21 D. 1358; 31 J. 744.

1600. Reclaiming Note — Competency — Interlocutor on the Merits—Prescription—Court of Session Act, 1850, s. 11.—In an action for the price of a "koker" or tank said to have been furnished to the defender, the Lord Ordinary sustained a plea founded on the quinquennial prescription. *Held* that this was an interlocutor disposing in part of the merits of the cause, and objection to the competency of a reclaiming note presented after the lapse of ten days repelled. *Kennard & Sons* v. *Wright*, 1864, 2 M. 677; 36 J. 338.

1601. Reclaiming Note — Competency — Interlocutor on the Merits—Order for Consignation—Court of Session Act, 1850, s. 11.—*Held* that an interlocutor allowing decree of consignation of the fund *in medio* in a multiplepoinding to go out against the pursuers and real raisers, is a judgment disposing in part of the merits of the cause, which may be competently reclaimed against within twenty-one days. *Duthie's Trs.* v. *Duthie*, 1864, 2 M. 388; 36 J. 188.

1602. Reclaiming Note — Competency — Interlocutor on the Merits—Court of Session Act, 1850, s. 11.—A reclaiming note, presented beyond the lapse of ten days, in a suspension of a decree of removing, against an interlocutor allowing reference to oath for the purpose of proving a lease for three years, and recalling the interlocutor of the sheriff, who had held a reference incompetent, and had decerned in the removing, *held* competent, the interlocutor being one which disposed of the merits, seeing that it recalled the decree of removing. *Walker* v. *Flint*, 1863, 1 M. 303; 35 J. 253.

1603. Reclaiming Note—Competency—Interlocutor on the Merits — Court of Session Act, 1850, s. 11.—A suspender having failed to lodge reasons of suspension, the Lord Ordinary decerned against him. *Held* that a reclaiming note, praying to be reponed against that interlocutor, was competently lodged within twenty-one days. *Anderson* v. *Brown*, 1854, 16 D. 367; 26 J. 175.

1604. Reclaiming Note—Competency—Interlocutor on the Merits — Court of Session Act, 1850, s. 11.—A judgment disposing of preliminary defences objecting to title in a reduction, is a judgment on the merits, and may be reclaimed against without the consent of the Lord Ordinary, and after the lapse of ten days. *Threshie* v. *Johnston*, 1854, 16 D. 341.

1605. Reclaiming Note—Competency—Interlocutor on the Merits — Court of Session Act, 1850, s. 11.—A claimant in a multiplepoinding was allowed to withdraw his claim, under reservation of all questions of expenses; and having been subsequently found liable in expenses, he reclaimed. *Held* that the interlocutor was a judgment upon the merits and was reclaimable within twenty-one days. *Fisher* v. *Pearson*, 1851, 13 D. 906; 23 J. 410.

1606. Reclaiming Note—Competency—Interlocutor on the Merits — Court of Session Act, 1850, s. 11.—A claimant in a multiplepoinding having failed to put in a minute stating whether he undertook to prove certain facts, the Lord Ordinary dismissed his claim, and preferred the competing claimant to the fund *in medio*, and granted warrant to pay the consigned fund to him. *Held* that this interlocutor was one disposing of the merits, which might be reclaimed against within twenty-one days. *Thomson* v. *Thomson*, 1851, 13 D. 1260; 23 J. 619.

1607. Reclaiming Note—Competency—Interlocutor on the Merits — Court of Session Act, 1850, s. 11.—In a petition for recall of sequestration, the petitioner was ordered to lodge a condescendence, and sist a mandatary, and having failed to do so, the Lord Ordinary dismissed the petition; and a reclaiming note, praying to be reponed, was refused, as not being lodged within ten days; whereupon another was presented within twenty-one days, without leave of the judge, praying the court to recall the interlocutor, and allow the petitioner a proof of the averments in his petition. *Held* that this note was competent. *Arnold* v. *Winton & Co.*, 1852, 14 D. 769; 24 J. 446; 1 Stuart 728.

1608. Reclaiming Note—Competency—Interlocutor on the Merits—Expenses—Court of Session Act, 1850, s. 11.—The Lord Ordinary found a defender liable in certain accounts sued for, as they should be taxed. By a subsequent interlocutor he decerned for a certain sum, and found the pursuer entitled to expenses. The defender having reclaimed against this last interlocutor, in so far as he was found liable in expenses, objection to the competency of the reclaiming note, that it should have been presented within ten days, as the interlocutor reclaimed against was not one disposing of the merits of the cause, *repelled*. *Henderson* v. *Jaffray*, 1852, 15 D. 11; 25 J. 16; 2 Stuart 10.

1609. Reclaiming Note—Competency—Interlocutor on the Merits—Interlocutor Finding it Incompetent to Proceed Further

with the Merits of the Case.—An interlocutor finding it "incompetent to pronounce further on the merits of the case," and finding one of the parties liable in expenses, *held* to be an interlocutor on the merits, and a reclaiming note presented more than ten days after the date of the interlocutor *held* competent. *Kirk-Session of Wester Anstruther* v. *Wilkie*, 1868, 5 S. L. R. 495.

1610. Reclaiming Note—Competency—Interlocutor not on the Merits or in Absence—Court of Session Act, 1850, s. 11.—A reclaiming note against an interlocutor assoilzieing the defender, in respect of the pursuer having failed to lodge a condescendence, *refused* as incompetent, in respect it was not presented within ten days. *Falla* v. *Graham*, 1851, 13 D. 482; 23 J. 200.

1611. Reclaiming Note—Competency—Interlocutor not on the Merits or in Absence—Court of Session Act, 1850, s. 11.—The Lord Ordinary having deserned against a pursuer, in respect his counsel stated that he was not instructed, *held* that a reclaiming note praying to be reponed, was incompetent after the expiry of ten days. *M'Lay* v. *Kerr*, 1854, 16 D. 658; 26 J. 309.

1612. Reclaiming Note—Competency—Interlocutor not on the Merits or in Absence—Court of Session Act, 1850, s. 11.—It is incompetent to reclaim against a decree by default after the lapse of ten days, although it be pronounced in a sequestration under the Bankrupt Act. *Arnold* v. *Winton & Co.*, 1852, 24 J. 340; 1 Stuart 610.

1613. Reclaiming Note—Competency—Interlocutor not on the Merits—Court of Session Act, 1850, s. 11.—An interlocutor, refusing a motion to disallow a proposed issue, as rested on grounds not relevant in law to infer damages, and "finding that there is no point of law or relevancy in the case which it is expedient to decide before trial," is not on the merits; and a reclaiming note against such an interlocutor not lodged within ten days is incompetent. *Cairns* v. *Caledonian Rly. Co.*, 1858, 21 D. 116; 31 J. 73.

1614. Reclaiming Note—Competency—Interlocutor not on the Merits or in Absence—Court of Session Act, 1850, s. 11.—A reclaiming note against an interlocutor repelling an objection to the competency of an action does not require to be presented within ten days. *Anstruther* v. *Mitchell & Cullen*, 1857, 19 D. 674; 29 J. 317.

1615. Reclaiming Note—Competency—Intimation of Intention to Reclaim—Judicature Act, s. 5.—Objection to the competency of a reclaiming note, on the ground that a party had not intimated his intention to reclaim to the Lord Ordinary, *repelled*. *M'Laurin* v. *M'Gregor*, 1845, 7 D. 744; 17 J. 353.

1616. Reclaiming Note—Competency—Issue—Motion to Vary.—Where the Lord Ordinary has disallowed an issue *in toto*, and his judgment is not acquiesced in, the proper method is to proceed by reclaiming note and not by motion in the Inner House, as directed by the Court of Session Act, 1868, and A. S. 14th Oct. 1868, in the case where a variation of an issue only is desired. *Hare* v. *Hopes*, 1870, 8 S. L. R. 189. Cf. *M'Arthur* v. *Ballantyne*, 1871, 8 S. L. R. 499.

1617. Reclaiming Note—Competency—Issue — Motion to Vary. — The defenders in an action of reduction reclaimed against the interlocutor of the Lord Ordinary approving of issues, one on fraudulent impetration and the other on the Act, 1696, c. 5. In the Inner House both issues were withdrawn and a single issue on fraud at common law substituted, which was subsequently approved of. *Held* that the defenders had rightly proceeded by reclaiming note, and not by motion, to vary the issues. *Rintoul & Co.* v. *Port Eglinton Storage Co.*, 1869, 7 S. L. R. 199.

1618. Reclaiming Note—Competency—Jury Trial — Issues — Trial before Lord Ordinary without Jury.—The findings of a Lord Ordinary on issues tried before him without a jury are final. *Stewart* v. *Governors of Watson's Hospital*, 1862, 24 D. 256; 34 J. 126. See also *Evans, Arnott, & Co.* v. *Drysdale's Trs.*, 1863, 4 M. 998; 38 J. 508.

1619. Reclaiming Note—Competency—Leave—Interlocutor on the Merits.—*Held* that an interlocutor in a reduction-improbation, refusing the pursuer's motion for certification *contra non producta*, is a decree on the merits, though pronounced before the record was closed, and is reviewable without leave of the Lord Ordinary. *Gracie's Trs.* v. *Ferguson*, 1851, 14 D. 18; 24 J. 11; 1 Stuart 1.

1620. Reclaiming Note—Competency—Leave — Multiplepoinding — Shares Fixed but not Amount of Fund.—In an action of multiplepoinding the Lord Ordinary pronounced an interlocutor exhausting all the questions of law between the different claimants, settling the shares of the fund *in medio* (the amount of which had not been ascertained) to which they were respectively entitled, appointing the case to be enrolled for further procedure, and finding no expenses due to or by any of the competing claimants. *Held* that a reclaiming note without leave of the Lord Ordinary was incompetent. *Kennedy* v. *Taylor*, 1873, 11 M. 603; 45 J. 376.

1621. Reclaiming Note—Competency—Leave—Where Question of Expenses not Disposed of — Judicature Act, s. 17 — Court of Session Act, 1868, ss. 53 and 54.—After various interlocutors dealing with the merits of the competition in a multiplepoinding, the Lord Ordinary pronounced an interlocutor whereby he preferred a claimant to the balance of the fund *in medio*, decerned against the nominal raisers for payment accordingly, and appointed parties to be heard on the question of expenses. *Held* that as the Lord Ordinary's interlocutor had not determined the question of expenses, it could not

be regarded as a final judgment, and that it was not competent to reclaim against it without leave of the Lord Ordinary. *Lamond's Trs.* v. *Croom*, 1872, 10 M. 690; 44 J. 385.

1622. Reclaiming Note—Competency—Leave—Vacation.—Leave to reclaim may be given in vacation. *Galloway* v. *Handyside*, 1854, 16 D. 342.

1623. Reclaiming Note—Competency—Petition.—*Held* that a petition by a minor for a *curator bonis* to himself, his father being alive, was competently presented to the Junior Lord Ordinary, and that in such a petition a reclaiming note was competent only on the merits, no change having been made in this respect by the Court of Session Act, 1868. *M'Nab* v. *M'Nab*, 1871, 10 M. 248; 44 J. 147.

1624. Reclaiming Note—Competency—Petition for Loosing Arrestments — The Debtors (Scotland) Act, 1838, s. 20.—*Held* that a reclaiming note against an interlocutor of the Lord Ordinary, on a petition for loosing arrestments, must be lodged within ten days from the date of the interlocutor, whether the reclaiming days expire during session or in vacation. *Lockhart* v. *Cumming*, 1851, 13 D. 996; 23 J. 459.

1625. Reclaiming Note—Competency—Presented by Party not Appearing before Lord Ordinary. — *Held* that a beneficiary under a trust, on whose application a judicial factor had been appointed in succession to a former factor, and for the purpose *inter alia* of getting that factor's accounts audited and settled, was entitled to appear by reclaiming note and insist in objections to these accounts, though the factor had acquiesced in an interlocutor of the Lord Ordinary adverse to these objections. *Ewing* v. *Barclay*, 1864, 3 M. 127; 37 J. 67.

1626. Reclaiming Note—Competency—Prints of the Record.—*Held* by the whole court that a reclaiming note to be reponed against an interlocutor pronounced after the record was closed, "in respect the counsel for the party failed to appear to debate the case," was competent, without the record being appended. *Wilson* v. *Stark*, 1844, 6 D. 692; 16 J. 605. *Taylor* v. *M'Donald*, 1844, 6 D. 731; 16 J. 340.

1627. Reclaiming Note—Competency—Reclaiming by Respondent who did not Oppose Appointment.—A party served with a petition for appointing a *curator bonis* under the Act 20 and 21 Vict. c. 56, may reclaim against an interlocutor making an appointment, pronounced in absence, as against an interlocutor on the merits. *Sharp* v. *M'Call*, 1860, 23 D. 38; 33 J. 18.

1628. Reclaiming Note—Competency—Security for Salvage—Merchant Shipping Act, 1854, s. 468.—*Held* that an interlocutor by the Lord Ordinary on the Bills in vacation, fixing the amount of security to be found for a claim for salvage, under the above section, was subject to review of the Inner House. *Otis* v. *Kilston, etc.*, 1862, 24 D. 419; 34 J. 206.

1629. Reclaiming Note—Competency—Sending Copies to Opposite Agent—Judicature Act, s. 18.—*Held* that the provisions, requiring six copies of a reclaiming note to be sent to the opposite agent at the date of boxing, were directory merely, and that non-compliance therewith did not render the reclaiming note incompetent. *Campbell's Trs.* v. *Campbell, etc.*, 1868, 6 M. 563; 40 J. 290.

1630. Reclaiming Note—Competency—Sequestration—Onus of Proof in Petition for Sequestration.—A creditor having presented a petition for sequestration of his debtor's estate, the debtor appeared to object. The Lord Ordinary on the Bills allowed to the debtor a proof of the averments on which his objections were founded, and to the creditor a conjunct probation. The debtor having reclaimed, on the ground that the onus of proof lay upon the petitioner, the court sustained the competency of the reclaiming note, recalled the interlocutor, and allowed to each party a proof of his averments, and to both a conjunct probation. *Davis* v. *Hepburn*, 1866, 5 M. 80; 39 J. 47.

1631. Reclaiming Note—Competency—Suspension—Failure to Find Caution.—In a suspension in which the Lord Ordinary had passed the note "on caution," and had afterwards given decree against the suspender for expenses, in respect of no caution having been found, *held* that a reclaiming note against this decree was incompetent, the bill being out of court. *Purdie* v. *Bryson*, 1861, 24 D. 85; 34 J. 98.

1632. Reclaiming Note—Competency—Suspension.—A suspender having failed to carry through a reference to the oath of the charger, and decree refusing suspension having thereupon been pronounced, a reclaiming note to be reponed *held* competent. *Law* v. *Thomson*, 1852, 15 D. 481; 25 J. 17; 2 Stuart 28.

1633. Reclaiming Note—Competency—— Vacation — Suspension — Intimation. — The period for reclaiming against an interlocutor of the Lord Ordinary on the Bills, refusing a note of suspension, having expired during vacation, a reclaiming note, which was not intimated to the respondent's agent nor to the Clerk of the Bills within fourteen days after the date of the interlocutor, was *refused* as incompetent. *Hopkirk* v. *Mochrie*, 1859, 21 D. 835; 31 J. 464.

1634. Reclaiming Note—Expiry of Reclaiming Days—Leave—Administration of Justice and Appeals Act, 1808, s. 16.—An interlocutor of a Lord Ordinary, not reclaimed against, was extracted. Afterwards several interlocutors of the Inner House were appealed to the House of Lords. The appellant then obtained leave from the Lord Ordinary to reclaim against his interlocutor, on the ground that the reclaiming days had been allowed to expire through "mistake or inadvertency."

The Inner House, in the then circumstances of the cause, superseded consideration of the reclaiming note. The House of Lords remitted to the court to consider it. After a lapse of nearly twenty years the son of the reclaimer (who had died) was sisted in the process, and prayed the court to send the note to the roll. Motion *granted*. *Officers of State* v. *Alexander*, 1864, 2 M. 1294; 36 J. 646.

1635. Reclaiming Note—Expiry of Reclaiming Days—Leave—Administration of Justice and Appeals Act, 1808, s. 16.—After an interlocutor had become final by mistake, the party was reponed by the court on a reclaiming note, and payment of expenses in terms of the statute. *Butler* v. *Kirkpatrick*, 1852, 14 D. 546; 24 J. 252; 1 Stuart 481.

1636. Reclaiming Note—Effect of—Removal of Case from Lord Ordinary—Commission to Take Evidence. — *Question*, whether a Lord Ordinary who has decided the relevancy of a case can, pending a reclaiming note against his judgment, grant commission to take evidence to lie *in retentis*. *Swan* v. *Carruthers*, 1857, 19 D. 1015.

1637. Reclaiming Note—Form of—Bill Chamber.—It is necessary to print the words "Bill Chamber" on a reclaiming note against an interlocutor of the Lord Ordinary on the Bills. *Robb* v. *Wright*, 1859, 21 D. 203; 31 J. 111.

1638. Reclaiming Note — Leave to Reclaim — Stat. 48 Geo. III. c. 151, s. 16. — Where a party neglected to reclaim against an interlocutor of the Lord Ordinary within the reclaiming days, and then applied for leave to reclaim, as in a case of "mistake or inadvertency," under the stat. 48 Geo. III. c. 151, s. 16, on the allegation that he had been under a mistaken belief that the proper time for reclaiming against the interlocutor, which contained special findings on the merits of the cause, was when those findings should come to be applied by a subsequent interlocutor and decree, *held* that this was not a case within the true meaning of the statute; and leave to reclaim *refused*. *Williams* v. *MacNee*, 1841, 3 D. 1014; 16 Fac. 1060.

1639. Reclaiming Note — Lodging Defences.—It is competent for a defender to present a reclaiming note, accompanied with defences before extract, against a decree pronounced in respect of failure to lodge defences, although twenty-one days have expired from the date of the decree. *Scottish Union Insurance Co.* v. *Calderwood*, 1836, 14 S. 1114.

1640. Reclaiming Note—Non-Appearance of Counsel—Refusal of Reclaiming Note.—Reclaiming note *refused*, in respect of no appearance of counsel. *Dargavel* v. *Gray*, 1871, 8 S. L. R. 400.

1641. Reclaiming Note—Form of—Note of Suspension—Inferior Court Record—A. S. 24 Dec. 1838.—*Held*, in a suspension on juratory caution, of a charge for expenses awarded by a sheriff in dismissing a petition for interdict, that a reclaiming note against an interlocutor refusing the suspension was not incompetent, because the inferior court record was not appended to the note. *Simpson* v. *Somers*, 1852, 14 D. 773; 24 J. 439; 1 Stuart 716. *Wilsons* v. *Stuart*, 1853, 15 D. 817; 15 J. 501; 2 Stuart 508.

1642. Reclaiming Note—Objection to Lord Ordinary's Finding—When to be Made.—When a respondent in a reclaiming note objects to the Lord Ordinary's interlocutor as to expenses he must do so at the hearing. *Mags. of Arbroath* v. *Dickson*, 1872, 10 M. 630; 44 J. 347.

1643. Reclaiming Note — Form of — Omission of Essential Words in Interlocutor Prefixed.—A reclaiming note in a suspension *refused* as incompetent, on the ground that, in the interlocutor prefixed, the words, "Finds the letters and charge orderly proceeded, and decerns," were omitted. *Don* v. *Richardson*, 1859, 21 D. 751; 31 J. 404.

1644. Reclaiming Note — Form of — Prayer—Suspension.—A note of suspension having been passed, and a record made up and closed, and judgment on the merits pronounced by the Lord Ordinary, a reclaiming note praying the court to "refuse the note," and also to recall and alter the Lord Ordinary's interlocutor, without stating to what effect, *held* competent. *Fife & Kinross Rly. Co.* v. *Deas*, 1859, 21 D. 1205; 31 J. 668.

1645. Reclaiming Note—Previous Interlocutors—Reclaiming Note against Interlocutor Disposing of Expenses — Prior Interlocutors Dealing with Merits — Court of Session Act, 1868, s. 52.—*Held* that an interlocutor of the Lord Ordinary disposing of the whole subject-matter of the cause, but reserving the question of expenses, may be competently submitted to the review of the Inner House, after the lapse of twenty-one days from its date, by a reclaiming note against a subsequent interlocutor disposing of the question of expenses. *Bannatine's Trs.* v. *Cunninghame*, 1872, 10 M. 317; 44 J. 244.

1646. Reclaiming Note—Previous Interlocutors—Reclaiming Note on the Merits in Multiplepoinding—Previous Interlocutor Sustaining Competency of Action, etc.—*Held* that an interlocutor sustaining the competency of an action of multiplepoinding, repelling objections to the fund *in medio*, and ordering consignation of the fund, not having been reclaimed against at the time, could not be objected to after the reclaiming days had expired on a reclaiming note against an interlocutor on the merits. *N. B. Rly. Co.* v. *Gledden, etc.*, 1872, 10 M. 870.

1647. Reclaiming Note — Form of — Printing.—Although special reference was made in the record to a letter in the appendix to it, and the letter was referred to in the Lord Ordinary's interlocutor, yet *held* that a reclaiming note was not incompetent because the letter was not printed. *Campbell* v. *Pringle*, 1852, 14 D. 769; 24 J. 439; 1 Stuart 708.

1648. Reclaiming Note — Reponing. — After the record had been closed and the cause enrolled in the debate roll, the respondent, though repeatedly called, having failed to appear, decree was pronounced against him, "in respect of no appearance." *Held* to be a decree by default, and a remit made to repone him on payment of expenses. *Munro* v. *Dick*, 1840, 3 D. 127.

1649. Reclaiming Note — Time — Bill Chamber — "Marking" — A. S. 24 Dec. 1838.—The requirement in the A. S. 24 Dec. 1838 (for regulation of proceedings in the Bill Chamber), that a reclaiming note shall be "marked" within fourteen days, means that the note shall be marked by the clerk of process within that time. A note therefore cannot be received, unless lodged in time to enable that to be done. *Mackay* v. *M'Culloch*, 1867, 5 M. 401.

1650. Reclaiming Note—Time—Boxing—Cessio—6 and 7 Will. IV. c. 56—A. S. 24 Dec. 1838.—A reclaiming note from a judgment of the sheriff in a *cessio*, which had come before the Lord Ordinary on the Bills during recess, but had not been disposed of by him before the commencement of the session, was not boxed to the judges for a fortnight after the meeting of the court. Objection, that it was too late under the Act of Sederunt, which provides that it shall be boxed "on the meeting of the court," *repelled*. *Galloway* v. *Scrivens*, 1845, 7 D. 355 ; 17 J. 171.

1651. Reclaiming Note—Time—Lodging—Interlocutor Approving of the Auditor's Report and Decerning—Court of Session Act, 1850, s. 11.—An interlocutor approving of the auditor's report, modifying the amount of expenses, and decerning therefor, was reclaimed against by the defender on the 21st day after its date. *Held* that the reclaiming note was incompetent, not having been presented within ten days from the date of the interlocutor, as required by the above section. *Cowper* v. *Callender*, 1872, 10 M. 353 ; 44 J. 212.

1652. Reclaiming Note—Time—Lodging—Interlocutor Limiting Proof to Writ or Oath—A. S. 10 Mar. 1870, s. 2.—*Held* that an interlocutor finding that an alleged agreement could only be proved by writ or oath was not an interlocutor "importing an appointment of proof, or a refusal or postponement of the same," and that it could be competently reclaimed against more than six days after its date. *Stewart* v. *Clark*, 1871, 9 M. 616 ; 43 J. 412.

1653. Reclaiming Note—Time—Lodging—Interlocutor Allowing a Proof before Answer—Court of Session Act, 1868, ss. 27 and 28.—*Held* that an interlocutor allowing a proof before answer did not require to be reclaimed against within six days. *Christie's Trs.* v. *Muirhead*, 1869, 7 M. 1001 ; 41 J. 583. Cf. A. S. 10 Mar. 1870, s. 1.

1654. Reclaiming Note—Time—Lodging—Leave—Double Limitation of Time—Judicature Act, s. 18—Court of Session Act, 1850, s. 11—Court of Session Act, 1868, s. 54.—*Held* that an interlocutor by a Lord Ordinary disposing of part of the merits of the cause may be reclaimed against within twenty-one days of the date when it is signed, provided that the Lord Ordinary's leave to reclaim be obtained, and the reclaiming note be lodged within ten days of the interlocutor granting leave. *Fraser* v. *Fraser, etc.*, 1872, 10 M. 420 ; 44 J. 235.

1655. Reclaiming Note — Time — Saturday.—*Held* that when reclaiming days expire on a Saturday, on which day the offices of the Clerks of Court are not open, a reclaiming note may be received of consent on the following Monday. *Hume* v. *M'Alister*, 17 D. 477 followed. *M'Call & Co.* v. *Laing & Wilson*, 1868, 40 J. 569.

1656. Reclaiming Note—Time—Lodging and Boxing—Vacation.—*Held*, where the reclaiming days in a sequestration expired during vacation, that a reclaiming note was competently presented and boxed on the first box-day after the expiry of the reclaiming days. *Joel* v. *Gill*, 1860, 22 D. 357 ; 32 J. 159.

1657. Reclaiming Note—Time—Time Extended by Order of House of Lords. — A judgment of the Court of Session refusing to examine the appellant's agent in the cause being reversed, and it being stated by the respondent, that by another interlocutor (not appealed from) a similar objection to the admissibility of his agent had been sustained, the House of Lords authorised him to present to the Court of Session a reclaiming petition against that interlocutor, although the reclaiming days had then expired. *Sawyer* v. *E. of March & Ruglen*, 1750, 1 Pat. 479.

1658. Reclaiming Note — Time — Vacation.—Where an interlocutor is pronounced by a Lord Ordinary during session, the reclaiming days do not run during the sittings of the Lords Ordinary, after the rising of the court. *Black* v. *Laidlaw*, 1844, 6 D. 1045 ; 16 J. 542.

1659. Reclaiming Note — Withdrawal — Notice to Keeper of Rolls.—The court having been moved by the respondents to refuse a reclaiming note of consent of both parties, *observed* that notice of withdrawal should have been formally given to the Keeper of the Rolls by a note from both parties before it appeared in the short roll, in order to guide the court in putting out cases for hearing. *Macleod* v. *Inglis*, 1870, 8 S. L. R. 156.

1660. Record—Amendment.—Where the record was closed, the court *refused* to allow an amendment of the libel to be made, which changed the ground of action. *Baird's Trs.* v. *Mitchell*, 1845, 7 D. 1001 ; 17 J. 517.

1661. Record—Amendment—Additional Plea in Law.—A new plea in law *allowed* to be added to a closed record, on payment of all expenses incurred since the date of the summons. *Laurie* v. *Clelland*, 1848, 11 D. 110 ; 21 J. 15.

1662. Record—Amendment—Additional Plea in Law—Judicature Act, s. 11.—A plea added to a closed record, in terms of s. 11 of the Judicature Act, "as fit to be discussed in relation to the facts already set forth." *Struthers* v. *Dykes*, 1845, 7 D. 436; 17 J. 218.

1663. Record—Amendment—Additional Plea—Merchant Shipping Act, 1854, part 9.—In an action of damages brought by a widow for the loss of her husband, in consequence of a collision at sea, after the record was closed, the defender proposed to add an additional plea, to the effect that the pursuer's right of action was barred by her failure to aver on record that she had applied for an inquiry to the Board of Trade, as required by the Merchant Shipping Act. The court *refused* to allow the additional plea, as the effect might be to deprive the pursuer of the remedy she might have had if it had been stated *tempestive*. *Livermore* v. *Duncan*, 1865, 37 J. 202.

1664. Record—Amendment—Additional Pleas—Reduction—Judicature Act, s. 6—A. S. 10 July 1828, s. 51.—In an action of reduction by the heir-at-law, of a deed of settlement of lands, chiefly on the ground of death-bed, the court, after the production had been satisfied, and peremptory defences lodged, *allowed* an additional reason as an amendment, to the effect that the granter of the deeds was precluded from conveying the lands to strangers, by a previous contract of marriage entered into by his father or grandfather, or by other deeds executed by them, or one or other of them. *Miller* v. *Marsh*, 1850, 12 D. 653; 22 J. 231.

1665. Record—Amendment—Alteration.—When a case is in the adjustment-roll, it is incompetent to alter a defence without leave of the Lord Ordinary. *M'Naughton* v. *M'Naughton*, 1860, 23 D. 146; 33 J. 68.

1666. Record—Amendment—Alteration.—It is irregular to make any alteration upon a paper lodged with the clerk of court, even although the opposite party consent, unless the authority of the court to the proposed alteration be first obtained. *Reid* v. *Meux & Co.*, 1861, 24 D. 221.

1667. Record—Amendment—Alteration of Date—Competing Petitions for Service—Judicature Act, s. 10 — Advocation. — A motion to alter a date in a closed record in an advocation of competing petitions for service, after proof led and concluded by the party making the motion, *granted*; the court being of opinion that s. 10 of the Judicature Act, foreclosing parties from further statements after closing a record, did not apply to the case of an advocation of competing petitions for service. *Campbell* v. *Campbell*, 1865, 3 M. 501; 37 J. 238.

1668. Record—Amendment—Alteration in Date of Deed—Expenses.—A deed, which was not in the pursuer's possession, was referred to on record and its date was mentioned. When recovered under a diligence, it turned out that the date alleged was erroneous. After the error was discovered, the pursuer did not amend his record, but proposed an issue, whether certain parties had arranged to execute a deed, and whether it was executed accordingly. *Held* that that was not sufficient, and that the defender was entitled to insist on the date averred on record being inserted in the pursuer's issue. But in these circumstances, on payment of expenses, the record was allowed to be amended after it was closed, and issues lodged. *Bignell* v. *Flint*, 1859, 22 D. 190.

1669. Record—Amendment—Alteration of Important Date.—In an action of damages for certain proceedings which were said to have taken place in 1850, the record being closed and issues adjusted, motion by the pursuer for authority to amend the record and issues, by substituting the words "the spring of 1851" for "about the month of April 1850," as the date of the proceedings complained of, *refused*. *Hill* v. *Kinloch*, 1855, 17 D. 958; 27 J. 487.

1670. Record — Amendment — Material Alterations—Action of Damages by Bank against Directors.—*Held* that, after the record had been closed in an action of damages at the instance of a banking company against the directors, and after a variety of procedure had taken place in discussions upon the relevancy, a proposed amendment of the record, involving a change in the nature of the allegations, was inadmissible. *Western Bank* v. *Bairds*, 1862, 24 D. 859; 34 J. 435.

1671. Record—Alternative Averment.—In judging of the relevancy of a record an alternative averment will be taken on its weaker alternative. *Finnie* v. *Logie*, 1859, 21 D. 825; 31 J. 473.

1672. Record — Amendment — Charter Party, Action on.—A party raised a summons against Sutherland, on a charter-party of a vessel, subscribed by J. and T. as acting for Sutherland. The latter having denied that he had authorised any one to enter into the charter-party on his behalf, the pursuer proposed an amendment to the effect that Sutherland had entered into a joint adventure with J. and T. to charter the vessel; that they held a mandate by him to enter into the charter-party in prosecution of the joint adventure; that J. and T. were not subject to the jurisdiction of the Scots courts; and that Sutherland was liable to the pursuer, reserving his recourse against J. and T. The court *sustained* the amendment. *Gray* v. *Sutherland*, 1847, 9 D. 925; 19 J. 415.

1673. Record — Amendment — Clerical Error.—At the adjustment of issues, the court *allowed* a record to be altered, to the effect of substituting in one article the word "August" for "April," as, in the opinion of the court, the context clearly showed that

the word "April" was a clerical error. *M'Alister* v. *British Plate-Glass Co.*, 1859, 21 D. 546; 31 J. 291.

1674. Record — Amendment — Clerical Error.—Where a pursuer neglected to make the answers in a revised condescendence meet the revised statement of the defender, and alleged, after the record had been closed, that an admission by him did not apply to the corresponding article of the revised defences, but to another which had been transposed on revisal, *held* that this was not a clerical error, but a gross neglect, against which the pursuer could not be reponed without opening up the record; the revised papers ordered to be withdrawn, and a new record to be made up. *Cruickshank* v. *Fairlie*, 1863, 1 M. 928; 35 J. 552.

1675. Record — Amendment — Clerical Error.—The correction of a clerical error in a closed record, and in the condescendence, may be made on the order of the court, without amendment of the libel. In an action of damages for slander, a mistake in the date of the slander *held* to be a clerical error. *Bayne* v. *Macgregor*, 1862, 24 D. 1126; 34 J. 562.

1676. Record — Amendment — Multiplepoinding. — A closed record in a multiplepoinding carries with it all the finality and effects of a closed record in an ordinary action: therefore *held* incompetent to open up a record in order to add matter which was neither *res noviter* nor an explanation of any averment already on record, but in substance a new ground of action. *Stevenson's Trs.* v. *Dumbreck*, 1861, 23 D. (H. L.) 1; 4 Macq. 86; 33 J. 269.

1677. Record — Amendment — Competition in a Multiplepoinding.—Circumstances in which, in a multiplepoinding brought for distribution of a fund, and for exoneration of trustees, *held* that it was competent for the Inner House, being of opinion that the claims had not been so stated as to enable the court to put the proper construction on the trust deed, to open up the record, and allow the claims to be amended. *Ferguson's Trs.* v. *Hamilton*, 1862, 24 D. (H. L.) 8; 34 J. 659; 4 Macq. 397.

1678. Record — Amendment — Competency—Statute.—In an action by a party to compel a railway company to form a line of railway in a particular direction and in terms of a particular statute, *held* that although the statute was partially repealed by a subsequent statute, an amendment of the libel was competent, to the effect of concluding that the line should be made in terms of both statutes. *Colquhoun* v. *Caledonian & Dumbartonshire Rly. Co.*, 1852, 24 J. 612; 1 Stuart 1012.

1679. Record—Amendment—Conditions. —*Held* that a defender in an action for an alleged balance arising upon transactions in consols, was not entitled, after a record had been closed, to add a new plea, to the effect that the action was excluded by the Acts 7 Geo. II. c. 8, and 10 Geo. II. c. 8, except on the footing of the pursuer being permitted to abandon the action as at the date of lodging defences, and *found* entitled, on abandonment, to expenses from that date. *Thomson* v. *Hughson & Co.*, 1861, 23 D. 679; 33 J. 318.

1680. Record—Amendment—Action of Damages for Slander — "Maliciously." — After a remit to the Lord Ordinary to dismiss an action for slander, in which the pursuer had previously been allowed an opportunity of making certain statements more specific, and had tendered a minute, but, on the defenders objecting, had not insisted on its being added to the record, a proposed amendment of the summons by inserting the word "maliciously" not *allowed*. *Watson* v. *Burnet*, 1862, 24 D. 494; 34 J. 359.

1681. Record—Amendment—Action of Damages for Wrongous Imprisonment.— It is not competent to allow an amendment of the libel, whereby the basis of the action would be changed; and therefore, where a summons of damages for wrongous imprisonment assumed the regularity of legal proceedings, *held* not competent to admit an amendment averring irregularity. *Gilchrist* v. *Anderson*, 1838, 1 D. 37.

1682. Record—Amendment—Action of Damages for Illegal Execution of a Caption.—In an action of damages for the illegal execution of a court caption, signed by a sheriff-clerk, and the legality of the caption itself was not disputed till a record had been prepared, and a debate on the relevancy, an amendment to the effect that the caption should have been signed by the sheriff, *refused*. *Scott* v. *Curle*, 1841, 2 Robin 317. Affg. 2 D. 348; 15 Fac. 346.

1683. Record — Amendment — Date of Slander.—A pursuer on record averred that a verbal slander had been uttered respecting him "in or about the year 1861." Record *allowed* to be opened up, and the time being limited to "in or about the month of May of the year 1861," issue, as so limited, *allowed*. *Stephen* v. *Paterson*, 1865, 3 M. 571; 37 J. 284.

1684. Record—Amendment—Device of Bringing a Second Action—Res noviter.— A, the indorsee and holder of a bill drawn in Paraguay by B, raised an action against B for payment. B pleaded that it had been obtained by force and fear and without value, and a jury trial took place in which A was successful. While a motion by B for a new trial was in dependence B raised an action against A to reduce the bill on the ground that it was null by Paraguayan law, not having been stamped, alleging that although he had been resident in Paraguay at the date of the law requiring bills to be stamped he was ignorant of the law at the date of the first action. *Held* (1) that as a motion by the defender in the original action to amend the record would not have been granted unless

it was supported by a relevant averment of *res noviter*, he could not place himself in a better position by the device of bringing a second action; and (2) that the second action contained no relevant averment of *res noviter*. *Stewart* v. *Gelot*, 1871, 9 M. 1057; 43 J. 583.

1685. Record—Amendment—Discovery of new Document. — After a diligence, granted to the pursuers of a reduction, had been reported and the case advised, the court, on discovering that the record had not been closed, remitted to the Lord Ordinary, after closing the record, to repel the reasons of reduction, and decern. The pursuers then moved to be allowed to produce a new document, and to add a relative article to their condescendence, on the ground that the document had only been recovered since the advising; that they had previously twice applied to the person in whose custody it was, who had searched for it without success; and that though they had not examined him as a haver, yet as they had used their best efforts to recover it before the advising, they were now entitled to produce it. The court *allowed* the document to be produced, and the relative addition to be made. *Thriepland* v. *Rutherford*, 1848, 10 D. 506; 19 J. 247.

1686. Record—Amendment—Action of Divorce—Date of Adultery.—In a summons of divorce the adultery was alleged to have been committed in 1843, and the record was closed on the summons and defences; but on the proof it appeared that it was committed in 1844, and could not have taken place in 1843. The court *refused* to allow the summons to be amended, by substituting 1844 for 1843, but allowed the pursuer to abandon the action on payment of modified expenses. *A* v. *B* (*Lawson* v. *Lawson*), 1847, 7 D. 595; 17 J. 291.

1687. Record—Amendment—Failure to Lodge a Revised Condescendence.—A pursuer having failed to lodge a revised condescendence which had been ordered, and the record having been closed, the court *allowed* it to be opened up, and the revised paper received, in respect of the assurance of counsel that the paper was of importance to his client, and on condition of his paying all previous expenses. *Bell* v. *Ogilvie*, 1862, 24 D. 505; 34 J. 249.

1688. Record — Amendment — Fundamental Alteration.—In an action brought against parties as trustees of a father (whose estate it was said was liable to beneficiaries under his son's settlement) by a party in right to a share of the son's funds, the trustees averred in the record that they had acted all along as the trustees of the father; but after it was closed, they craved leave to amend the record by a statement that they had administered the son's funds as his executors. *Held* that such an alteration was not a mere amendment, but a totally new case, and that it could not be allowed. *Boswell* v. *Ogilvy* (*Cuming's Trs.*), 1848, 11 D. 185; 21 J. 40.

1689. Record — Amendment — Further Specification.—In an action as to the use of a stream, a minute lodged after the record was closed, stating the specific uses of the water referred to, *held* to be admissible as part of the record. *Mackenzie* v. *Woddrop*, 1854, 16 D. 381; 26 J. 180.

1690. Record — Amendment — Infringement of Copyright—Specification of Locus —Expenses.—In an action of damages for infringement of copyright the *locus* of the infringement was not specified. Amendment of statement *allowed* on payment of expenses since the closing of the record. *Graves & Co.* v. *Logan*, 1868, 7 M. 204; 41 J. 126.

1691. Record — Amendment — Insufficient Specification—Judicature Act, s. 10. —A motion, after the record was closed, for leave to obviate, by a minute, an objection of want of precision and specification in the pursuer's condescendence, *refused*. *Baird* v. *Harvey's Trs.*, 1858, 20 D. 1220; 30 J. 720.

1692. Record — Amendment — Issues Tried before Lord Ordinary without a Jury.—In a case tried by the Lord Ordinary without a jury upon issues, the defender, after findings had been pronounced, moved for leave to add a statement and plea to the record, as *res noviter veniens ad notitiam*. The new matter had come to his knowledge two or three days before the trial, and had been brought out in evidence at the trial. *Held* that the statement in question involved a new ground of defence, and motion refused in the circumstances. *Question*: Is it competent, after verdict by a jury, or findings by the Lord Ordinary without a jury, to open up the record, and allow the addition of *res noviter veniens ad notitiam*? *Hansen* v. *Craig, etc.*, 1858, 20 D. 1306; 30 J. 771.

1693. Record—Amendment—Issue Proposed—Amendment Necessary to Make Action Relevant.—After the record had been closed, and the pursuer had proposed an issue for the trial of the cause, the court *refused* to allow an amendment, without which the action was irrelevant. *Levett* v. *London & N.-W. Rly. Co.*, 1866, 2 S. L. R. 207.

1694. Record — Amendment — Amendment after Judgment Delivered but before Interlocutor Signed. — An application to amend a record, and an offer of proof after judgment had been delivered, although no interlocutor had been signed, *refused*. *Mackenzie* v. *Munro*, 1869, 7 M. 676; 41 J. 374.

1695. Record — Amendment — Libelling Statute.—*Question*, whether it was competent to found upon the Act, 1696, c. 33 (requiring slaps for the passage of fish to be made in all dam-dykes in rivers), where the Act was not libelled on. The court *allowed* an amendment of the libel introducing the Act; but found the pursuer liable in the expenses of a previous discussion thereby rendered unnecessary, and of such alterations in the defences and record

as might in consequence be necessary. *Munro* v. *Munro*, 1845, 7 D. 358; 17 J. 174.

1696. Record — Amendment — Multiplepoinding.—The court having decided that one of the claimants in a multiplepoinding was not entitled to participate in the fund *in medio*, another party, who had claimed upon the footing that the unsuccessful competitor was entitled to a share, craved to have the record opened up so as to enable him to extend his claim. Motion *refused*. *Graham's Tr.* v. *Grahams*, 1868, 6 M. 820; 40 J. 452.

1697. Record — Amendment — Petition and Complaint.—A petition and complaint against the trustee in a sequestration *not allowed* to be amended by striking out a prayer for censure, in respect that the whole character of the proceedings would be thereby altered. *Paterson* v. *Robson*, 1872, 11 M. 76; 45 J. 62.

1698. Record—Amendment—Action as to Pauper's Settlement—Alteration of Date when Relief first Received.—In an action of relief by one parish against another, *held* that the alteration of the date when the pauper first received relief on revisal, was not the introduction of a new ground of action. *Bremner* v. *Taylor* (O. H.), 1866, 3 S. L. R. 24.

1699. Record—Amendment—Question as to Validity of Lease—Question Raised at the End of the Case as to whether Certain Fields Included in the Lease.—An action was brought by a proprietor for declarator that two persons, who were in possession of two of his farms, had no valid lease thereto, or to "any part thereof," and for removal. The court having found that the defenders had a valid lease, the pursuer moved for leave to amend the summons by adding conclusion, statement, and pleas to try the question whether certain fields in the possession of defenders were not included in the lease. The court *refused* the motion. *Forbes* v. *Watt's Trs.*, 1870, 9 M. 96.

1700. Record—Amendment—Action of Reduction Founded on the Act, 1621, c. 18.—A record opened up, and an amendment allowed, to the effect that the trustee on a sequestrated estate, the pursuer of a reduction, on the Act, 1621, c. 18, and on fraud at common law, represented, as trustee, creditors whose debts were contracted prior to the date of the deeds sought to be reduced. *Edmond* v. *Grant*, 1853, 15 D. 703; 25 J. 425; 2 Stuart 421.

1701. Record—Amendment—Reduction on the Ground of Forgery—Addition of Averment and Plea of Invalid Attestation.—At the end of the pursuer's proof in a reduction on the ground of forgery he craved leave to amend the record by adding an averment and plea of invalid attestation. Leave *granted*. *Arnott, etc.* v. *Burt*, 1872, 11 M. 62; 45 J. 46.

1702. Record—Amendment—Reduction—Act, 1696, c. 5.—In an action of reduction founded on the Act, 1696, it was not stated that the defender was a prior creditor or alleged prior creditor. The record was closed without any notice being taken of the omission. The court *refused* to allow an amendment of the libel but allowed the pursuer to repeat a reduction founded on the Act, 1696. *Connon* v. *Ballinten*, 1853, 2 Stuart 376.

1703. Record—Amendment—Res noviter — Additional Evidence — Declarator of Marriage.—The pursuer in a declarator of marriage was successful in the Court of Session, but on appeal the judgment was reversed. On a motion by the defender to have the judgment of the House of Lords applied, the pursuer moved the court to allow a condescendence of *res noviter* to be received and added to the record. Motion *refused*, on the ground that the matter proposed to be condescended on was not *res noviter*, but only additional evidence. *Longworth* v. *Yelverton*, 1865, 3 M. 645; 37 J. 322.

1704. Record—Amendment—Res noviter—Reference to Averments in Previous Action.—*Held* that averments in a previous action were such as to show that a proposed addition to the record in a subsequent action was not *res noviter veniens ad notitiam*. *N. B. Rly. Co.* v. *Brown, Gordon, & Co.*, 1857, 19 D. 840; 29 J. 393.

1705. Record—Amendment—Res noviter.—Circumstances in which a party *held* not excusably ignorant of facts, so as to entitle him to have an addition made to the record, as *res noviter*. *N. B. Rly. Co.* v. *Brown, Gordon, & Co.*, 1856, 18 D. 1283.

1706. Record—Amendment—Res noviter veniens ad notitiam — Deed Recorded in Public Registers.—There is no abstract rule that a deed or instrument recorded in the public records can in no case be founded on as *res noviter veniens ad notitiam*. Circumstances in which facts appearing from such a deed were allowed to be added to the record. *Maitland* v. *M'Clelland*, 1857, 19 D. 945; 29 J. 436.

1707. Record — Amendment — Advocation—Res noviter.—*Held* by the Lord Ordinary, and acquiesced in, that it was competent to open up a record closed in the inferior court, and to allow additional statements, although these were not *res noviter*. *Smith, etc.* v. *Lamont*, 1858, 20 D. 912; 30 J. 539.

1708. Record—Amendment—Res noviter—Divorce—Specific Cases of Adultery.—In order that a condescendence of *res noviter* should be allowed, the fresh statements must be specific and important, as well as indicating a distinct line of evidence from that originally led.

The original tenor of proof in an action of divorce having been to infer adultery from general conduct during a lengthened period, the court *admitted* statements alleging specific acts but *rejected* a statement of the same general conduct as was admitted to proof on the original record. The question, whether the facts are really *res noviter*, is a matter for

evidence just as much as the truth of the facts themselves. *Walker* v. *Walker*, 1870, 8 S. L. R. 49.

1709. Record—Amendment—Undefended Action of Aliment by Wife against Husband.—The court *refused* to proceed on general averments in an action for aliment at the instance of a wife, but *allowed* an amended condescendence to be lodged, making the averments more specific; and the defender being in England, evidence required of personal intimation of the action. *Herald* v. *Cowper*, 1860, 23 D. 68; 33 J. 32.

1710. Record—Amendment—Allowance of Issues.—An addition not allowed to be made to the record, after issues had been adjusted, although the record had not been closed. *Forster* v. *Barclay*, 1848, 11 D. 140; 21 J. 23.

1711. Record—Amendment—Judicature Act, 1825—Act of Sederunt, 1828.—Leave to amend a closed record refused, where the alleged error was said to affect only the accuracy of statement, and not the essence of the case. *Halliday* v. *Morison*, 1857, 19 D. 1094.

1712. Record — Amendment — Clerical Errors.—When the record in an action had been closed through inadvertency, though containing manifest mistakes, the court opened it up, and *allowed* the mistakes to be corrected on payment of expenses. *Dobie* v. *Mitchell*, 1854, 17 D. 98; 27 J. 22.

1713. Record — Closing — Minute — Signature by Counsel.—The minute closing the record must be signed by counsel, and not by the parties. *Davidson* v. *Paul*, 1849, 11 D. 703; 21 J. 234.

1714. Record — Closing — Minute — Alteration of Procedure by Court of Session, 1850.—*Held* that in an action in dependence before the passing of the Act 13 and 14 Vict. c. 36, but in which the procedure had been in the form provided by that Act, it was competent for the Lord Ordinary to close the record by interlocutor without a minute signed by counsel. *National Exchange Co.* v. *Drew & Dick*, 1860, 23 D. 27; 33 J. 11.

1715. Record—Closing of—No Express Closing.—A record *held* to have been duly closed, although there was no express declaration in these words. *Parish of Lasswade* v. *Edinburgh Charity Workhouse*, 1844, 6 D. 637; 16 J. 298, 425.

1716. Record — Closing — Reduction — Exclusion of Action by Reference.—In a reduction, production was satisfied, and defences on the merits ordered. The defenders pleaded that the action was excluded by a reference. The Lord Ordinary, without closing the record, found that the matter fell within the submission, and remitted to the referees to hear and decide. On a reclaiming note, praying for a recall of the remit to the referees, the court *recalled* the whole interlocutor, and *remitted* to the Lord Ordinary to make up a record. *Robertson* v. *Robertson's Trs.*, 1860, 22 D. 1145; 32 J. 524.

1717. Record—Closing—Senior Counsel.—Senior counsel ought to be instructed to revise before closing a record. *Stott* v. *M'William*, 1856, 18 D. 716; 28 J. 310.

1718. Record—Closing—Summons and Defences—Court of Session Act, 1850, s. 3.—*Held* (1) that, under s. 3 of 13 and 14 Vict. c. 36, the consent by the pursuer to close upon summons and defences need not be absolute, but may competently contain a denial of the defender's statements, in so far as inconsistent with those of the pursuer; (2) that the proper object of a revisal is to meet an opponent's statement, not to amplify the statement of the party moving for revisal, and that it is a matter of discretion with the Lord Ordinary, upon the defender's motion, to order a revisal, if he is of opinion that the pursuer is unfairly sheltering himself under a general denial, when he ought articulately to answer the defender's statement; (3) that the Lord Ordinary had, in the circumstances of this case, exercised a sound discretion in refusing the motion; but (4) a remit made to the Lord Ordinary to allow the defenders to amend their statement on payment of expenses. *Campbell* v. *Campbell*, 1863, 1 M. 217; 35 J. 163.

1719. Record—Closed Record—Competency of Dismissing Case as Irrelevant before Record Closed.—An action cannot be dismissed as irrelevant on an open record, unless the summons is *ex facie* irrelevant; but of consent the record closed in the Inner House. *Dallas* v. *Fraser*, 1849, 11 D. 1058; 21 J. 404.

1720. Record—Condescendence—Signature of Counsel.—A condescendence must be signed by counsel, and not by the party himself only. *Rennie* v. *Murray*, 1850, 13 D. 36.

1721. Record—Deed of Entail Recorded in Books of Council and Session—Recording Thereof in Register of Tailzies — Nobile officium — Procedure. — *Fletcher & Others* (Petitioners), 1886, 3 S. L. R. 99.

1722. Record—Forgery.—Where forgery is proponed, the record is to be made up by condescendence of articles improbatory, and answers containing articles approbatory. *Golder* v. *Deans*, 1826, 5 S. 161; 2 Fac. 108.

1723. Record—Irrelevant Matter Struck Off.—Matter considered by the court irrelevant, struck out of a closed record in the Inner House. *Cattanach* v. *Thom's Exrs.*, 1858, 20 D. 1206; 30 J. 716.

1724. Record — Issue — Incompetent to Raise Question of Relevancy after Issue Allowed.—In an action for reduction of a deed, *held* incompetent, after the trial, to plead that the pursuer could take no benefit from the verdict, in respect that the issue did not fall within the statements on record. *M'Conechy* v. *M'Indoe*, 1853, 16 D. 315; 26 J. 145.

1725. Record — Issue — Relative Functions.—*Question*, whether a general issue is controlled by the record. *Macgillivray* v. *Souter, etc.*, 1860, 23 D. 212; 33 J. 101.

1726. Record — Issue — Relative Functions.—*Question*: To what extent are issues controlled by the record? *Fairley* v. *O'Halloran*, 1855, 18 D. 78; 28 J. 22.

1727. Record — Issue — Relative Function.—*Observed*, in H. of L., that the issues on which a case goes to trial are not controlled by the record, and it is incompetent to refer to the record for the purpose either of limiting the inquiry, or of defining more precisely the points to be determined by the jury. *Morgan* v. *Morris*, 1858, 20 D. (H. L.) 18; 3 Macq. 323; 30 J. 686.

1728. Record — Issue — Relative Functions.—*Observed* that, according to the practice in Scotland, and the principle of the Scots system of closed records, the granting of a general issue leaves the parties under the control of the record in their proof. *Kerr* v. *Mags. of Stirling*, 1858, 21 D. 169; 31 J. 100.

1729. Record — Issue — Relative Functions of.—Under an issue whether a party had been concerned in the giving of a sum to another as a consideration for his "concurring in, facilitating, or obtaining" an act, *observed*, that it would not be competent to establish anything under the words "facilitating or obtaining," as these words were not contained in the record. *Inglis* v. *Gardiner*, 1843, 5 D. 1029.

1730. Record — Issue — Relative Functions—Action of Damages for Wrongous Apprehension and Detention in an Asylum.—In an action of damages for wrongous apprehension and detention in an asylum, *held* that the presiding judge had rightly directed the jury that the issue did not raise any question whether, supposing the pursuer rightly detained in an asylum, there was any illegality in the mode of his confinement, nor any question of breach of statutory regulations in regard to the registers of the asylum, or the manner of keeping them, no such ground of action being disclosed on record. *Mackintosh* v. *Smith & Lowe*, 1864, 2 M. 1261; 36 J. 631. Affg. 3 M. (H. L.) 6; 4 Macq. 913; 37 J. 318.

1731. Record—Issue—Variance between Them.—A summons of declarator of right to a moss contained a wrong description of it. The record having been closed, the pursuer proposed an issue, the schedule annexed to which described the bounds of the moss correctly. The case having been reported on the adjustment of issues, the proposed issue was refused as not contained in the summons; and it was *held* incompetent to amend the libel so as to render the description in the summons conform to that in the schedule. *Messer* v. *Simson's Trs.*, 1857, 19 D. 664; 29 J. 306.

1732. Record—New Record, Making Up—Certain Conclusions Abandoned—Averments Applicable Thereto.—After a record was closed the pursuer abandoned some of the conclusions. The record remained encumbered with the averments applicable to those conclusions, and the court *ordered* a new record to be made up. *Inglis* v. *Douglas, etc.*, 1860, 22 D. 505; 32 J. 450.

1733. Record—Opening Up—Conditions.—Circumstances in which the record closed in absence of the defender's counsel was opened up on payment of ten guineas. *Swanston* v. *Mackersey*, 1856, 18 D. 720; 28 J. 84.

1734. Record — Opening Up of—Withdrawal of One of the Defenders.—In an action against several defenders, separate records were made up, and one of the defenders made a general reference to the answers and statements of another defender. After the record was closed, that defender ceased to be a party to the action. *Held* competent to open up the record to enable the defender to make specific answers and statements. *Richardson* v. *Gavin's Trs.*, 1851, 14 D. 275; 24 J. 121; 1 Stuart 216.

1735. Record—Revisal.—The holder of a bill raised an action on it, as still having right under it to the sum contained in it. *Held* competent to add, on revisal, that the bill had been duly negotiated and protested. *Macdonald* v. *M'Quarrie*, 1860, 22 D. 922; 32 J. 389.

1736. Record — Revisal — Alteration in Ground of Action.—A party who had bought hay in terms of a note of sale signed by J. T. and indorsed by W. T., brought an action of damages for failure to implement the contract against both, alleging in his summons that J. T. and W. T., acting in concert, sold the hay, and that the contract was indorsed by W. T. "as a guarantee for its due fulfilment," and averring in his revised condescendence that it had been indorsed by W. T. "in testimony that he was a party thereto." The defender W. T. gave no explanation of his signature. *Held* (1) that there had been no change in the ground of action against W. T., it appearing that the word "guarantee" had not been used in its technical meaning; and (2) that the averments were relevant to entitle the pursuer to an issue against both defenders. *Paterson & Co.* v. *Tod*, 1862, 24 D. 260; 34 J. 128.

1737. Record—Revisal—Alteration of Ground of Action.—In an action—on an unaccepted bill drawn on his employers by the master of a ship for disbursements at a foreign port—brought by the indorsees against the drawees, it was pleaded by the defenders that the ground of action had been changed on revisal, to the effect of the pursuers claiming not merely as indorsees, but as disbursers. *Held* that that plea fell to be disposed of before issues were adjusted; and, on an analysis of the closed record, that it was well founded. The pursuer was appointed to delete the statements complained of, so as to restore the original ground of action. *London Joint Stock Bank* v. *Stewart & Co.*, 1859, 21 D. 250; 31 J. 38.

1738. Record — Revisal — Change of Ground of Action.—An improbative deed being founded on, *held* that it did not amount to a change of the ground of action to add, on revisal, that it had been validated *rei interventu*. *United Mutual Mining & General Assurance Co.* v. *Murray*, 1860, 22 D. 1185; 32 J. 540.

1739. Record — Revisal — Extension of Grounds of Action.—Averments added by a pursuer to his condescendence at revisal, and containing new grounds of action, though they cannot have the effect of extending the grounds of action set forth in the summons, are not necessarily to be deleted, but may be looked at in explanation of the original grounds of action. *Macdougall's Tr.* v. *Law*, 1864, 3 M. 68; 37 J. 30.

1740. Record—Revisal—Material Averments—Expenses.—In an action of damages for slander, the court *allowed* certain material averments, omitted in the summons, to be stated in the revised condescendence, on payment of the expense of revisal. *Hewatson* v. *Irving*, 1853, 15 D. 519; 2 Stuart 296.

1741. Record—Revisal—Order for Taken by Pursuer—Pursuer's Failure to Revise—Procedure.—Where a pursuer takes an order to revise, and does not do so, the defender is not entitled to take decree by default, but the clerk must transmit the process for adjustment. *Norris* v. *Laing*, 1857, 19 D. 786; 29 J. 364.

1742. Record—Revisal—Reference to a Statement Deleted.—A statement in the condescendence annexed to the summons is not available when it has been struck out on revisal. *Hunter* v. *Broadwood*, 1854, 16 D. 441; 26 J. 295.

1743. Record—Supplementary Summons—Additional Sum.—It is not competent after the record is closed, to ask by supplementary summons for interest on the sums concluded for in the original libel. *Carmichael* v. *Union Canal Co.*, 1842, 1 Bell 316. Revg. 2 D. 23.

1744. Reduction—Pending Arbitration—Alleged Disqualification of Arbiter.—In a contract for forming a portion of a railway, it was stipulated that all disputes should be referred to the company's engineer, who accepted of the submission and pronounced orders. During its dependence he was appointed manager to the company, whereupon the contractor brought an action under the contract against the railway company. *Held* that before proceeding therein the submission must be set aside by reduction. *Phipps* (*Fraser's Tr.*) v. *Edinburgh & Glasgow Rly. Co.*, 1843, 5 D. 1025; 15 J. 387.

1745. Reduction — Bankruptcy — Acts 1621 and 1696.—In an action on the stats. 1621, c. 18, and 1696, c. 5, the Lord Ordinary reduced, in terms of the libel, but explained, in a note, that he rested on the Act, 1696. The defender having reclaimed, the court "recalled the interlocutor, so far as the same reduces, and decerns, upon the grounds of the Act, 1696, and remitted to the Lord Ordinary to proceed and do further in the cause as to his Lordship shall seem proper." *Held* that the pursuer was not foreclosed from insisting, under the remit, on the Act, 1621. *Cranstoun* v. *Bontine*, 1834, 12 S. 645.

1746. Reduction—Bond de judicio sisti—Personal Bar.—A warrant for the apprehension of a foreigner as in *meditatione fugæ* was granted on the application of an alleged foreign creditor, and the debtor appeared voluntarily and stated that he was a foreigner, that he intended to leave this country to return home, but had no intention of evading any proceedings that might be instituted against him, and he granted a bond of caution *de judicio sisti*. He was cited in an action, and pleaded no jurisdiction. This plea the court repelled, on the ground of the bond *de judicio sisti*. In a reduction of the proceedings in the petition for apprehension, and of the bond of caution, *held* that the pursuer could not be allowed to reduce the bond as the foundation of the jurisdiction of the court in the previous action sustained by a final judgment, and that he was barred by his own voluntary proceedings from challenging it. *Irvine* v. *Hart & Son*, 1869, 7 M. 723; 41 J. 381.

1747. Reduction — Competency — Bankruptcy—Sheriff.—S. 10 of the Bankruptcy (Scotland) Act, 1856, enacts that "all alienations of property by a party insolvent or notour bankrupt, which are voidable by statute or at common law, may be set aside either by way of action or exception." S. 9 of the Bankruptcy and Real Securities (Scotland) Act, 1857, declares that the preceding enactment is to "be taken to apply to actions and exceptions in the ordinary court of the sheriff." *Held* that these enactments did not extend the sheriff's jurisdiction, so as to make an action of reduction competent in the sheriff court. *Dickson* v. *Murray*, 1866, 4 M. 797; 38 J. 423.

1748. Reduction — Competency — House of Lords' Judgment. — *Question* as to the competency of reducing judgment of the House of Lords on the ground that the Court of Session and House of Lords had no jurisdiction in the action in which it was pronounced. *Longworth* v. *Yelverton*, 1868, 7 M. 70; 41 J. 19.

1749. Reduction — Competency — Interlocutor of Sheriff Allowing Expenses upon a Higher Scale than Authorised by Statute —Failure to Appeal—Sequestration.—The interlocutor of a sheriff awarding expenses in a sequestration upon a higher scale than authorised by statute cannot be set aside by reduction but must be appealed against. *Baillie* v. *M'Gibbon*, 1845, 8 D. 10; 18 J. 11. Affg. 6 Bell 260; 20 J. 358.

1750. Reduction—Competency—Action against Sheriff-Substitute to Reduce Warrant Granted by him.—*Held* that an action against a sheriff-substitute, containing a con-

clusion merely for reduction of warrants granted by the defender for the pursuer's removal to and detention in a lunatic asylum, upon which the pursuer had been removed to an asylum and detained for a short time, was incompetent. *Mackintosh* v. *Arkley*, 1868, 6 M. (H. L.) 141 ; 40 J. 482.

1751. Reduction — Competency — Sheriff Court Decree.—A sheriff court decree was extracted and a charge given upon it. Before it was implemented the debtor brought a reduction. *Held* (*per* Lord Ormidale, Ordinary) that this was a competent mode of obtaining the review of the Supreme Court, although suspension was also competent. *M'Leod* v. *Collie*, 1869, 42 J. 62.

1752. Reduction — Competency — Statutory Jurisdiction of Road Trustees—Provision for Appeal to Quarter Sessions and to Court of Session.—A local Act creating a statutory jurisdiction in road trustees, provided that any party finding himself aggrieved should appeal to the quarter sessions and to the Court of Session. *Held* in a reduction of proceedings under the statute, that the remedies specially provided by the Act not having been adopted, an action was barred at common law. *Crawford* v. *Lennox*, 1852, 14 D. 1029 ; 24 J. 629 ; 1 Stuart 1065.

1753. Reduction — Competency — Unextracted Decree.—A party who had pledged goods with a pawnbroker, subsequently obtained a justice of peace decree under the Pawnbrokers Act, 39 and 40 Geo. III. c. 99, s. 14, against the pawnbroker, for the value of the article pledged, and expenses. In an action of reduction brought by the pawnbroker to set aside the decree, which was not extracted, and was not a final judgment exhausting the case in the court below, *held* that reduction was incompetent and action *dismissed*. *Scoular* v. *M'Laughlan*, 1864, 2 M. 955 ; 36 J. 465.

1754. Reduction—Competency of, without Reductive or Declaratory Conclusions.—A summons containing reductive without petitory or declaratory conclusions, *sustained*. *Graham* v. *North British Bank*, 1850, 12 D. 907 ; 22 J. 303, 416.

1755. Reduction—Decree in Absence in an Action of Putting to Silence—Title and Interest to Reduce.—An action of putting to silence, containing also conclusions for damages, was brought against a woman, and decree in absence was obtained against her in the action, except *quoad* the conclusions for damages. She subsequently brought a reduction of the decree, but process was sisted during the dependence of an action of declarator of marriage at her instance, in which she ultimately failed. *Held*, that though the main fact was settled against her in the declarator, she had an interest, and was still entitled to proceed with the action of reduction. *J. H.* v. *R.*, 1844, 16 J. 576.

1756. Reduction—Decree in Absence—Reponing.—The 18th section of the stat. 1 and 2 Vict. c. 119, which empowers the sheriff to repone against a decree in absence, does not exclude the common-law procedure by way of reduction in the Court of Session. *M'Lachlan* v. *Rutherford*, 1854, 16 D. 937 ; 26 J. 483.

1757. Reduction — Decree Alleged to have been Obtained in Absence—Notice of Trial Duty given to Party's Agent—Allegation that Agent not Qualified.—Where a verdict was obtained in absence of one of the parties, after notice of trial to the agents who had acted for him, and after a motion had been made by one of them to delay the trial, and the verdict was subsequently applied, and decree extracted. *Held* that this was not a decree in absence, and that it was incompetent to reduce it, on the allegations that the pursuers had, from poverty, been unable to make appearance at the trial ; and that no notice of trial had been given to themselves personally, or to a properly qualified agent. *Gilchrist* v. *Gilchrist*, 1844, 7 D. 214 ; 17 J. 102.

1758. Reduction — Decree of Approbation.—Reduction of a decree of approbation in absence by the party who obtained it. *M'Neill's Trs.* v. *Campbell*, 1872, 11 M. 211 ; 45 J. 131.

1759. Reduction—Decree in Count and Reckoning Proceeding on an Accountant's Report—Error calculi.—In an action of count and reckoning a remit was made to an accountant. His report was approved of, and the pursuer paid the defender the balance found due. It was afterwards discovered that the report was erroneous. *Held* in an action of reduction and repetition that the decree in the original action must be opened up and the defender must *primo loco* repeat to the pursuer the sum he had received. *Brown* v. *Graham*, 1849, 11 D. 1330 ; 21 J. 515.

1760. Reduction—Decree of Divorce—Proof Led in Original Action.—*Held* that it was competent for the court, in the reduction, to consider the proof led in the original action, and that the onus was upon the pursuer of the reduction to show that the decree of divorce should be set aside. *Stewart* v. *Stewart*, 1863, 1 M. 449 ; 35 J. 272.

1761. Reduction—Decree in foro—Title to Sue.—A party raised an action of reduction of a disposition and of a decree *in foro*, founding his title to insist on a deed which stood reduced by that decree ; and no relevant grounds were stated for setting aside the decree. Defence sustained against reducing the decree ; and action dismissed, as, in respect of that decree, the party had no title to challenge the disposition. *Drusdale* v. *Nairne*, 1835, 13 S. 348.

1762. Reduction—Decree—Husband and Wife.—Action of reduction of a decree of absolvitor from a declarator of marriage before the commissaries, not brought within year and day, *dismissed*. *Donald* v. *Thom*, 1823, 2 S. 312 ; 21 F. C. 225.

1763. Reduction—Decree in a Multiplepoinding — Decree Obtained on an Un-

stamped and Improbative Document Alleged to have been Obtained by Fraud.—A party who was called in a process of multiplepoinding, in which decree of preference was pronounced in favour of another in his absence, and who claimed on an unstamped and improbative document of debt alleged to have been obtained by fraud, *held* entitled to pursue a reduction of the decree. *Mackay* v. *Murray*, 1826, 5 S. 34.

1764. Reduction—Decree of Presbytery—Deposition of a Schoolmaster.—Objections to the sentence of a presbytery deposing a schoolmaster *repelled* by the Lord Ordinary, (1) that the proof was not written by the presbytery clerk, but by an amanuensis, who did not sign the depositions; (2) that the presbytery clerk did not subscribe the depositions, except of such witnesses as could not write. *Sutherland* v. *Presbytery of Dornoch*, 1850, 13 D. 190; 23 J. 67.

1765. Reduction—Decree of Sale—Satisfying Production—"Grounds and Warrants" of Decree.—A decree of sale was impugned as having been fraudulently obtained, many of the alleged debts not having been really due, and production was called for of the grounds and warrants on which it had proceeded. The defenders produced the decree, and pleaded that they were not bound to make further productions. The Court of Session sustained the defence, without prejudice to the pursuer calling the defenders to account for any particular debt against which he alleged fraud. The House of Lords reversed the judgment, holding the decree no bar to the action, and reserving its effect. *Held* that production of such decree is not a sufficient title to exclude exhibition of other writs specially called for. *Irvine* v. *E. of Aberdeen, etc.*, 1770, 2 Pat. 249. Affg. M. "Tallie" App., Part 1, No. 1.

1766. Reduction—Execution of Citation—Simple Reduction or Reduction-Improbation.—*Held* incompetent to challenge a messenger's execution of a summons on the ground of falsehood in a simple reduction, the proper form for doing so being by action of reduction-improbation; and *observed*, that it is not essential that the messenger be made a party to such action. *M'Vitie* v. *Barbour*, 1838, 16 S. 1185, 13 Fac. 812. See also *M'Lellan* v. *Graham*, 1841, 16 Fac. 1209, and *M'Kinney* v. *His Creditors*, 1864, 2 M. 889; 36 J. 448.

1767. Reduction—Facility, Fraud, and Circumvention—Specification of the Parties by whom the Deed is said to have been Impetrated.—In a reduction on the ground of facility, fraud, and circumvention, the pursuer ought to condescend upon the parties by whom the deed is said to have been impetrated; and an allegation that a deed had been impetrated by "clergymen and lay members of the Free Church visiting at the house of the granter during his illness, or one or more of them," *held* insufficient to entitle to an issue. *Baird* v. *Harvey's Trs.*, 1858, 20 D. 1220; 30 J. 720.

1768. Reduction-Improbation—Necessity for Concurrence of Lord Advocate.—*Held* that a summons of reduction-improbation and declarator of non-entry, which had passed the Signet without a bill, and to which the Lord Advocate's concurrence had not been obtained, was incompetent, even as regarded the conclusions for reduction and declarator of non-entry, although those parts which related to the improbation had been deleted. *Hamilton* v. *Morison*, 1847, 10 D. 165; 20 J. 48.

1769. Reduction-Improbation — Forgery—Proof.—Possession of a farm followed in terms of a signed jotting. *Held* that the tenant, averring that the jotting produced in an action against him for the rent was not the one he signed, but was fabricated, must undertake improbation; and this having been done in the course of the process, *held* that he had failed to prove his averments. *Williamson* v. *Kennedy*, 1857, 19 D. 443; 29 J. 207.

1770. Reduction—Inferior Court Decree—Expenses in Inferior Court.—It is competent, under an action of reduction of an inferior court decree, to review it upon the point of expenses, and to order repetition of them, if the decree be reduced. *Bisset* v. *Anderson*, 1849, 11 D. 1015; 21 J. 365.

1771. Reduction—Interim Decree in a Multiplepoinding—Appeal to the Sheriff.—In a multiplepoinding in a sheriff court, an interim decree was pronounced for payment out of the fund *in medio*; against which an appeal was presented by one of the claimants, but the sheriff having adhered, payment was made. But three years after its date, and while the process was still in dependence, a reduction was brought of the decree by another claimant. *Held* that this action was incompetent. *Martin* v. *Barclay*, 1844, 6 D. 1136; 16 J. 498.

1772. Reduction—Judgment of Justices of Peace Assoilzieing Defender—Merchant Shipping Act—Section not Libelled on in Original Complaint.—*Held* in a reduction of a judgment of the justices of peace assoilzieing the defender in a complaint under the Merchant Seamen's Act, that the action was irrelevant, in respect that the ground of reduction was founded on a section of the statute not libelled on in the original complaint, and in regard to which, therefore, the justices committed no error in not enforcing it. *Ramsay* v. *Bruce*, 1849, 12 D. 243; 22 J. 46.

1773. Reduction—Letters of Horning and Adjudication Following Thereon.—In an action of reduction of letters of horning, and adjudication following thereon, the pursuer averred that certain words had been inserted in the horning after it was signeted, and before it was recorded. He did not aver that the words had been inserted by the defender, or any one for whom the defender was responsible. The court, holding that the words alleged to have been inserted were immaterial, assoilzied the defender. *Smyth* v. *Walker*, 1867, 5 M. 552; 39 J. 268.

1774. Reduction — Necessity for — Challenge of Decree against a Principal Debtor by a Cautioner.—After a decree has been pronounced against an executor, the cautioner, although not called as a defender, cannot object to the decree in an action against him otherwise than by reduction. *Ross* v. *Mackenzie*, 1840, 15 Fac. 1296.

1775. Reduction — Necessity for — Competency of Reducing a Regular Probative Deed ope exceptionis.—*Anstruther* v. *Mitchell*, 1857, 19 D. 674.

1776. Reduction — Necessity for — Deed Reducible under Bankruptcy Statutes—Competency of Setting Aside Deed by Way of Exception.—*Held* that a plea that a deed was reducible under the Bankruptcy Statutes could be stated by way of exception, there having been no reduction. *Observations* on the meaning of "exception." *Mackenzie* v. *Calder*, 1868, 6 M. 833; 40 J. 443.

1777. Reduction—Necessity for—Action of Damages for Wrongous Use of fugæ Warrant—Warrant not Reduced.—Reduction *held* not to be necessary to entitle the pursuer to issues in an action of damages for wrongous imprisonment under a *meditatio fugæ* warrant, alleged to have been obtained by the defender in bad faith. *Maclean* v. *Colthart*, 1865, 3 M. 719; 37 J. 364.

1778. Reduction—Necessity for—Exception—Letter of Guarantee.—The acceptor of a bill was sued, as representing his father, on a letter by the father guaranteeing payment of the bill. The son transmitted this letter to the holder. *Held* he was not entitled to plead, by way of exception, that the letter had been impetrated from his father while infirm and under fear of diligence; but must bring a reduction. *Dickie* v. *Gutzmer*, 1829, 8 S. 147.

1779. Reduction—Necessity for—Execution—Facts Admitted which Necessarily Inferred its Falsity.—*Question*, whether it is necessary, where facts are admitted by a party founding on an execution which necessarily infer its falsity, for the party challenging such execution to bring a reduction of it. *Ritchie* v. *Barclay*, 1845, 17 J. 427.

1780. Reduction—Necessity for—Incompetency of Cautioner in a Composition-Contract Objecting to a Ranking.—A cautioner in a composition-contract is not entitled to object summarily, by suspension, to a debt which had been ranked without objection on the sequestrated estate; the proper form of redress is by reduction. *Smith* v. *Wilson*, 1824, 3 S. 393.

1781. Reduction—Necessity for—Objection to Notarial Protest—Incompetency of Pleading same ope exceptionis.—*Held* that an objection to a notarial protest, on the ground that it bore to have been served at a certain house as the debtor's dwelling-place, which it was alleged was not so, could not be pleaded *ope exceptionis*, but required a reduction. *Telfer* v. *Barron*, 1844, 7 D. 170; 17 J. 83.

1782. Reduction—Necessity for—Objection to a Decreet-Arbitral by Way of Exception.—Objection to a reference and decreet-arbitral which *allowed* to be stated by way of exception to an action on the award. *Thomson's Trs.* v. *Muir*, 1867, 6 M. 145; 40 J. 83.

1783. Reduction — Necessity for — Possessory Question—Fraudulent Title.—In a possessory question it is competent for a sheriff to refuse to give effect to a title of possession when he is satisfied that it is fraudulent. *Brown's Trs.* v. *Fraser*, 1870, 8 M. 820; 42 J. 479.

1784. Reduction—Necessity for—Stockbroking Transactions.—Restitutio in integrum.—A broker instructed to purchase shares on 15th October, of that date notified a purchase to his employer, who, on 6th November, paid the price and got the transfers. In regard to fifty of them, it turned out that they had been purchased on 6th November, and the purchaser was held not bound to register them. The purchaser now sued the broker for repetition of the price of the whole. Action *dismissed*, there being no conclusions for reduction of the transaction, nor offer to restore the transfers. *Cullen* v. *Kerr*, 1857, 19 D. 969; 29 J. 453.

1785. Reduction—Partial Reduction—Competency.—A party *held* entitled to reduce a deed, so far as it affected her interests, without concluding for reduction *in toto*. *M'Conechy* v. *M'Indoe*, 1853, 16 D. 315; 26 J. 145.

1786. Reduction—Production of Documents—Jury Trial.—In a reduction of testamentary writings, the pursuer moved for a warrant on the Lord Clerk Register and his deputes to transmit the deeds which had been recorded to the clerk to the process, in order that the rule might be complied with, which required that all documents to be used at the trial must be lodged with the clerk eight days before the trial, and in order that the pursuer's agent might have access to the deeds when preparing for the trial, as he required to show the signatures to the witnesses when precognosced. The court *refused* the motion, holding that that rule would be satisfied by the production of extracts of the deeds, and that, if it was necessary to show the deeds to the witnesses in the course of the precognition, the witnesses might be taken to the Register House. *Maclean* v. *Maclean's Trs.*, 1861, 23 D. 1262; 33 J. 480.

1787. Reduction — Reduction of Deed which Granters may be Compelled by Legal Process to Grant—Discharge of "all his Claims"—Claims Unknown to Granter.—A party granting a deed in error is entitled to reduce it, although he is liable to be compelled by legal process to grant a deed in similar terms. A party granting a discharge which he believes to include "all his claims," is entitled to reduce it on its turning out that there were at the time competent to him claims of which he knew nothing. *Purdon* v. *Rowatt's Trs.*, 1856, 19 D. 206; 29 J. 99.

1788. Reduction—Reduction of Service—Defender Allowed to Repeat a Reduction of Pursuer's Service.—In a reduction by a daughter served heir of her alleged father of a prior service in favour of the defender, the latter allowed to repeat a reduction of the pursuer's service. *Gilchrist* v. *Whicker*, 1852, 1 Stuart 393.

1789. Reduction—Reduction of Settlement ex capite lecti—Defence that Trustees who were Defenders had Resigned.—In a reduction *ex capite lecti* of a trust deed, a defence was stated by some of the trustees as preliminary, to the effect that they had resigned their office prior to the raising of the action; which defence was repelled as preliminary, but without prejudice to the effect of the alleged resignation as affecting the merits of the action as insisted in against the said defenders. *Pattison* v. *Dunn's Trs., etc.*, 1863, 1 M. 647; 35 J. 382.

1790. Reduction—Reduction of a Settlement ex capite lecti—Proof in Undefended Action.—In an undefended action of reduction of a settlement *ex capite lecti*, decree of reduction pronounced, on a consideration of proof led by the pursuer. *Eason* v. *Eason*, 1863, 1 M. 1163; 35 J. 660.

1791. Reduction—Reduction of Sheriff Court Decree—Incompetency of Reviewing Prior Interlocutors.—A sheriff ordered one of the parties to delete certain matter from his paper, and granted interim decree for the expense so occasioned. In an action of reduction, *held* that as the only interlocutor brought under reduction was the interim decree for expenses, it was incompetent to review the interlocutors which led to the interim decree being pronounced; and there being no objection arising *ex facie* of the decree, the reduction dismissed. *Flowerdew* v. *How*, 1852, 15 D. 198; 25 J. 137; 2 Stuart 106.

1792. Reduction—Reduction or Suspension?—Alleged Invalidity of Bill on the Ground of Minority and Lesion.—Although a bill was accepted by a son, then a minor and in apprenticeship, along with his father, yet *held* that it was not competent for him to suspend a charge upon the bill on the allegation of minority and lesion, a reduction being the only mode by which he could have redress. *Waddell* v. *Gibson*, 18 Jan. 1812, F. C.

1793. Reduction—Reduction of Titles—Pursuer Title Bad even if Defender's Reduced.—In an action of reduction the pursuer and defender derived right from a common author; and the defender was in possession. The author's title was bad; if it had been good the pursuer would have had a title to sue the action. *Held* that as the pursuer could not make up a better title than the defender's he had no interest to reduce her title and dispossess her. *Irving* v. *Hyslop*, 1837, 15 S. 993; 12 Fac. 926. See *Livingston* v. *Warrock*, 1773, 6 Pat. 790, and *Ross* v. *Ross*, 1758, 6 Pat. 715.

1794. Reduction—Restitutio in integrum.—Several parties purchased 2500 shares of a railway in order to get command of its management. One of the parties, who had purchased 50 of these shares, discovered that 10 of the shares allotted to him were shares of another railway. An action for reduction of the sale and repayment of the price or alternatively for the price of the 10 undelivered shares at the instance of this purchaser against the seller *dismissed*, as (1) the pursuer could not offer restoration of the whole 2500 shares and therefore could not reduce the sale, and (2) he had suffered no injury seeing that the object of the purchase (command of the railway) had been attained. *Graham* v. *Scott*, 1852, 15 D. 165; 25 J. 114; 2 Stuart 84.

1795. Reduction—Sale—Auction—Relevancy.—Trustees under a *mortis causa* deed exposed heritage to sale by auction under articles of roup, specifying an upset price, and declaring that the highest offerer was to be preferred to the purchase. A party offered the upset price, and the property was knocked down to him at a considerable advance, after competition with the person entitled to the residue of the trust estate, who was the only other offerer. The purchaser raised an action against the exposers and residuary legatee, concluding for reduction of the minute of sale so far as it embraced any offer except that of the upset price, and of all offers subsequent to that; for declarator, that he purchased at the upset price, and that the exposers should be decerned to convey the lands to him on payment of that amount. The pursuer averred that, had the upset price been accepted, there would have been left a balance, payable to the residuary legatee, after satisfying all claims against the trust. *Held* (1) that the residuary legatee must be assumed to have been aware of the state of the trust, and that it was not necessary to aver that he was; (2) that the sale was really for behoof of the residuary legatee; that he was virtually the exposer, and incapacitated from bidding at the sale, and his offers illegal; (3) that it was unnecessary to aver fraud or collusion on the part of the residuary legatee; (4) that the pursuer sought the proper remedy in concluding for reduction of all offers subsequent to the offer of the upset price, and that it was not necessary that the sale should be set aside *in toto*. Objections to the relevancy of the libel, and to the suitableness of the remedy, were therefore *repelled*. *Faulds* v. *Corbet*, 1859, 21 D. 587; 31 J. 313.

1796. Reduction—Satisfying Production—Objection to Pursuer's Title—Production Ordered to be Satisfied Reserving as to the Objection.—In an action of reduction-improbation, and alternatively of declarator of non-entry, at the instance of a corporation as superiors of certain subjects, against a defender as alleged proprietor of the subjects, but whose titles, if any, were alleged to have flowed from the corporation, preliminary defences were put in, denying that the subjects

in question were included in the pursuers' charter, and pleading that the pursuers had no title to sue. A record was made up on the preliminary defences, and a proof allowed. Thereafter, the Lord Ordinary sustained the objection to the title to pursue, and dismissed the action. *Held* that the only objection to title to sue was not one which afforded a good objection to satisfying the production, and therefore that the proper course was to reserve it, and appoint the production to be satisfied, and the cause to be prepared for judgment on the merits. *United College of St. Andrews* v. *Blyth*, 1864, 2 M. 810; 36 J. 417.

1797. Reduction—Satisfying Production—Preliminary Defence of no Title to Sue.—In a reduction brought by a son-in-law of a testamentary disposition granted by his father-in-law on the ground of forgery, etc., it was stated, as a preliminary defence, that the pursuer had no title to sue, in respect that by his contract of marriage his wife conveyed to him her estate under burden of the provisions contained in the writs challenged, and therefore his own title barred the action. *Held* that, before ordering the production to be satisfied, this preliminary defence ought to be disposed of. *Hamilton* v. *Henderson*, 1849, 11 D. 577; 21 J. 165.

1798. Reduction—Satisfying Production—Reduction of Titles to an Estate—Preliminary Defences against Satisfying Production.—In an action to reduce the titles to an estate, *held* (1) that the defender was not bound to satisfy production when the pursuer's title to sue rested on an erroneous construction of a statute, though that construction was averred; and *observed* (2) that alleged prescriptive possession forms no defence against satisfying production; (3) that a preliminary defence founded upon an alleged title to exclude cannot be sustained without exhibition of the title deeds instructing it; and (4) that corruption of blood in respect of the attainder of an ancestor, through whom the pursuer traced his pedigree, would found a good objection to satisfying production, but that it could not be sustained in the face of an unreduced service expede by the pursuer in the character in which he claimed. *E. of Perth* v. *Lady Willoughby de Eresby's Trs.*, 1871, 9 M. (H. L.) 83; 43 J. 394; L. R. 2 Sc. App. 139.

1799. Reduction—Satisfying Production—Reservation of Preliminary Pleas.—Circumstances in which, in an action of reduction, where the defenders pleaded, *inter alia*, that the action was incompetent and irrelevant, and that they were not bound to satisfy the production of any of the writs called for, the court *appointed* the defenders to satisfy the production, and reserved consideration of the relevancy and competency, to be discussed along with the merits. *Cochran* v. *Dunlop*, 1872, 9 S. L. R. 597.

1800. Reduction—Satisfying Production—Writs Lost—Actions of Proving the Tenor Raised by Defender.—In a reduction of certain writs, some of which were referred to by the defender as on record, and he had brought actions of proving of the tenor of others, the court *refused in hoc statu* to pronounce decree of certification against them as not produced. *Lebrun, etc.* (*Gracie's Trs.*) v. *Ferguson*, 1852, 14 D. 486; 1 Stuart 408.

1801. Reduction—Title to Exclude and to Sue.—Titles brought under reduction cannot form a title to exclude the action in which they are sought to be reduced. *Clark* v. *Loudon*, 1856, 18 D. 499; 28 J. 187.

1802. Reduction—Title to Sue.—A person who held property under condition that she should dispone it to A and B in such proportions as she chose executed a deed giving the property to A and £40 to B and thereafter disponed the whole to A. *Held* that B had no title to reduce the latter deed as the earlier one remained. *Robertson* v. *Megget*, 1822, 1 S. 364.

1803. Reduction—Title to Sue—Party having jus quæsitum.—Any party having a *jus quæsitum* under a deed has a title to sue a reduction of another deed granted in prejudice thereof. *M'Gowan* v. *Robb*, 1862, 1 M. 141; 35 J. 72.

1804. Reduction — Warrant to Levy Poor Rates—Whether Action Excluded by the 86th Section of the Poor Law Amendment Act.—In an action for reduction of a warrant to levy poor rates, of an execution of search by the constable, certificate of non-payment by the collector, and warrant of imprisonment, on the ground that the pursuer had paid his assessment, and that no further assessment could be imposed upon him for that year, *held* (1) that the action was not excluded by the 86th section of the Poor Law Amendment Act; and (2) that it was not incompetent, in respect that the summons contained no petitory conclusions, and that the defenders had tendered payment of the alleged surcharge; but (3) that it was unnecessary and incompetent to direct the action against the constable. *Ferguson* v. *Malcolm*, 1850, 12 D. 732; 22 J. 252.

1805. Reference to Oath—Competency—Decree on the Merits Extracted—Auditor's Report on Expenses not Approved and no Decree Therefor.—Where a decree had been extracted, but before approval of the auditor's report and decerniture as to expenses, the defender put in a minute of reference to the pursuer's oath. Objection, that the decree having been extracted, the reference was incompetent, *repelled*. *Drew* v. *Drew*, 1855, 17 D. 784; 27 J. 406.

1806. Reference to Oath—Deposition—Exhaustive of Cause—Subsequent Proof.—A party charged on a bill of exchange suspended on the ground that the charger has failed to implement an agreement in respect of which the bill was granted, and he referred to the charger's oath that he had given no real value for the bill. The charger deponed as to the

agreement and the implement. *Held* that a proof *prout de jure* of non-implement was incompetent. *Wyllie* v. *Latta*, 1832, 11 S. 151. Cf. *Brown* v. *Paterson*, 1809, Hume 469.

1807. Reference—Judicial—Difference as to Meaning of—Recall of by Court.—On the eve of a jury trial the parties put in a minute referring the matters in dispute to an engineer, to which reference the presiding judge interponed his authority. Parties, when heard before the referee, could not agree as to the meaning of the remit, and the referee reported to the court. The judges differing in opinion the court recalled the interlocutor interponing the authority of the court to the judicial reference, and allowed parties to proceed as if no such reference had been agreed to. *Stewart* v. *J. Walker & Co. & Others*, 1853, 2 Stuart 243.

1808. Reference—Judicial—Alteration of Terms of Decree Suggested by Referee.—A judicial referee in a division of commonty gave in his report, suggesting the terms of the decree of division. An alteration having been suggested as necessary in the terms of the decree, *held* that the regular course was to remit to the judicial referee to make it. *Lord Advocate* v. *Heddle*, 1856, 18 D. 1211; 28 J. 616.

1809. Reference — Judicial—Remit to Counsel held to be Equivalent to—Incompetency of Further Procedure. — Under a petition for continuing certain parties as managers of a disfranchised burgh, the Lord Ordinary of consent, before answer, remitted the case to two counsel to inquire into and report their opinion as to the grounds of objection set forth in the record, but without reporting the evidence. *Held* that this was substantially a judicial reference, and that the report by the counsel was conclusive of the cause. *Jarvis* v. *Swayne*, 1838, 16 S. 427.

1810. Relevancy, Question as to—Discretion of Court as to Procedure.—When a question of relevancy is raised, and judgment asked upon it before the facts of a case have been ascertained, there is no rule which requires the court to pronounce judgment upon the relevancy; but it is a matter of discretion whether the demand should be complied with, or whether the disputed matters of fact should be investigated in some proper manner before answer. *Millar* v. *Small*, 1856, 18 D. 402; 28 J. 157.

1811. Remit—Remit to Accountant—Action of Count and Reckoning against Party who had Intromitted with a Deceased's Estate.—In an action for count and reckoning and damages by the executor under a will, against a party who had intromitted with the estate of the deceased as executor under a will of the deceased, which was revoked by the other, and who had fraudulently concealed the former will, *held* that, instead of remitting the cause for jury trial *hoc statu*, it was expedient that a remit be made to an accountant to report the balance for which the intromitter should be accountable. *Cleland* v. *Weir*, 1840, 2 D. 344.

1812. Remit—Action of Accounting—Remit to an Accountant.—In an action of accounting, which the pursuer desired to have sent to a jury at once, the Lord Ordinary, before further procedure, remitted certain points to an accountant, thinking his report might supersede the necessity of a jury trial, and would be useful in any view. The pursuer reclaimed, but the court adhered, making the remit "before answer." *Carron Co.* v. *Stainton's Trs.*, 1857, 19 D. 932; 29 J. 545.

1813. Remit—Remit to Accountant—Competency of Objecting to his Report.—*Observed*, that a remit to an accountant is not of the character of a reference, but that parties are entitled to object to all the grounds on which he forms his opinion. *Cameron* v. *Anderson*, 1844, 7 D. 92; 17 J. 42.

1814. Remit — Accountant. — Under a remit to an accountant "before answer," with power to take evidence—*held* the accountant entitled only to take such evidence as is competent. *Robertson* v. *Murphy*, 1867, 6 M. 114; 40 J. 61. *Liquidators of Western Bank* v. *Baird's Trs.*, 1868, 5 S. L. R. 671.

1815. Remit—Remit to Accountant for Report—Whole of Acountant's Fee Paid by one Party—Right of the Party to use Report.—A pursuer was ordered to lodge an accountant's report in process; but not having paid his share of the accountant's fee, he had not got the report, and so was unable to implement the order. The accountant obtained decree against him for his share of the fee. Thereafter the defender, who had paid his own share, paid that of the pursuer also, and obtained the report, but refused to produce it until repaid by the pursuer his half of the fee. Motion by the pursuer to have the defender ordained to produce the report, *refused*. *Sutherland* v. *Goalen*, 1855, 17 D. 509; 27 J. 212.

1816. Remit—Remit to an Antiquary—Class—Clan Chattan.—In a declarator relative to the succession of the lands of Faillie, claimed by a party who represented himself to be a member of the Clan Chattan, to which he averred that the destination was limited, a remit by the Lord Ordinary to an antiquary to inquire and report before answer on, What is a clan; whether there is such a thing as the Clan Chattan; and what constitutes membership, *recalled*. *Macgillivray* v. *M'Arthur or Souter & Noble*, 1860, 32 J. 634.

1817. Remit—Agreement that Value of Subjects be Determined by Referees.—Where it is a part of an agreement that the value of subjects shall be ascertained by mutual referees, and this is not done extrajudicially, *held* competent to do so, in an action for their value, by remitting to a person of skill. *Munro* v. *Mackenzie*, 1823, 2 S. 593.

1818. Remit—Builder's Account—Competency of Remit without Consent.—In an action for payment of a builder's account, the defence to which was that it was overcharged, *held* that the sheriff had competently remitted

the account to an architect although the defender objected. *Robertson* v. *Thomson*, 1866, 1 S. L. R. 248.

1819. Remit—Remit of Consent—Incompetency of Proof Thereafter. — *Grant* v. *Dunbar*, 1834, 12 S. 717. *Macintosh* v. *Lady Ashburton*, 1834, 12 S. 518. *Murray* v. *Presbytery of Glasgow*, 1833, 12 S. 191; 9 Fac. 129. *Wilson & Son* v. *Struthers & Son*, 1837, 15 S. 523; 12 Fac. 469. *Brown* v. *Love*, 1842, 4 D. 386.

1820. Remit — Whether Final — Competency of Proof—Consent.—*Held* that a party was barred from demanding further probation by acquiescence in an interlocutor pronounced after a discussion on objections to an accountant's report by which the Lord Ordinary "of consent of parties and with the view of finally disposing of the case, of new" remitted to the accountant to inquire and report upon one particular branch of the accounting, of which remit the party did not avail himself. *Gibson* v. *Ewan*, 1852, 15 D. 211; 2 Stuart 49, 117.

1821. Remit — Judicial Report — Bar. — Circumstances under which a party was *held* barred from objecting to a judicial report, and to the opinions of the consulted judges, as not regularly taken. *Stewart* v. *Blaikie*, 1829, 7 S. 330; 4 Fac. 390.

1822. Remit—Remit to a Commissioner to Examine Titles — Declarator of the Property of a Piece of Ground.—*Held* competent for the Lord Ordinary, in a declarator of the property of a piece of ground, which both the pursuer and defender maintained was included in their titles, to remit before answer in the preparation of the cause, to a commissioner to examine the titles, and the titles of conterminous proprietors, and to prepare a state thereof with reference to the allegations and pleas. *Mushet* v. *D. of Buccleuch*, 1851, 13 D. 713; 23 J. 313.

1823. Remit—Party to Remit not Barred by Acquiescence to it from leading Evidence in Subsequent Declarator.—In an application to a sheriff complaining of encroachments upon the gable of a house, the property of the petitioner, the respondent acquiesced in a remit to inspectors to report upon the questions in dispute. The report and the judgment being unfavourable to him, he advocated, and raised a declarator of his right to the property of the gable. *Held* that he was not barred by his acquiescence in the remit to the inspectors, and the procedure thereupon, from leading proof in the declarator. *Gray* v. *Watson*, 1844, 6 D. 925; 16 J. 412.

1824. Remit—A Party concurring in a Remit can't afterwards Object to Reporter. —A party concurring in a remit for the opinion of American counsel as to the law and practice of South Carolina on a certain question, held not entitled, on an adverse opinion being returned by a counsel of New York, to have a new remit to lawyers in South Carolina. *Welsh* v. *Milne*, 1844, 7 D. 213; 17 J. 101.

1825. Remit — General Remit — Inconclusiveness of Report.—Where the court has remitted to an advocate "to inquire into and report on the true state of the facts" in the case, his report is not conclusive, but the court must itself consider and decide on the proof as led. *Brown* v. *Doctor*, 1851, 1 Stuart 23.

1826. Remit — Remit from One Lord Ordinary to Another—Lord Ordinary being a Witness for one of the Parties.—Upon a statement by the counsel for the defender, that the Lord Ordinary, before whom the pursuer had enrolled the cause, was an essential witness for the defender, the court remitted to another Lord Ordinary. *Clarke* v. *Wardlaw*, 1845, 7 D. 268.

1827. Remit from One Lord Ordinary to Another—Death of Lord Ordinary from whom Case Remitted.—The court on the petition of the pursuer of an action in respect that Lord Craig before whom it was, was indisposed remitted the case to Lord Gillies. After Lord Craig's death the case continued before Lord Gillies. An objection that the remit was limited to Lord Craig's lifetime *repelled* and the subsequent procedure *held* regular. *Ferrier* v. *Ross*, 1833, 11 S. 531.

1828. Remit from One Division to Other —Contingency.—*Held* that it was incompetent even of consent to remit a case from one Division to the other, where contingency is not averred. *Robson* v. *Denny*, 1857, 19 D. 654; 29 J. 302. Rendered competent by 20 and 21 Vict. c. 56, s. 7.

1829. Remit — Payment of Expenses thereof—Party Paying has no Lien over Report.—A party to a process, who has paid the whole expenses of a remit to an accountant, does not thereby acquire an assignation to the accountant's lien over his report, and has no right to refuse to produce the report in process until the other party shall have paid his proportion of the expense. *M'Queen* v. *M'Queen's Trs.*, 1851, 13 D. 502; 23 J. 211.

1830. Remit—Remit to inferior Judge— — Expenses. — Under a remit to recall a decree in absence and receive defences, an inferior judge cannot make the payment of expenses a condition of receiving the defences unless specially ordered. *Souter* v. *Gray & Co.*, 1826, 4 S. 425.

1831. Remit—Removal of Judge to Inner House—Act of Sederunt as to Remitting all Causes Depending before him to his Successor—Necessity of Enrolling Cause within three Months—Cause not Enrolled within three Months Decided by Successor —Nullity of whole Proceedings.—An A. S. was passed on the removal of a judge from the Outer to the Inner House, remitting all processes pending before him to his successor, provided an enrolment was made within three months. This was emitted in a cause, but the cause was proceeded with before the new Lord Ordinary for several years, a judgment pronounced, which was reclaimed against, and a remit made by the Inner House to the Lord

Ordinary; and thereafter a second judgment was pronounced by him, all without objection by the defender. *Held* that the proceedings were null. *M'Leod* v. *Rose*, 1833, 11 S. 333.

1832. Remit—Remit to Man of Skill—Competency of Proof Thereafter.—A party having acquiesced in a judicial remit to a person of skill, *held* not thereafter entitled to insist on a proof in regard to facts reported upon by that person. *Dixon* v. *Monkland Canal Co.*, 1821, 1 S. 145; 1825, 1 W. & S. 636. Cf. *Rowat* v. *Whitehead*, 1826, 5 S. 19. *D. of Buccleuch* v. *Pringle*, 1827, 5 S. 677. *Hunter* v. *D. of Queensberry's Exrs.*, 1827, 6 S. 89. *Jollie* v. *Grahame*, 1827, 6 S. 236; 5 W. & S. 280. *Measow* v. *D. of Queensberry's Exrs.*, 1827, 6 S. 326. *Halkett* v. *E. of Elgin*, 1831, 9 S. 412; 6 Fac. 294; 1 S. & M'L. 629.

1833. Remit—Remit to Man of Skill—Bill Chamber.—A remit made in the Bill Chamber before answer to an engineer, to inspect and report. *Scott* v. *Scott*, 1839, 1 D. 1176.

1834. Remit—To Man of Skill—Bar to Subsequent Proof at Large.—*Held* that a party having acquiesced in, although without expressly consenting to, a judicial remit to a person of skill, was not thereafter entitled to a proof at large of his averments respecting the subject of the remit. *Pearce Brothers* v. *Irons*, 1869, 7 M. 571; 41 J. 302.

1835. Remit—Remit to Man of Skill—Difference between two Reporters—Remit to a third Party.—Where two inspectors, under a judicial remit, were at issue with each other, and had returned an incomplete report, the court conjoined a third party with them, and remitted of new. *Muir* v. *Anderson*, 1833, 12 S. 129.

1836. Remit—Remit to two Persons of Skill—Death of one of These—Remit to New Reporter.—In an action brought by a landed proprietor to compel a railway company, whose line intersected his estate, to fulfil a statutory obligation to make and maintain the slopes of the embankments, the Lord Ordinary remitted to persons of skill to examine and report. These gentlemen made a report which did not exhaust the case; and one of them having died, held that the proper mode of making the further investigation was not by a jury or proof on commission, but by a new reporter to act with the survivor. *Lord Blantyre* v. *Glasgow & Greenock Rly. Co.*, 1851, 13 D. 570; 23 J. 254.

1837. Remit—Report of Man of Skill—Evidence.—Where the court, having obtained the opinion of a man of skill, have remitted to him for additional information, and the parties have intimated to him that they did not wish to meet him on the subject, the court will not listen to objections or explanations in regard to the additional report; and where parties themselves have obtained reports from men of skill, the court will only listen to statements therein contained as matter of averment, and not as evidence. *Bertram, etc.* v. *Presbytery of Lanark, etc.*, 1864, 2 M. 1406; 36 J. 693.

1838. Remit—Remit to Man of Skill—Interdict.—A remit made to a person of skill relative to operations craved to be interdicted, before deciding on the title of the party to make the operations. *Mags. of Montrose* v. *Birnie*, 1829, 8 S. 108.

1839. Remit—Remit to Man of Skill—Power to take Proof. — Circumstances in which the court preferred a remit to a man of skill, with power to take proof as to a question regarding the working of coal, to a jury trial. *Robertson* v. *Hundman*, 1834, 12 S. 544.

1840. Remit—Remit to Man of Skill——Report Approved—Incompetency of thereafter raising Objections to Report.—Objections to the report of a surveyor as to the value of an estate having been repelled, and the report approved of, *held* incompetent afterwards to bring forward objections that the value of woods, minerals, etc., had not been specially considered and included. *Hunter* v. *Cochrane's Trs.*, 1831, 9 S. 477.

1841. Remit—Remit to Man of Skill—Tradesman's Account.—A defender objected to an account of plumber work as overcharged, and a remit was made to a plumber to "examine the account, and report his opinion as to the charges." A report was returned, stating a variety of items as overcharged, and others as undercharged. *Held* that the defender could not reject the report as to the partial undercharge, if he founded on it in proof of the partial overcharge. *Thomson* v. *Moffat*, 1831, 10 S. 124.

1842. Remit—Proof or Remit—Question as to whether certain Teinds were Bishops' Teinds.—*Held* that an allegation in a process of locality, as to whether certain teinds were or were not bishops' teinds, should be inquired into in the ordinary mode by proof on commission, and not by a remit to the teind-clerk. *Macleod* v. *Wedderburn*, 1862, 24 D. 774; 34 J. 390.

1843. Remit—Question as to Funds to be Applied to the Maintenance of Ministers—Defence that whole was being so Applied — Remit made to Inquire into this — Defence withdrawn—Inquiry Directed by the Court to be Completed.—In an action by a presbytery to have it found that the holders of a fund were bound to apply it to the maintenance of the ministers of the Church of Scotland within the burgh of Dundee, and that the holders were bound to provide adequate salaries to the ministers, the holders of the fund pleaded, *inter alia*, that the ministers were already in receipt of sums exhausting the revenue of the fund devoted to that purpose. The court having remitted to ascertain the nature and amount of the funds and of the claims, and considerable progress in the investigation having been made, their Lordships, in applying a judgment of the House of Lords, directed the completion of the inquiry and report, though the defenders withdrew the

above defence. *Presbytery of Dundee* v. *Mags. of Dundee*, 1861, 34 J. 106.

1844. Remit—To Sheriff to Inquire and Report.—Where the court, in aid of its own jurisdiction, calls into action the assistance of a sheriff (a sheriff-substitute) by remitting to him to inquire into the facts of the case and to report, he is bound to execute the remit, and is not entitled to remuneration. *Dyce* (*Compearer*), 1868, 7 M. 31 ; 41 J. 24.

1845. Removing—Action Raised against Possessor as Tenant.—Where a process of removing is raised against a party on the sole ground that he is tenant, it is incompetent in the same process to remove him as a vitious possessor. *Waterstone* v. *Mason*, 1846, 8 D. 944 ; 18 J. 486.

1846. Removing—Ejection—Advocation—Suspension ob contingentiam.—A bill of advocation of an order of ejection in a process of removal refused as incompetent under the Judicature Act ; and a bill of suspension *ob contingentiam* likewise refused. *Gibson* v. *Scott*, 1826, 4 S. 404.

1847. Reponing—Accounting—Lodging Accounts.—In an action of count, reckoning, and exhibition, in which no defences had been lodged, an order was pronounced upon the defender to lodge his accounts within a specified time ; which order he failed to obey, and in respect thereof the Lord Ordinary decerned against him in terms of the conclusions of the libel. *Held* that a reclaiming note at his (the defender's) instance to be reponed was competent, although the accounts were not lodged along with the note ; and the accounts having been lodged within the reclaiming days, the Lord Ordinary's interlocutor was recalled. *Bell* v. *Hill*, 1858, 20 D. 718 ; 30 J. 368.

1848. Reponing — Aliment — Conjugal Rights (Scotland) Act, 1861, s. 15. — In actions of aliment by wives under the Conjugal Rights (Scotland) Amendment Act, the defender may be reponed in ordinary form against decrees in absence. *Hutton* v. *Hutton*, 1861, 24 D. 101 ; 34 J. 52.

1849. Reponing—Act 48 Geo. III. c. 151, s. 16 — Conditions. — A party cannot be reponed under the Act 48 Geo. III. c. 151, s. 16, against an interlocutor improperly allowed to become final without paying full expenses, even where there is a previous interlocutor finding no expenses due. *Thom*, 24 May 1811, F. C.

1850. Reponing — Caution — Suspension.—The estates of an advocator were sequestrated, and his trustee having declined to appear, the Inner House remitted *simpliciter*, and decerned for expenses, without directing intimation to be made to the advocator's cautioner. *Held* that he could not be reponed against the interlocutor ; and *observed*, that his redress, if any wrong had been suffered, was by suspension. *Swan* v. *Halyburton*, 1833, 11 S. 245.

1851. Reponing—Cessio.—The pursuer of a process of *cessio* was in absence found entitled to the benefit of *cessio*, the agent of objecting creditors having failed to attend an adjourned diet of examination. Upon a reclaiming note to the court, it being stated that the agent of the opposing creditors had made a mistake as to the hour of the examination, the objectors were reponed, on condition of the agent paying personally the expenses incurred. *M'Kechnie* v. *Halliday*, 1856, 18 D. 659 ; 28 J. 283.

1852. Reponing—Circumduction of the Term for Reporting a Commission.—In an action of accounting raised in 1856, a conjunct probation was granted in June 1858, to be reported *quam primum*. In January 1859 the pursuer's diligence was ordered to be reported in four weeks, and on 10th Feburary circumduction was made against him in absence. He reclaimed, and moved to be reponed on paying expenses. Motion *refused*. *Burt* v. *Burt*, 1859, 21 D. 596 ; 31 J. 318.

1853. Reponing — Competency — Agreement as to Implementing Decree.—A suspension to be reponed against a decree in absence, where the defender had granted a trust deed for the purpose of implementing it, and the pursuer had bound himself not to do diligence, *refused*. *Wotherspoon* v. *Winning*, 1849, 11 D. 371 ; 21 J. 104.

1854. Reponing—Competency of Reponing same Party Twice.—Objection to the competency of a reclaiming note against a decree pronounced in respect of non-appearance at the debate, on the ground that the party had previously been reponed against a decree in absence, *repelled*. *Cruickshank* v. *Mackay*, 1845, 7 D. 1084 ; 17 J. 559.

1855. Reponing — Decree in Absence — Decree taken in Contravention of an Agreement.—A decree in absence having been taken against a defender in violation of a compromise, the court reponed him, and remitted to the Lord Ordinary to decide as to expenses, which he found due to the defender. *Leech* v. *Shepherd*, 1847, 9 D. 1253.

1856. Reponing — Decree in Absence—Forthcoming.—*Held* incompetent, under a reponing note by a defender, to object that he was precluded by an intervening circumstance from insisting in his defence. *Ainslie* v. *Haig*, 1845, 17 J. 342.

1857. Reponing—Decree in Absence—Party not Reclaiming Reponed.—In an action against a debtor and the trustees under a deed which directed that a sum of money should be applied in payment of the principal defender's debts, and that the balance should be liferented by him, the fee being destined to other parties, the Lord Ordinary decerned in absence against both the debtor and the trustees, conform to the conclusions of the libel. The trustees craved to be reponed. *Held* that although the principal debtor did not reclaim, the decree ought, in the circumstances, to be recalled *in toto*. *Johnstone* v. *Grieve*, 1860, 23 D. 37 ; 33 J. 17.

1858. Reponing—Decree in Absence—Decree by Default.—A decree in respect of no defences, in a cause where the summons had been taken out to see and which had been twice continued on motion by defender's counsel, is a decree, not by default, but in absence, and the defender may be reponed against it at any time before extract. *Marjoribanks* v. *Borthwick*, 1857, 19 D. 474.

1859. Reponing—Decree in Absence or Decree by Default.—*Held* that a decree, "in respect no appearance is made for the pursuer in the cause now called in the course of the debate-roll, assoilzies the defenders," etc., is not a decree in absence, but *in foro*, and a reclaiming note to be reponed after the lapse of the reclaiming days is incompetent. *Boak or Watson* v. *Watson*, 1860, 22 D. 1468; 32 J. 666.

1860. Reponing—Decree by Default or in Absence—Reclaiming Note—Record.—An interlocutor, decerning in terms of the conclusions of the libel, set forth that the defender's counsel appeared at the calling of the cause in the debate-roll, and declined to proceed. *Held* competently reclaimed against as a decree in absence, without appending the record. *National Exchange Co.* v. *Drew & Dick*, 1860, 23 D. 27; 33 J. 11.

1861. Reponing—Decree by Default.—It is a matter for the discretion of the court whether or not a party shall be reponed against a decree by default. Circumstances in which the court *refused* to repone against a decree by default. *Arthur* v. *Bell*, 1866, 4 M. 841; 38 J. 440.

1862. Reponing—Decree by Default—Consent of Opposite Party. — Reponing against decrees by default does not, as against decree in absence, take place as matter of course. *M'Laren* v. *Robertson*, 1857, 19 D. 769; 29 J. 348.

1863. Reponing—Decree by Default—Failure to Sist a Mandatary.—In a reclaiming note to be reponed against a decree in respect of failure to sist a mandatary, *held* that the party decerned against must, before being reponed, tender a minute sisting a mandatary, in implement of the order to that effect, and that production of a mandate was not enough to entitle him to be reponed; but a minute sisting the mandatary having been tendered at the bar, the court allowed the mandatary to be sisted, and reponed in common form. *Thomson* v. *Woodthorpe*, 1863, 1 M. 635; 35 J. 367.

1864. Reponing—Decree by Default—Sheriff Court Decree.—In an action in a sheriff court no appearance was made for the pursuer at a diet on the debate-roll; and on 25th March 1871 the sheriff-substitute, on the defender's motion, held the pursuer confessed as not insisting in the action. The pursuer did not appeal to the sheriff, but on 30th May 1871 appealed to the Court of Session. The court reponed him on payment of £10, 10s. of expenses, and continued the case for seven days, with a view to the case being disposed of in the Court of Session, at the same time expressing dissatisfaction at the procedure, and observing that it was not contemplated by the Act that cases should be brought up for review from the Inferior Court *causa non cognita*. The appellant having failed to pay the £10, 10s. within the seven days, the court *dismissed* the appeal, finding the appellant liable in expenses. *Morrison* v. *Walker*, 1871, 9 M. 902; 43 J. 491.

1865. Reponing—Decree by Default in Respect of Failure to Lodge Minute—Duty of Lodging Minute with Reclaiming Note.—A decree in terms of the libel having been pronounced by default to lodge a minute, *held* that a reclaiming note, unaccompanied by the minute, praying not to be reponed, but to alter the interlocutor and sustain the defences, was competent, and a remit made to the Lord Ordinary to proceed with the cause. *Rait* v. *Stewart*, 1846, 8 D. 1225; 18 J. 587.

1866. Reponing — Decree by Default — Failure to Pay One-Half of the Fees of an Accountant's Report.—Judgment by default having been pronounced against a party who had failed to implement a decree which had become final for payment of one-half of the fees of an accountant's report, he presented a reclaiming note praying to be reponed, but without offering to pay his half of the accountant's fee, he being at that time using endeavours to get on the poor's roll. *Held* that he could be reponed only on purifying the default. *Burk* v. *Madder*, 1845, 17 J. 153.

1867. Reponing — Defender in Divorce Action Allowed to Repone on Payment of Expenses.—Judgment having passed in absence of a defender resident abroad, and cited to an action of declarator of marriage, raised in virtue of an arrestment *jurisdictionis fundandæ causa*, the court, while allowing him to be reponed, refused to reserve the question of expenses, although he disputed the jurisdiction, but remitted to the Lord Ordinary to repone, on payment of such expenses as he might see fit. *Brackenridge* v. *Kenneth*, 1834, 12 S. 654.

1868. Reponing—Decree—Final Decree.—After a final decree in a multiplepoinding has been pronounced and implemented, though not extracted, it is incompetent to repone a party as against a decree in absence. *M'Intyre* v. *Collins*, 1834, 13 S. 101.

1869. Reponing—Decree in foro.—A lady residing in Jamaica was charged to enter heir, and in an action of constitution she made appearance denying representation; but although repeatedly reponed against a decree, she failed to renounce, and the decree was extracted. *Held* in a question with her executors, that the decree was *in foro quoad* the representation, and that they were not entitled to be reponed. *Smith* v. *Oliphant*, 1807, Hume 439.

1870. Reponing — Decree — Minority. — Although the pursuer of a reduction of a decree in absence has been found, in respect

of minority, not excluded from reducing it, he is not entitled forthwith to be reponed, but only to be heard on the merits of the decree. *Macdonald* v. *Brown*, 1838, 14 Fac. 206.

1871. Reponing—Expenses.—A party who failed to attend a second diet for examination on oath, reponed against an interlocutor pronounced in respect thereof, on paying expenses. *Miller* v. *Cooper*, 1835, 13 S. 369.

1872. Reponing—Failure by Minor to Sist Curator ad litem — Attainment of Majority. — A pursuer who was under age having repeatedly failed to have a curator *ad litem* appointed, absolvitor was pronounced; whereupon he applied to be reponed, alleging that he was now of full age. An objection to the competency of the reponing note, that he should have produced with it a certificate of the fact, *repelled*, and a remit made to repone on proof of it being produced. *Sawers* v. *Matheson*, 1852, 14 D. 769; 24 J. 439; 1 Stuart 708.

1873. Reponing — Failure to Sist a Mandatary — Return to Scotland. — A reclaiming note against an interlocutor of the Lord Ordinary assoilzieing the defender, in respect the pursuer had failed to sist a mandatary, *held* competent; and the pursuer reponed, although the reclaiming note was unaccompanied by a mandate, and the record was not appended — a minute having been lodged, stating that he had returned to Scotland, and had no intention of again leaving the country. *Hall* v. *Newland's Trs.*, 1859, 22 D. 333; 32 J. 140.

1874. Reponing — Issues — Failure to Lodge — A. S. 11 July 1828 — Court of Session Act 1850, s. 12.—Where decree was pronounced against a party, in respect of failure to lodge issues which he had been appointed to give in under certification, *held* that this was a judgment against which he was entitled to be reponed, and that the leave of the Lord Ordinary was not necessary under the 12th section of the 13 and 14 Vict. c. 36, to enable him to reclaim. *Harvey* v. *Fisher*, 1851, 13 D. 498; 23 J. 208.

1875. Reponing — Multiplepoinding — Failure to Lodge Claim.—After decree of preference in a multiplepoinding had been allowed to become final, and had been, though not extracted, to a great extent implemented, a note by a party who had been called, but had made no appearance, praying to be reponed against the interlocutor as in absence, *refused*. *Observed*, that the provisions of the A. S. 1828 did not apply where implement of a decree in absence had been obtained. In such cases the remedy is reduction. *Stodart* v. *Bell*, 1860, 22 D. 1092; 32 J. 501.

1876. Reponing — Multiplepoinding — Reclaiming Note — Competency. — *Question* whether, in a multiplepoinding, a reclaiming note against a judgment of the Lord Ordinary disposing of the funds *in medio*, presented without the record appended to it by a party called as a defender, but who had lodged no claim, is competent. *Jaffe* v. *Carruthers*, 1860, 22 D. 936; 32 J. 395.

1877. Reponing—Proof in Replication—Advocation.—A pursuer who had allowed circumduction to pass against him, moved the sheriff to open up the decree, and allow him a proof in replication. The sheriff *refused*. In an advocation, the Lord Ordinary granted it before answer, under reservation of all objections to the relevancy and competency. The court recalled the interlocutor, observing (1) that this was an unusual motion, which the Lord Ordinary ought not to have granted before deciding its competency; and (2) that there was no allegation of surprise by the pursuer to warrant the motion being granted. *Henderson* v. *Anderson*, 1854, 26 J. 514.

1878. Reponing—Party on Poor's Roll.—The court has no power to repone a party litigating on the poor's roll on any other than the ordinary conditions. *Ord* v. *Ord*, 1861, 24 D. 25; 34 J. 15.

1879. Reponing—Form of Reclaiming Note—Interlocutor Prorogating the Time for Lodging the Paper.—A reclaiming note to be reponed against a decree, in respect of failure to lodge a revised condescendence, refused as incompetent, in respect a copy of an interlocutor prorogating the time originally allowed for lodging the paper was not prefixed to the note. *Dargavel* v. *Heron*, 1850, 12 D. 944; 22 J. 414. *Thomson* v. *Innes*, 1851, 13 D. 1173; 23 J. 560, 593. *Scots Mining Co.* v. *Leadhills Mining Co.*, 1853, 15 D. 277; 2 Stuart 145. *Arthur* v. *Deuchar*, 1866, 4 M. 705; 38 J. 292. *Macdonald* v. *Harper*, 1856, 18 D. 1319; 28 J. 677. *Raleigh* v. *Smith*, 1858, 20 D. 912; 30 J. 537. *Aikman* v. *Aikman's Trs.*, 1867, 5 M. 372.

1880. Reponing — Reclaiming Note — Form of—Record.—A reclaiming note against a decree, in "respect of no appearance," pronounced after the record had been closed and a proof led, *held* competent, although the record was not appended. *Milne* v. *Scott*, 1858, 20 D. 1224; 30 J. 725. *Bell* v. *Ogilvie*, 1862, 24 D. 375; 34 J. 249.

1881. Reponing — Reclaiming Note — Form of Prayer—"Recall" or "Repone."—Objection to a reclaiming note against a decree in absence, that it did not contain a prayer to "repone," but prayed that the interlocutor should be recalled, *repelled*; but *observed*, that "repone" was the proper form of expression to be used. *Horne & Rose* v. *Ryrie*, 1847, 10 D. 116; 20 J. 29.

1882. Reponing — Reclaiming Note — Service.—It is not necessary to serve upon the opposite agent copies of a reclaiming note, praying to be reponed against an interlocutor pronounced on failure to lodge a paper. *Cullen* v. *Whyte*, 1851, 13 D. 526; 23 J. 237.

1883. Reponing—Reduction — Adjudication.—A creditor who had adjudged, raised a declarator of expiry of the legal, which the

debtor instructed an agent to oppose; but he being employed by the creditor, declined to do so, and decree in absence was pronounced. *Held*, in an action of reduction, that he was entitled to be reponed. *Maclellan* v. *Macree*, 21 Jan. 1806, F. C.; M. "Adjudication" App. No. 15.

1884. Reponing — Right of Defender's Representatives to be Reponed—Reference to Oath.—A summons contained a reference to oath, and after personal citation of defender decree in absence was pronounced. *Held*, nevertheless, that his representatives were entitled to be reponed and plead prescription of the bill. *Nicholson* v. *M'Leod*, 23 Nov. 1810, F. C. Cf. *Grant* v. *M'Gregor*, 1839, 1 D. 1048; 14 Fac. 1080.

1885. Reponing — Second Reponing — The Court Refused to Repone a Party against a Second Decree by Default. — *Hamilton* v. *Christie*, 1857, 19 D. 712; 29 J. 330.

1886. Reponing—Second Reponing.—The court will not repone a party a second time, without sufficient cause shown. *Observations* on the case of Mather *v.* Smith, 21 D. 24. *Pearson* v. *M'Gavin*, 1866, 4 M. 754.

1887. Reponing — Suspension.—A Lord Ordinary having, in respect of a suspender having delayed to exhaust a reference to oath which had proceeded a certain length, and been found negative so far as it went, repelled the reasons of suspension, the court refused a reclaiming note to be reponed, and *held* that, there being no reclaiming note on the merits, the judgment could not be reviewed. *Sutherland* v. *Johnstone*, 1856, 18 D. 626; 28 J. 273.

1888. Reponing—Third Reponing.—The court reponed against a third decree by default. *Mather* v. *Smith*, 1858, 21 D. 24; 31 J. 11.

1889. Report to the Inner House — Sequestration — Incompetency of Verbal Report—Formal Report.—It is incompetent for the Lord Ordinary to report a sequestration case under 2 and 3 Vict. c. 41, by formal interlocutor for the decision of the Inner House; but a verbal report is competent, upon which the Lord Ordinary may pronounce an interlocutor, "after having advised with the Inner House." *Wryghte* v. *Lindsay*, 1856, 19 D. 55; 28 J. 660.

1890. Restriction—Effect of Decree after Restriction of Conclusions.—*Held* that an interlocutor, whereby the judge, in respect of a minute by the pursuer stating that he did not insist in certain conclusions, "dismisses the action and decerns," did not preclude the pursuer from raising another action containing the same conclusions. *Stewart, etc.* v. *Greenock Harbour Trs.*, 1868, 6 M. 954; 40 J. 550.

1891. Restriction — Ancillary Declaratory and Reductive Conclusions.—In an action of declarator, and for reduction of the assignments of certain shares of a bank, containing also an alternative conclusion, "in the event of its being found by our said Lords that the said writs ought not to be reduced and set aside as hereinafter concluded for," for payment of the price of the shares, the declaratory and reductive conclusions were departed from, except as ancillary to the petitory conclusions. *Held*, on a construction of the summons and record, that there were no relevant averments to entitle the pursuers to insist in the petitory conclusions of the summons as restricted, and that the action must be dismissed. *Speirs* v. *Struthers*, 1859, 21 D. 585.

1892. Restriction—Action of Damages for Breach of Promise and Seduction—Case Restricted to Damages for Seduction — Absolvitor. — In an action of damages for breach of promise of marriage and seduction, the pursuer's agent intimated that "the conclusions as to breach of promise were departed from, and the issue withdrawn." Motion by the defender, for decree of absolvitor from the conclusions for damages for breach of promise, *refused hoc statu*. *Campbell* v. *Beveridge*, 1861, 23 D. 1292.

1893. Restriction—Minute of—Reservation.—*Held* that a pursuer was not entitled to insert in a minute of restriction of the libel a reservation of right to bring a new action on the claim not insisted in. *Wilson* v. *Mags. of Musselburgh*, 1868, 6 M. 483; 40 J. 250.

1894. Restriction — Multiplepoinding — Abandonment. — The real raisers of a multiplepoinding, on enrolling the summons, lodged a minute abandoning the action as to one of two sums to which the conclusions applied, and restricting the conclusions to the other; and enrolled the summons "as restricted per minute." *Held* that the proposed restriction was incompetent. *Campbell's Trs.* v. *Campbell*, 1863, 1 M. 1016; 35 J. 594.

1895. Review — Reduction — Extracted Sheriff Court Decree—Charge—Suspension or Reduction—Review of Sheriff Court Decree.—A sheriff court decree was extracted and a charge given upon it. Before it was implemented the debtor brought a reduction. *Held*, that this was a competent mode of bringing the sheriff's judgment under review, although suspension would also have been competent. *M'Leod* v. *Collie* (O. H.), 1869, 7 S. L. R. 64.

1896. Review—Suspension—Charge on a Bill—Bill not Produced.—Bill of suspension of a charge on a bill *passed* seeing that the bill was not produced in support of the charge. *Muir, Wood & Co.* v. *Sibbald*, 1820, Hume 80.

1897. Review — Suspension — Caution Bill Due by a Company.—A bill of suspension *passed* without caution of the charge upon a bill of exchange due by a company, of which the suspender denied that he was a partner. *Anderson* v. *Bolton & Barker*, 26 Jan. 1810, F. C.

1898. Review — Suspension—Caution.—Note of suspension by one partner of a firm A of a change on a bill drawn by the other

partner B *passed* without caution seeing that the bill was in favour of B's father, and the granting of it was averred to be in breach of the articles of partnership. *Waddell* v. *M'Laren*, 1851, 1 Stuart 17.

1899. Review — Suspension—Caution.—Goods in a shop kept in a wife's name *prima facie* belong to the husband and therefore, a bill of suspension by a wife of a warrant of sale following upon a providing by a creditor of the husband *refused* as caution was not offered. *Cargill* v. *Somervill*, 1820, Hume 223.

1900. Review — Suspension — Caution—Sheriff Court Decree for Expenses.—A suspension of a sheriff court decree for expenses, on the ground of incompetency in the procedure, *refused*, the note being presented without caution, and the grounds of suspension not being *prima facie* sufficient to move the court in the exercise of its discretion to pass the note. *Stephen* v. *Anderson*, 1867, 2 S. L. R. 47.

1901. Review—Suspension—Court of Session Decree in foro—Competent and Omitted. — Suspension of a final decree *in foro*, on grounds which might have been urged before the decree was pronounced, was *refused*. *Kerr* v. *James*, 1866, 1 S. L. R. 119.

1902. Rolls—Summar or Short Roll—Debts Recovery Act, 1867.—*Observed* that the court is not bound to send appeals under the Debts Recovery Act to the summar roll. *Sutherland & Mackay* v. *Mackay*, 1867, 2 S. L. R. 40. *Douglas* v. *Thomson*, 1870, 8 S. L. R. 107.

1903. Separate Actions—Same Wrong—Defamation and Assault.—A party having been assaulted and defamed at one and the same time, brought an action of damages for the assault before the sheriff, without specifically libelling on but referring to the defamation, and a separate action before the commissary for the defamation. *Held* that the assault and defamation being one and the same incident, could not form the ground of separate actions. *Porter* v. *Smith*, 1788, Hume 591.

1904. Separation—Order for Custody of Children after Final Decree—24 and 25 Vict. c. 86, sec. 9.—It is not competent in an action of separation or divorce to pronounce an order for custody, etc., of children under the Conjugal Rights Act, 1861, s. 9, after final decree. *Lang* v. *Lang*, 1869, 7 M. 445 ; 41 J. 159.

1905. Service — Bankruptcy Appeal—Failure to Carry Out Order for Service Timeously—New Order for Service.—In an appeal under the Bankruptcy Act *held* that failure to carry out an order for service in time to enable the parties to appear did not annul the appeal but that it was in the court's discretion to grant a new order. *Aberdeen Town & County Bank* v. *Scottish Equitable Assurance Co.*, 1859, 22 D. 162 ; 32 J. 67.

1906. Sheriff — Conclusions for Reduction, Delivery, and Payment—Competency. A summons in the sheriff court contained conclusions for reduction, delivery, and payment. *Held*, that though the conclusion for reduction in that court was incompetent, it might be read as containing the grounds of action on which the petitory conclusions were rested, and summons *quoad* them sustained. *Moroney & Co.* v. *Muir & Others*, 1867, 6 M. 7 ; 40 J. 8.

1907. Sheriff—Firm—One Man Firm—Firm's Place of Business in One County—Sole Partner Resident in Another. — A party domiciled in one county, carried on business alone in another, under a company firm. A partnership had once really existed, but the firm now consisted only of the party himself, and no notice of dissolution had been given. *Held* that he was barred from objecting to a citation served on the company at the place of business, and from pleading that the sheriff of the county where it was had no jurisdiction. *Young* v. *Livingstone*, 1860, 22 D. 983 ; 32 J. 417.

1908. Sheriff—Scottish Origin—English Domicile — Personal Citation within the County.—Scotch origin, coupled with personal citation, does not make a party domiciled in England amenable to the jurisdiction of a sheriff. *Crichton* v. *Robb*, 1860, 22 D. 728 ; 32 J. 279.

1909. Sheriff Court — Removing — Reduction of Decree.—In an action of removing, raised in the sheriff court of Fife, the sheriff "appointed the defender against the 10th March current to give in a condescendence," etc., this being a court day ; and no condescendence being lodged, decree was on that day pronounced as by default. *Held* (after an inquiry into the practice of the sheriff courts, which was not uniform) that no default was incurred, and could not be so until after the expiry of the 10th day of March, and therefore that the decree must be reduced, although pronounced according to the practice of the sheriff court of Fife. *Hog* v. *Hog*, 1837, 15 S. 532 ; 12 Fac. 503.

1910. Sist—Augmentation—Augmentation Opposed on the Ground that the Teinds were Valued—Invalidity of Valuation.—In a process of augmentation, wherein the heritors opposed the augmentation on the ground that the teinds were valued, and that the valuation had received effect in a process of locality in 1815, and had since then been acquiesced in, process sisted to enable the minister to bring a declarator of the invalidity of the decree. *Orr* v. *E. of Glasgow, etc.*, 1866, 5 M. 195 ; 39 J. 95.

1911. Sist—Agent—Action of Separation and Aliment — Wife's Agent — Expenses.—An action of separation and aliment, at the instance of a wife against her husband, having been stopped before decree by the reconciliation of the parties, the court *refused* in the circumstances to sist the wife's agent as a party in the action for the purpose of enabling him to get a decree against the husband for expenses. *Smith* v. *Smith*, 1871, 9 M. 538 ; 43 J. 265. *See* Expenses (cf. *Clark* v. *Henderson*, 1875, 2 R. 428).

1912. Sist—Agent—Right to Expenses.—In an action for damages where the word

was closed and issues were being adjusted the parties settled extrajudicially without the intervention of any of the agents of the suit. Terms of a discharge *held* not sufficient *per se* to show a fraudulent intention to defeat the pursuer's agent's claim for expenses; and agent held not entitled to sist himself to the effect of obtaining decree in his own name for expenses. *MacQueen* v. *Hay*, 1854, 17 D. 107; 27 J. 27.

1913. Sist — Another Case Involving same Question under Appeal.—Motion to sist proceedings, in respect that another case involving the same point was under appeal, *refused*—one of the parties insisting that the present case should be disposed of. *Purves* v. *N. B. Rly. Co.*, 1848, 10 D. 853; 20 J. 299.

1914. Sist—Action on same Ground in Sheriff Court and in Court of Session.—An action on the same grounds as in the sheriff court being raised in the Court of Session, the sheriff having, for certain reasons, reserved consideration of a minute of abandonment by the pursuer, the court sisted process for fourteen days, in order that the pursuer might bring an advocation. *Cormack* v. *Waters*, 1846, 8 D. 889; 18 J. 285.

1915. Sist — Sist of Party — Action against Bankrupt and Trustee—Trustee Defends but Subsequently Leaves the Country—Right of Bankrupt to be Sisted.—An action of fraud was brought against a bankrupt and the trustee on his sequestrated estate, and was sent to a jury. The bankrupt did not appear at the trial, but the case was defended by the trustee. A verdict was returned for the pursuer. The trustee having left the country, failed to sist a mandatory. *Held* that the bankrupt was entitled to be sisted. *M'Whinnie* v. *Johnston & Morrison*, 1864, 2 M. 668; 36 J. 370.

1916. Sist — Trustee in Bankruptcy — Conditions.—In an action of reduction, count, reckoning, and payment, the Lord Ordinary decerned in terms of the rescissory conclusions, and appointed parties to proceed with the accounting, reserving all questions of expenses. The defender reclaimed, but became bankrupt before the reclaiming note was disposed of; his trustee then craved to be sisted as a party to the action, on the condition that he should acquiesce in the Lord Ordinary's judgment, and should not be found liable for the expenses previously incurred. *Held* that the trustee could be sisted only unconditionally. *Ellis* v. *Ellis*, 1870, 8 M. 805; 42 J. 447.

1917. Sist—Competency of Respondents Sisting Themselves as Petitioners—Withdrawal of Petitioners—Disputed Election of Magistrates.—In a petition against an election of magistrates, the petitioners having withdrawn the petition, *held* incompetent for the respondents to insist that the question should be decided on the merits or to sist themselves as complainers. *Grant* v. *Dick*, 9 Feb. 1821, F. C.

1918. Sist — Competition between two Parties both Alleging Themselves as Heir of Taillie to Deceased—Estate Claimed by Deceased Trustees.—In an action of reduction of titles made up by the defender as heir of taillie and provision to a party deceased, the pursuer (who claimed to be the true heir of taillie) moved the Lord Ordinary to sist the process, in respect of the dependence of an action at the instance of the testamentary trustees of the deceased, success in which would carry away the estates in question from both parties. Motion *refused*. *Connell* v. *Grierson*, 1865, 3 M. 1166.

1919. Sist — Competing Actions of Declarator of Marriage.—The court *refused* to sist procedure in a declarator of marriage merely because another declarator at the instance of another pursuer had subsequently been raised, founding upon a marriage of an anterior date. *M'Connochie* v. *Binnie*, 1849, 11 D. 1419; 21 J. 12, 549.

1920. Sist—Sist of Party—Complaint against the Election of Magistrates of a Burgh—Sist of a Councillor.—Pending the discussion of a defence of no process stated to a complaint against the election of magistrates of a royal burgh, a councillor, not being an original party to the complaint, allowed to sist himself to the effect of maintaining that the complaint had been effectually before the court within the two months. *Millar* v. *Gibson-Craig*, 1827, 5 S. 305; 2 Fac. 190.

1921. Sist—Concurrent English Litigation.—Circumstances in which a motion by holders of fund and nominal raisers of multiplepoinding to sist process pending proceedings against them by certain claimants in English courts, *refused* in *hoc statu*. *Thomson* v. *N. B. & Mercantile Insurance Co.*, 1868, 6 M. 310; 40 J. 171.

1922. Sist—Consenter to Action—Death of—Necessity of Sisting Representative.—*Opinion*, that where a party consents to and concurs with the pursuer in a summons, the decree will not be null, though the consenter die pending the process, and his representatives are not sisted. *Wilkie* v. *Flowerdew*, 1850, 12 D. 818; 22 J. 354.

1923. Sist—Dean of Guild Judgment Involving Heritable Right—Declarator.—Process *sisted* to allow declarator to be brought, where Dean of Guild had pronounced judgment on the merits of a petition which involved a competition of heritable rights. *Smellie* v. *Thomson*, 1868, 6 M. 1024; 49 J. 583, 6.

1924. Sist—Death of Defender—Settlement Nominating Trustees—Destruction of the Settlement—Proving the tenor.—The defender in an action died *pendente processu*, leaving a settlement nominating trustees. The settlement was destroyed, and the trustees raised, but had not called, an action for proving its tenor. *Held* that until the settlement was revived by decree of proving the tenor, the trustees could not sist themselves as parties in the action against the truster. *Geikie* v. *Hutchison*, 1848, 10 D. 354; 20 J. 120.

1925. Sist—Action for Payment of Deposit-Receipt — Receipt — Actions of Reduction and Multiplepoinding Relating thereto also in Court.—In an action brought by the payee in a deposit-receipt for payment of the amount, on the allegation that the bank had improperly refused to pay, after which it had been arrested, the bank stated that there were other actions in court, viz., a reduction of the receipt, and a multiplepoinding relating to the sum contained in it, and moved the court to sist the action against them, until it should be ascertained in the reduction or multiplepoinding who had right to the money. *Held*, that the pursuer was entitled to proceed with the action, and motion refused. *Mitchell* v. *Royal Bank*, 17 D. 228 ; 27 J. 85.

1926. Sist of Diligence.—*Question*, whether a sist on a bill of suspension "on caution" is sufficient to prevent the charger from proceeding with diligence. *Tait* v. *Gordon*, 1828, 6 S. 1056 ; 3 Fac. 1077.

1927. Sist—Counter Actions of Divorce —Prior Action in which Decree Pronounced by Lord Ordinary Sisted till Second Action Ripe for Judgment.—An action of divorce was raised by a husband in October 1869, and a counter action of divorce was raised by his wife in January 1870. The Lord Ordinary on 5th February 1870 pronounced decree of divorce against the wife in the first action ; and in the second action the husband then pleaded that the action was incompetent, and the wife having moved to be allowed a proof, the Lord Ordinary sisted the second action till a reclaiming note by the wife against the decree of divorce in the first action should be disposed of. The court recalled this interlocutor and sisted process in the first action until the action of divorce at the instance of the wife should be ripe for judgment. *Brodie* v. *Brodie*, 1870, 8 M. 854 ; 42 J. 508.

1928. Sist—Sist to Enable a Document to be Produced.—A document founded on, but a copy only of which had been produced in proof, having been objected to as unstamped, the court *sisted* process to allow the party founding on it to produce it. *Macfarlane* v. *Johnstone & Others*, 1864, 2 M. 1210 ; 36 J. 574.

1929. Sist — Sist of Alleged domini litis.—The representatives of a testator, who had executed deeds to their prejudice, entered into a contract with third parties, who agreed to advance the funds necessary for instituting a reduction of these deeds, and to relieve the representatives of all expenses of process, in the event of the litigation proving unsuccessful ; but if successful, the representatives agreed that these parties should receive a certain amount from the property recovered. A motion by the defenders that these parties should sist themselves as pursuers, and the process until they did so, *refused*. *Waddell* v. *Hope*, 1843, 6 D. 160 ; 16 J. 121.

1930. Sist—Sist of Pursuer's Agent as the True dominus litis.—Although the action was instituted in the creditor's name yet *held*, that as the agent was the true *dominus litis*, by whose directions and for whose behoof the action was carried on, the defender was entitled to insist that the action should not proceed unless the agent sisted himself as a party to it. *Fraser* v. *Dunbar*, 1839, 1 D. 882 ; 14 Fac. 971.

1931. Sist—Sist of Executor—Decree of New in his Favour—Effect of Alleged Change of Circumstances.—A claimant in a multiplepoinding obtained a decree *in foro*, ranking and preferring her in terms of her claim, but did not for some years enforce the decree, and died without enforcing it. Her executor having been sisted, moved for decree of new in his favour. This motion was opposed by another claimant, in respect of an alleged change of circumstances. *Held* that the decree having become final, could not be gone back upon, and that her executor was entitled to decree of new. *Campbell, etc.* v. *Lindsay*, 1867, 39 J. 256.

1932. Sist—Sist of Agent—Expenses—Action for Interim Aliment by Wife against Husband—Action Abandoned.—In an action for interim aliment by a wife against her husband, the court gave interim decree for a weekly amount of aliment and for a certain sum of expenses, and superseded further consideration of the cause, to admit of the wife instituting an action of separation and aliment. The wife having subsequently returned to live with her husband, the court allowed the agents for the wife to sist themselves as parties to the action, and to obtain decree in their own name against the husband for expenses. *Macgregor & Barclay* v. *Martin*, 1867, 5 M. 583 ; 39 J. 294.

1933. Sist — Action for Damages for Fraud against a Purchaser of Shares and Other Parties Acting in Concert with him —Action Sisted quoad the Other Parties.—The trustees of a deceased shareholder sold certain of the shares held by the deceased to the manager of the company. The sellers subsequently raised an action concluding against the purchaser for reduction of sale, and alternatively concluding against him and another partner of the company, and the representatives of the partners who had died before the date of the sale, for £20,000 of damages, alleging that the shares had been sold at a price greatly under their value, in consequence of the fraudulent representations and concealments of the defenders acting in concert in regard to the affairs of the company. *Held* that the case against the purchaser should be sent to trial first, and action sisted *quoad* the other defenders. *Jardine's Trs.* v. *Dawson & Others*, 1864, 2 M. 639 ; 36 J. 316.

1934. Sist — Forthcoming of Rents of Property Alleged to be Wife's Exclusive Property—Questions with Regard to Wife's Rights. — A married woman purchased heritable property with a portion of a fund belonging to herself, exclusive of the *jus mariti*, and the title was taken to herself excluding the *jus mariti* of her husband. The

rents were arrested by the husband's creditors. In an action of furthcoming, in which the wife compeared, *held* that it was not competent in a furthcoming to enter into an inquiry as to the character and validity of the right vested in the wife, or to deny effect to the title founded on by her; and the action sisted, that competent proceedings might be instituted to establish the liability of the property for the husband's debts. *Loudon* v. *Young*, 1856, 18 D. 856; 28 J. 389.

1935. Sist—Sist of Party—Interdict—Interdict Craved against an Agent—Sist of Principal.—An agent placed a lock on the door of the pew of a parish church for the purpose of excluding a party who had been in possession of sittings in the pew. *Held* by the sheriff, that a petition was properly directed against the agent as the actual wrongdoer; and he having brought an advocation, a minute was lodged for the principal, craving that he should be sisted as a party, and that the process should be sisted until the issue of a declarator at his instance, and consenting to interim interdict. The application was held to be incompetent, and the advocation dismissed. *Dobbie* v. *Halbert*, 1863, 1 M. 532; 35 J. 317.

1936. Sist—Sist until "Final Judgment" in Another Action—Judgment of Inner House Appealed.—An action having been of consent sisted "until a final judgment shall be pronounced" in a relative action, *held* that an interlocutor pronounced in the Inner House, disposing of the whole cause, but which was immediately taken by appeal to the House of Lords, was not a final judgment entitling to have the sist recalled. *Orr & Others* v. *Glasgow, Airdrie & Monklands Junction Rly. Co., etc.*, 1857, 20 D. 327; 30 J. 176.

1937. Sist—Judgment Pronounced After Death of Party—Repetition of Judgment.—A Lord Ordinary's judgment declaring an entail invalid having been adhered to in the Inner House at a date subsequent to that of the pursuer's death in Australia, the court, on the motion of the deceased's trustees, sisted them in room of the deceased, and repeated the judgment. *Gibson's Trs.* v. *Gibson, etc.*, 1869, 7 M. 1061.

1938. Sist — Judgment Extension Act, 1868.—Process *sisted* in a suspension of a charge on an Irish decree registered under the Judgments Extension Act, 1868, to enable the complainers to present an application to the Irish Court in arrest of judgment. *Wotherspoon, etc.* v. *Connolly*, 1871, 9 M. 510; 43 J. 243.

1939. Sist — Defender — Landlord and Tenant. — It is competent for a landlord, having the true interest in an action against a tenant, to sist himself as a defender, though an interlocutor dismissing the action should be final *quoad* the tenant who had previously appeared, but on his interest ceasing had withdrawn. *M. of Douglas* v. *E. of Dalhousie*, 1811, 16 F. C. 349.

1940. Sist—Declaratory of Legitimacy—Reduction of Titles and Service.—A declarator of legitimacy sisted till preliminary defences in a relative reduction of titles and a service were discussed. *Shedden* v. *Patrick*, 1849, 11 D. 1333; 21 J. 503.

1941. Sisting of Party—Liability for Previous Expenses.—A party, compearer, not allowed, in the minute sisting himself, to insert a condition of non-liability for previous expenses. *Wallace* v. *E. of Eglinton*, 1836, 14 S. 599.

1942. Sist — Multiplepoinding — Count and Reckoning. — In a multiplepoinding raised by a bank who claimed to be a creditor on a bankrupt estate, the only competing claim was lodged by the trustee on the estate, who averred that the bank, instead of being a creditor, was debtor to the bankrupt; and thereafter the trustee raised a count and reckoning against the bank, in which action the same questions of law were raised as in the multiplepoinding. *Held* that it was premature to sist procedure in the count and reckoning. *Frier* v. *Western Bank*, 1855, 18 D. 272; 28 J. 111.

1943. Sist—Multiplepoinding and Exoneration—Liability of Representatives of Deceased Executor to Account.—Two executors-nominate gave up an inventory of the deceased's whole estate, and were confirmed. An annuitant having survived both executors, two executors *ad non executa* were appointed at the request and for the benefit of the annuitants. They gave up an inventory of what they believed to be the whole residue, being a portion of the funds contained in the former inventory. In a process of multiplepoinding and exoneration at their instance, the Lord Ordinary *held* that they were not bound to account beyond the amount of inventory in their confirmation. The court *suspended* advising until the raisers should take steps to call the representatives of the surviving executor to account for the funds with which he had intromitted, or which were included in the original inventory. *Nicol & Carny* v. *Wilson*, 1856, 18 D. 1000; 28 J. 457.

1944. Sist—Multiplepoinding of a Trust Estate—Action of Reduction of the Trust Deed.—Trustees under a trust-deed brought multiplepoinding of the trust-estate. During the dependence of the action the trust-deed was reduced at the instance of the truster's heir-at-law *ex capite lecti* as to part of the subjects. These subjects formed part of the fund *in medio* in the multiplepoinding, and had been claimed in that process. In an action of removing by the heir-at-law against the trustees from the subjects in question, the trustees applied for a sist pending the result of the multiplepoinding. The court *refused* the motion on the ground that these subjects had ceased to be part of the fund *in medio*. *Barstow* v. *Dunn's Trs.*, 1870, 8 S. L. R. 169.

1945. Sist—Suspension—Allegation that a Document was a Forgery—Necessity of Reduction-Improbation.—In his answers in

the Bill Chamber to a note of suspension and interdict, the respondent admitted the genuineness of a document found on as having been granted by him. The note was passed, and interim interdict granted. In his answers in the Court of Session, the respondent alleged that the document was a forgery. *Held* that he could not then be allowed to plead forgery, unless he produced a decree of reduction-improbation; but process sisted to enable him to institute and follow out the requisite action. *Macintyre* v. *MacRaild*, 1867, 5 M. 526; 39 J. 265.

1946. Sist—Sist of Party—Necessity for—Competency of Taking Decree against Defender after his Death and without Sisting his Representatives.—In a reduction and declarator of irritancy, on the ground of contravention, against an heir of entail, and other parties, the Lord Ordinary pronounced decree of absolvitor by default of the pursuers; but it having afterwards turned out that the principal defender (the heir in possession) had died before the interlocutor was pronounced, the court *recalled* the decree, and remitted to the Lord Ordinary. *Mercer* v. *Maxwell*, 1850, 12 D. 756; 22 J. 265.

1947. Sist—New Pursuer—Consent of Defender.—A new party cannot compear as pursuer without the consent of the defender. *Taylor* v. *Crawford*, 1833, 12 S. 39; 9 Fac. 26. Cf. *Mags. of Edinburgh* v. *Budge & Co.*, 1824, 3 S. 403.

1948. Sist—Declaratory of Nullity of a Torn Settlement—Proving the Tenor.—In an action of declarator of the nullity of a settlement, which had remained in the custody of the granter, and was found after her decease torn into two parts, the court sisted process till the defender (the grantee) should bring an action of proving the tenor. *Dow* v. *Dow*, 1848, 10 D. 1465; 20 J. 541.

1949. Sist—Pactum de non petendo.—In an action for payment of certain bills of exchange, *held* that a *pactum de non petendo* had been instructed, and process sisted. *Macvean* v. *Maclean*, 1873, 11 M. 764; 45 J. 470.

1950. Sist—Plea that Subject-Matter had Already been Dealt with by a Decree-Arbitral.—A party having raised an ordinary action for the value of extra work performed by him, the defender pleaded that the action was incompetent, its subject-matter being already before an arbiter in a submission, and under which a decree-arbitral had been pronounced. The pursuer maintained that the claim was *ultra fines compromissi*. *Held* that a reduction was necessary, and the ordinary action sisted to allow such a process to be brought. *Birrell* v. *Dundee Gaol Commrs.*, 1856, 29 J. 46.

1951. Sist—Recall—Ranking and Sale.—Sist of a ranking and sale *recalled* owing to change of circumstances. *Ferrier* v. *Gartmore's Crs.*, 1835, 13 S. 977.

1952. Sist—Pursuer—Ranking and Sale.—Where there was an objection to the title of the real creditor who was pursuer in a ranking and sale, the court *allowed* another creditor to be sisted as pursuer in place of him. *E. of Dunmore* v. *Dickson*, 1835, 13 S. 1107; 10 Fac. 913.

1953. Sist—Reduction of a Conveyance by a Bankrupt—Suspension by Bankrupt of Debt on which Sequestration Granted.—The trustee in a sequestration brought a reduction against a party who had obtained from the bankrupt a conveyance of heritage. In the course of the litigation the trustee obtained a decree *in foro* for certain expenses against the defender, and upon the decree raised an adjudication of the subjects. There was depending a suspension, at the bankrupt's instance, of the ground of debt on which the sequestration had issued. *Held* that the defender in the adjudication was not entitled to have it sisted till the suspension should be disposed of. *Stephen's Tr.* v. *Morison*, 1861, 33 J. 369.

1954. Sist—Reduction of General Conveyance at Instance of Heir—Action of Constitution by Trustees against Heir.—A party having conveyed his estates, both heritable and moveable, to trustees, by a disposition which contained no special conveyance, his heir-at-law raised a reduction of the deed; whereupon the trustees raised an action of constitution against the heir, for the purpose of making up a feudal title. *Held* that this latter action might proceed pending the reduction, without prejudice to the heir proceeding with his action. *Gilmour's Trs.* v. *Gilmour*, 1851, 13 D. 986; 23 J. 453.

1955. Sist—Action for Payment of Rent—Counter-Action for Damages.—In an action for payment of rent, in which (independent of a claim of damages) the defence was payment, at least of great part of the sum sued for, the Lord Ordinary sisted procedure, with the view of allowing the defender to establish his claim of damages. The court altered, and remitted to proceed. *Thomson* (*M'Dougall's Trs.*) v. *Paxton*, 1849, 11 D. 1113; 21 J. 426.

1956. Sist—Action against Co-Obligants Sisted Pending Action of Relief between Them.—An action brought by an agent of one of three parties, for repayment from them all of certain advances for which they were liable, sisted, so far as the amount of one of the shares was disputed, till the relative proportion of each should be determined in a process of relief pending between the co-obligants themselves. *M'Ritchies & Murray* v. *Young*, 1827, 5 S. 242.

1957. Sist—Right of Party Sisted as Assignee of Pursuer to Insist in Conclusions of Summons.—It does not follow that a party who is sisted as pursuer of an action as assignee has as good a right to follow out every conclusion of his cedent's summons as the cedent himself.

On this principle, *held* that a transferee of stock, who had not obtained himself registered,

and who was sisted as pursuer to an action raised by his cedent against the company, was not entitled to declarator that the company were bound to pay the dividends upon the stock to him after the date of transfer, although his cedent, whose name was on the register, might have been entitled to obtain such declarator. *Anderson & Watt* v. *Scottish North-Eastern Rly. Co.*, 1867, 3 S. L. R. 270.

1958. Sist—Suspension and Reduction of Sheriff Court Decree—Failure of Action of Reduction.—A party presented a suspension, and then brought a reduction of a sheriff's decree, and the suspension was sisted during the dependence of the reduction. After the reduction had been decided against him, the reasons of suspension were repelled by the Lord Ordinary, in respect of the decision in the reduction; whereupon the suspender appealed the judgment in the reduction, and reclaimed in the suspension, craving that it should be sisted till the appeal should be disposed of. The court refused to do so, observing that the point was completely fixed. *Baillie* v. *M'Gibbon's Reps.*, 1846, 8 D. 1129; 18 J. 561.

1959. Sist—Title to Sue.—An action to reduce prior infeftments *sisted* in order to enable the pursuer to obtain a title to sue by sueing as heir of provision or otherwise. *Stiven* (*Young's Factor*) v. *Brown's Trs.*, 1871, 8 S. L. R. 626.

1960. Sist—Trust.—An action having been brought by an heir, to declare an absolute disposition, granted by his ancestor, to have been a trust; and the defender having pleaded, that the action was barred by the ancestor's oath in a process of *cessio bonorum*, and by the plea of *pactum illicitum*, as the transaction was said to have been intended to defraud the ancestor's creditors—process *sisted*, and intimation ordered to the creditors. *Bryson* v. *Chalmers*, 1833, 5 J. 401.

1961. Small Debt—Citation—Execution.—*Held* that, under the Sheriffs Small Debt Act, 6 Geo. IV. c. 24, the execution of service does not require to bear that a copy of the document of debt founded on had been delivered to the defender. *M'Vitie* v. *Barbour*, 1838, 16 S. 1184; 13 Fac. 812.

1962. Special Case—Appeal, House of Lords—Judgment—Opinion and Judgment.—When parties to a special case under s. 63 of the Court of Session Act, 1868, wish a judgment which can be extracted and appealed to the House of Lords, they must ask a judgment and not merely an opinion. *Macdougall, etc.*, 1869, 7 M. 976; 41 J. 547.

1963. Special Case—Competency—All Parties not Called — Question between Local Authority and Ratepayer.—A local authority and a ratepayer in a special drainage district therein presented a special case for the opinion and judgment of the court on the question whether the local authority was entitled to charge certain expenses against the special district or the whole parish. *Held* that the special case was incompetent, in respect that the only form in which the question of law could have been raised was an action of declarator, and that in that case it would have been necessary to call more than a single ratepayer. *Parochial Board of Bothwell* v. *Pearson*, 1873, 11 M. 399; 45 J. 264.

1964. Special Case—Form of.—*Observations* on the form of special cases. *Halliday, etc.*, 1869, 8 M. 112; 42 J. 65. *Wright's Trs.*, 1870, 8 M. 708; 42 J. 363.

1965. Special Case—Form—Statement of Questions of Law—Representation of the People Act, 1868.—An appellant is bound to see that all the questions of law which he wishes to raise are stated by the sheriff, and he will not be allowed to argue any question not stated by the sheriff, though it arises upon the facts set forth in the special case. *Maitland* v. *M'Credie*, 1868, 7 M. 288; 41 J. 172. Cf. *Hilson* v. *Otto*, 1870, 9 M. 18; 43 J. 13.

1966. Special Case—Form of Judgment—Interdict.—A lease of a public-house incorporated as its conditions those contained in the statutory certificate required by the Act 25 and 26 Vict. c. 35, with a declaration that any contravention thereof by the tenant should *ipso facto* annul the lease, or, in the option of the landlord, entitle him to interdict the tenant from continuing such contravention. A special case between the landlord and tenant set forth a sale of spirits by the tenant to a child under fourteen years of age, and requested the opinion of the court whether this amounted to a breach of the certificate and the lease, craving judgment in the form of a decree of declarator with interdict against the tenant. *Held* that decree in the form craved could not competently be pronounced upon a special case. *Morton* v. *Gardner*, 1871, 9 M. 548; 43 J. 266.

1967. Special Case—Signature of—Competency of One Counsel Signing for Another.—*Observed*, that special cases ought to be signed by the counsel by whom they have been adjusted, and not by other counsel for them. *Hope, etc.*, 1870, 8 M. 699; 42 J. 362.

1968. Stamping—After-Stamping—Procedure.—The court *refused* to dismiss a reclaiming note, on an objection that the agreement libelled not being stamped, could not be looked at, but allowed time to have it stamped. *Harvey* v. *Miller*, 1845, 7 D. 398; 17 J. 198.

1969. Stated Case—Amendment—Case Stated by Quarter Sessions.—*Opinion*, that it is incompetent to remit for amendment a case stated by quarter sessions for the opinion of the court. *The Queen* v. *Caird*, 1867, 5 M. 288; 39 J. 142.

1970. Summar Roll — Advocation of Petition for Service.—Case of advocation of petition for service sent to summar roll. *Fenton* v. *Livingstone*, 1856, 18 D. 329; 28 J. 150.

1971. Summar Roll — Attendance of Counsel.—The court will not delay summar roll cases because he counsel may have gone

to London, or is out of the way. *Lumsden*, 1847, 19 J. 523.

1972. Summons—Accounting—Form of Conclusions — Amendment. — A summons of count, reckoning, and payment concluded (1) for exhibition; (2) for payment of £3000, or of such balance as should be found due, and (3) for expenses, but omitted the alternative conclusion, that, in the event of the defender failing to produce, he should make payment of a certain sum, which should, in that case, be held to be the balance due by him. *Held* that it was competent to supply the omission by amendment. *Opinion*, that the summons, as brought, was sufficient to sustain a demand for accounting. *Dobson* v. *Hughson*, 1858, 20 D. 610; 30 J. 311.

1973. Summons — Amendment. — An action for implement of a decree-arbitral being met by an action of reduction of the decree, which were conjoined, the pursuer of the former, before closing of the record, was allowed to amend his libel, by introducing an alternative conclusion for payment of the debt mentioned in the decree, upon paying the defender the expenses incurred by him in consequence. *Milne* v. *Mills*, 1844, 6 D. 986.

1974. Summons — Amendment of — Alteration in Instance.—*Held* by the Lord Ordinary, and acquiesced in, that where a party brings an action in his individual name, it is incompetent thereafter to amend the summons by libelling that he sues in the character of executor of a party deceased. *Smith* v. *Stoddart*, 1850, 12 D. 1185; 22 J. 532.

1975. Summons—Amendment — Alteration in Nature of Action.—*Held* incompetent, by an amendment of the libel under the form of an additional reason of reduction, to engraft a declarator of trust upon an action of reduction originally based upon a fundamental defect of title. *Stevenson* v. *Saunders*, 1848, 10 D. 1467; 20 J. 541.

1976. Summons — Amendment — Averment of Malice and Want of Probable Cause.—The pursuer failed to aver malice and want of probable cause in a case where this was necessary. The court *refused* to allow him to amend the summons by inserting such an averment. *Sheppeard* v. *Fraser*, 1849, 11 D. 446; 21 J. 123.

1977. Summons — Amendment — Conditions.—After the Lord Ordinary had allowed two amendments of the libel, reserving the question of expenses, and the pursuer having proposed a third, in order to avoid a condescendence, the Lord Ordinary sustained it, but only upon payment of all the expenses occasioned by the amendments. The pursuer having reclaimed, the court *remitted* to reserve all questions of expenses. *Hutton* v. *Douglas & Co.*, 1851, 13 D. 804; 23 J. 367.

1978. Summons — Amendment — Action of Damages against Messenger for Wrongous Diligence—Messenger's Knowledge of Sist.—In an action of damages against a messenger for executing diligence after a sist, an amendment allowed that he knew of the sist. *Ritchie* v. *Dunbar*, 1849, 11 D. 882.

1979. Summons — Amendment — Decree-Arbitral Founded on.—A summons having been raised in an inferior court founding on an informal decree-arbitral, and the judge having ordered a proof, *found* incompetent thus to rectify the decree-arbitral, but the libel allowed to be amended, so as to be laid on the facts of the case, independent of the decree. *Campbell* v. *Mitchell*, 1831, 9 S. 875.

1980. Summons—Amendment—Increase of Sum Sued for.—In an action concluding for payment of a sum of money, with interest to the date of signeting the summons, the pursuer moved to have interest on the principal sum from the date of the action inserted in the issue, and with that view craved leave to amend the conclusion of the summons if necessary. The Lord Ordinary pronounced an interlocutor approving of an issue which did not embrace the additional interest. *Held* (1) that a reclaiming note against that interlocutor, with a view to getting an amendment of the summons, was competent; but (2) that as the proposed amendment would subject to the adjudication of the court a sum larger than was originally concluded for, it was incompetent under the second clause of the same section. *Shotts Iron Co.* v. *Turnbull, Salvesen, & Co.*, 1870, 8 M. 383; 42 J. 177.

1981. Summons—Amendment—Insertion of "Malice and Want of Probable Cause." —Motion to amend a summons, after the record was closed, by inserting malice and want of probable cause, *refused*. *Reid* v. *Bruce*, 1855, 17 D. 1100; 27 J. 556.

1982. Summons—Amendment — Judicature Act, s. 6.—A member of an extinct copartnery raised a summons against a railway company, setting forth that, subsequent to the termination of the copartnery, the defenders, in order to obtain possession of certain premises, had paid £700 to the agent of the copartnery, for which they had received a discharge from the other partners, and a letter of guarantee from the agent; that the payment to the agent was not authorised by him; and concluding that the defenders should be ordained to pay him his share. And it having been objected that the summons was irrelevant, seeing that it averred nothing to show that the payment was not good payment, the pursuer made an addition, to the effect that, if the money was paid to the agent, he received it without having, and the defenders paid it knowing that he had not, authority from the pursuer to receive it, or to grant discharge therefor. The court *sustained* the summons as amended. *Smith* v. *N. B. Rly. Co.*, 1850, 12 D. 795; 22 J. 346.

1983. Summons — Amendment — "Maliciously and without Probable Cause."— The court having required an averment of

malice and want of probable cause in an issue, and the summons not containing any such, the pursuer was allowed to amend the libel by adding a statement to that effect, although an amendment had already been made correcting an erroneous date. *Brodie* v. *Young*, 1851, 13 D. 737; 23 J. 319.

1984. Summons—Amendment—Restriction—Changing Character of Action.—An unsuccessful candidate in an election of town councillors raised a summons of reduction to void the return of his adversary, and declarator to have himself declared duly elected. He afterwards lodged a minute withdrawing the declaratory conclusion, and restricting his action to the reduction. *Held* that as the minute changed the action into an action for voiding the election altogether, and as there were no *termini habiles* in the summons for such a conclusion, it must be dismissed. *Opinion*, that the summons might have contained an alternative conclusion to void the election, but that it was incompetent to sustain an amendment to that effect. *Blair* v. *Steele*, 1848, 10 D. 1095; 20 J. 402.

1985. Summons — Amendment — Summons Founded Exclusively on the Act, 1701.—A summons founded exclusively on the Act, 1701, cannot support a conclusion for damages at common law, independently of the penalties imposed by the Act; but an amendment of libel allowed. *Millar* v. *Mills*, 1831, 9 S. 625.

1986. Summons—Amendment—Statute.—Where a temporary statute is continued by a subsequent statute passed before the temporary period of endurance has expired, *held* that a summons which libelled the first statute alone was well laid; and that the summons might be competently amended to the effect of inserting a reference to the continuing statute. *Rankine* v. *Brown*, 1858, 20 D. 672; 30 J. 342.

1987. Summons—Blank in the Day of Compearance — Practice. — The will of a summons being blank in the day of compearance, the indorsed execution of citation to the "time and place within mentioned," *sustained* in respect of the practice. *Beattie* v. *Park*, 1830, 8 S. 784. *Wilson* v. *M'Kay*, 1831, 9 S. 288; 6 Fac. 197. *Cumming* v. *Munro*, 1833, 12 S. 61; 9 Fac. 86.

1988. Summons — Calling — Pursuer Sequestrated before Calling — Trustee's Right to Call the Summons. — After a summons was executed (but not called) the pursuer was sequestrated. *Held* competent after the trustee was confirmed to call the summons in his name. *Gallie* v. *Lockhart*, 1840, 2 D. 445; 15 Fac. 411.

1989. Summons — Calling — A. S. 11 July 1828, s. 29. — Leave to enrol a cause earlier than the second day after the calling, so as to allow it to appear in the roll of undefended cases for the last day of the summer session, *refused*. *Zizinias* (Petitioner), 1867, 5 M. 1077; 39 J. 602.

1990. Summons—Cessio bonorum—A. S. 24 Dec. 1838—Court of Session Act, 1850.—The form according to which a summons of *cessio bonorum* ought to be drawn, is that enjoined by the 13 and 14 Vict. c. 36, and not in the special form prescribed by the A. S. 24 Dec. 1838. *Hennecy* v. *His Creditors*, 1851, 13 D. 819; 23 J. 366.

1991. Summons — Cessio — Creditors' Names — Blanks. — It is not a sufficient objection to a summons of *cessio*, that when it passed the signet it was blank in names of certain creditors, which were afterwards inserted, or that the bill on which it proceeded did not contain these names. *M'Nicol* v. *His Crs.*, 1830, 8 S. 644.

1992. Summons — Competency — Two Actions of Damages on one Contract—The First Raised during the Contract for Damages to that Date—The Second Raised after the Expiry of the Contract.—In an action of damages for breach of contract the pursuer founded on a contract to give a daily supply of coals for a period not expired at the date of the action, reserving all claim for damages to be sustained in the event of the defenders failing to implement the contract during the period yet to elapse, and subsequently raised a second action for the damages alleged to have been sustained from the date of the first action till the expiry of the contract. *Held* that this was a competent course. *Jackson* v. *Cowie & Sons*, 1872, 9 S. L. R. 617.

1993. Summons — Competency — Subsumption of Damages — Conclusion for Relief.—*Held* that, in a summons containing a subsumption of damages simply, it was inept to deduce conclusions of relief where no damage had been actually sustained at the date of the action. *Martin* v. *Goldie*, 1834, 12 S. 830; 9 Fac. 426.

1994. Summons — Competency — Hypothetical Questions.—Parties have no title to sue hypothetical cases. *Harveys* v. *Harvey's Trs.*, 1860, 22 D. 1310; 32 J. 613.

1995. Summons — Competency — Action at the Instance of the Officials of an Incorporation — Conclusion for a Slump Sum to be Divided among them—Slander.—*Held* that an action by the officers of a corporation for themselves as individuals for a slump sum to be divided among them according to their respective rights against a party slandering the corporation was incompetent, and that the pursuers must sue for the sums due them respectively. *Fleshers of Dumfries* v. *Rankine*, 10 Dec. 1816, F. C.

1996. Summons — Competency — Public Officer Holding ad vitam aut culpa—Allegation of Dismissal without culpa—Remedy Declarator not Damages.—A session-clerk holding office *ad vitam aut culpam* sued members of the kirk-session for damages for his dismissal, averring that there was no *culpa*. *Held* that the pursuer's remedy was to reduce the minute dismissing him, and such declara-

tor that he was still clerk; but that an action for damages was not the correct means of remedy and therefore action *dismissed*. *Goldie* v. *Christie & Petrie*, 1868, 6 M. 541; 40 J. 275.

1997. Summons — Competency — Conclusions.—A summons contained merely a declaratory conclusion that a bill had been granted without value, and that the defender was bound to deliver it, but the will contained conclusions of reduction. There was no conclusion to decern the defender to deliver up the bill. Preliminary defence, that such a summons was incompetent, *repelled*. *M'Queen* v. *Murdoch*, 1861, 23 D. 725; 33 J. 350.

1998. Summons — Alternative Conclusions.—A person brought a summons concluding that under one or other alternative title as heir he had right to an estate. The court *declined* to advise him by deciding on the alternative conclusions. *Murray* v. *Murray*, 1833, 11 S. 629.

1999. Summons — Alternative Conclusions—Conclusions against two Defenders —Inconsistency of Conclusions and Averments.—The assignees of the owner of a cargo which had been lost by the total wreck of the vessel, raised an action for the amount of the loss against the ship's owners as carriers, alleging that they had undertaken to deliver the cargo at the port of delivery, and had failed to do so. The owners, in defence, stated that they had made no contract to carry the goods, and that during that voyage that ship was not under their control, but was let on hire to another company. The pursuers then raised a supplementary action for the same sum against that other company, averring that they had undertaken to carry the goods, and had failed to deliver. The two actions were conjoined. Issues against both companies *allowed*, notwithstanding the contention of the defenders in the first action that the averments in the second action were contradictory and destructive of the averments in the first. *London & Caledonian Marine Insurance Co.* v. *London & Edinburgh Shipping Co., and Dundee, Perth, etc., Shipping Co.*, 1867, 5 M. 982; 39 J. 540.

2000. Summons — Conclusions — Amendment—Discretion of Court.—Allowance of amendments being matter of discretion, circumstances in which the court *refused* to allow a conclusion to be amended to correspond with a fact accurately stated in the condescendence. *Henderson* v. *E. of Minto*, 1860, 22 D. 1126; 32 J. 519.

2001. Summons — Conclusions — Competency.—An action concluding against the partner of a joint stock company for certain sums, as for calls due *ex contractu*, cannot be insisted in as an action of contribution, on the allegation that the sums sued for were less than the proportion of the company's debts corresponding to the defender's shares. *Watson* v. *Ayrshire Iron Co.*, 1859, 22 D. 167; 32 J. 70.

2002. Summons — Conclusions — Guarantee against Loss on Sale of Shares.—In an action for implement of a guarantee against loss on sale of shares, the summons concluded for the amount guaranteed as loss upon a specific number of shares. Objection to relevancy that the guarantee was for a fixed sum and not with regard to any particular number of shares, *repelled*. *Milne* v. *Souter*, 1868, 6 M. 977; 40 J. 221.

2003. Summons—Conclusions—Interest.—Terms of summons under which a claim for interest on sums concluded for from the dates when they fell due, *held* competent. *Stirling & Dunfermline Rly. Co.* v. *Edinburgh & Glasgow Rly. Co.*, 1857, 19 D. 598; 29 J. 277.

2004. Summons — Conclusions — Action on Promissory - Note — Promissory - Note held to be Null—Action on the Debt.—A summons concluded for payment of a sum of money "for which the defender granted a promissory-note." The court *held* that the promissory-note was null, but *sustained* the action as to the debt, and *allowed* a proof by writ or oath. *Duncan's Trs.* v. *Shand*, 1872, 10 M. 984; 44 J. 566.

2005. Summons — Conclusions — Action for Repetition.—A instructed a broker to buy shares for him on a certain date, and paid him the price. A afterwards sued the broker for repetition of the price, on the averment that the shares were bought on another date. The action was *dismissed*, as there was no conclusion for reduction of the transaction nor any offer to restore the transfers. *Cullen* v. *Kerr*, 1857, 19 D. 969; 29 J. 453.

2006. Summons — Condescendence — Relevancy.—In judging of the relevancy of an action the statements appearing in the condescendence are taken and the summons cannot be looked to, to supply a fact not stated in the condescendence. *Ross* v. *Hutton*, 1830, 8 S. 916.

2007. Summons—Summons of Constitution—Execution.—*Held* that where some of the next-of-kin of a deceased party reside out of the kingdom, and some within, it is competent to execute letters of general charge, and a summons of constitution on the same day against those out of the kingdom, and thereafter to execute at a later date the charge and the summons *simul et semel* against those within the kingdom, provided the summons be not called in court until after the *inducice* of the charge and of the summons has expired against all the next-of-kin. *Lyell* v. *Christie*, 1836, 15 S. 41.

2008. Summons — Divorce—Signeting.—After a proof had been reported in an action of divorce, it was discovered that the summons had passed the signet, instead of being signed by a clerk of session, as required by 1 Will. IV. c. 69, s. 40. *Held* that the error was fatal, and that it could not be cured or waived. *Buxton* v. *Buxton*, 1845, 7 D. 1063; 17 J. 536.

2009. Summons—Judgment.—Under an issue, whether a representation had been false and fraudulent, the jury having found it false but not fraudulent, and the ground of action being fraud, *held* that no judgment could be pronounced under the summons. *Balmer* v. *Hogarth*, 1830, 8 S. 715.

2010. Summons — Loss of — Court of Session Act, 1868, s. 15.—After decree for expenses pronounced and process remitted to the extractor, *held* the process still depending, to the effect of enabling the court to authorise the substitution of a copy of the summons for the lost principal. *Couper* v. *Bain*, 1869, 7 M. 1130; 41 J. 237.

2011. Summons — Marking — Book of Enrolment.—It is irregular in the Keeper of the Outer House Rolls to mark a summons without enrolling it in the books of enrolment for the ensuing week; and a party is entitled to complain of such irregularity without showing any special injury. *Bryson* v. *Burnet*, 18 Dec. 1813, F. C.

2012. Summons—Omission by Writer to the Signet to Sign one Page of Condescendence.—An omission by a writer to the signet to sign one page of a condescendence is not fatal to the summons. *Robinson, etc.* v. *Wittenberg*, 1860, 23 D. 181; 33 J. 84.

2013. Summons — Partibus — Erroneous Designation — Amendment. — The *partibus* of a summons erroneously designed the defenders, who founded on the irregularity as fatal to the action. *Question*, whether the defenders objecting, the *partibus* could competently be amended; and whether the objection could be sustained as a defence. *Keddie & Co.* v. *J. & J. Gray*, 1856, 19 D. 41; 29 J. 10.

2014. Summons — Record — Relative Functions of.—*Held* (1) that a summons concluding for pecuniary penalties under a railway statute is to be strictly construed; and not being laid precisely in the terms of the statute, *dismissed* as irrelevant; (2) that the defective statements in such a summons cannot be supplied by the record. *Carruthers* v. *Caledonian Rly. Co.*, 1853, 15 D. 591; 25 J. 362; 2 Stuart 357.

2015. Summons — Revisal — Material Alterations — Necessary Averments. — In all actions everything which is of the essence of the action, whether in the averment of what is an essential quality, or of what is a proper ground of action, must be set forth in the summons; and such matters cannot be added on revisal of the condescendence, but only by an amendment of the summons. In an action of damages on the ground of false and malicious information of a crime, the summons contained no averment of want of probable cause, but an averment to that effect was added on revisal. *Held* that this averment was of the essence of the action, and could not be supplied on revisal, but only on leave granted; and action accordingly *dismissed*. *Dallas* v. *Mann*, 1853, 15 D. 746; 25 J. 448; 2 Stuart 457.

2016. Summons — Separation — Competency.—A summons of separation, drawn in terms of schedule A of 13 and 14 Vict. c. 36, concluded, "Given under our signet at Edinburgh," followed by the signature of the writer to the signet signing it, without the mention of any date in the body of the writ; but the summons was signeted, and a date marked on the margin. *Held* competent and sufficient. *Hutchison* v. *Craig*, 1851, 14 D. 261; 24 J. 129; 1 Stuart 209.

2017. Summons—Signature.—A summons in an inferior court, signed by the substitute of a sheriff-clerk depute, who had no power to name a substitute, *held* null, and incapable of being homologated. *Cumming* v. *Munro*, 1833, 12 S. 61; 9 Fac. 46.

2018. Summons — Signeting — Alteration of after Signeting before Execution.—A citation under a summons, which, when it passed the Signet, was directed against a father, but at his death was altered to his son and heir, *held* unwarranted. *Tod & Wright* v. *Boyd*, 1822, 2 S. 51.

2019. Summons—Signeting—Blanks in Summons. — A party raised a summons, libelling that he was executor-dative, conform to decree dative. When the summons passed the Signet, the date of the decree was left blank; but before the summons was executed, the blank was filled up with a date posterior to the date of signeting. *Held* that this alteration was incompetent, and the action dismissed. *Question*, whether the summons would have been effectual if the blank had not been filled up, or the date inserted had been prior to the date of the summons. *Egleton* v. *Flowerdew*, 1849, 11 D. 1486; 21 J. 584.

2020. Summons — Signeting — Error in Date of.—A summons bore to be "given under our Signet the 27th of June, in the thirteenth of our reign, 1848" (a clerical error for 1849), and the thirteenth year did not commence till May 1849. *Held* that this error, although not inferring a nullity, formed a good dilatory defence. *Sharpe* v. *Stephenson & Co.*, 1849, 12 D. 327; 22 J. 85.

2021. Summons — Supplementary Summons—Amendment.—An amendment of a summons raised as a supplementary one, having for its object the conversion of the summons into a substantially new one, *disallowed*. *Bartolomeo* v. *Morrison & Milne*, 1866, 2 S. L. R. 100.

2022. Summons—Supplementary—Conjunction. — A party was called as defender in a supplementary action. He lodged no defences. The original and supplementary actions were conjoined. A record was made up and proof ordered. The party then proposed to lodge defences. The Lord Ordinary refused the motion. On a reclaiming note the court *remitted* to the Lord Ordinary to receive the defences, and *found* the party liable in the expenses incurred by the pursuer in conse-

quence of the defences not being timeously lodged. *Anstruther* v. *Pollok, Gilmour, & Co.*, 1867, 5 S. L. R. 78.

2023. Summons—Supplementary—Conjunction.—After an interlocutory judgment adverse to the pursuer, on the main ground on which he founded a reduction (1) of certain decrees in absence, and (2) of certain transfers of property, *held* competent to bring a supplementary action concluding for restriction of all the decrees in absence, and limiting the transfers to securities for the amount in the decrees so restricted; and actions conjoined. *White* v. *Finlay, etc.*, 1863, 1 M. 786; 35 J. 467.

2024. Summons — Supplementary — Increase of Sum Sued for.—A party brought an action for damages against a railway company for injuries sustained in a railway accident. When the proof had been partly led, he brought another action stating his claim at an increased rate for the different items of damage, but libelling the same items. Second action *dismissed* as incompetent. *Bryan* v. *Glasgow & S.-W. Rly. Co.*, 1869, 6 S. L. R. 445.

2025. Summons — Supplementary — Larger Sum Concluded for—Competency—Lis alibi pendens.—A party raised an action for payment of wages against his employers. The record was closed, proof allowed and partially taken, when the pursuer discovered that he had understated his claims against the defenders. He thereupon raised another summons against the defenders, concluding that it should be conjoined with the former action, "and being so conjoined, or whether the same shall be conjoined or not," the defenders ought to be decerned to make payment, etc., "but under deduction from the foresaid several sums and interest thereon, of such part of the foresaid sums as may be decerned for in the said action at the instance of the pursuer against the defenders, raised as aforesaid." Pleas of *lis alibi pendens*, and that the action was incompetent, *repelled*. *Roy* v. *Hamiltons & Co.*, 1868, 6 M. 422; 40 J. 218. Cf. *Parker* v. *N. B. Rly. Co.*, 1899, 1 Fac. 872.

2026. Summons—Supplementary—New Defenders. — A supplementary summons, brought to obviate the defence that all parties had not been called, contained the same conclusions as the original summons, and was directed against the defenders called in the original summons, as well as against the new defenders. The defenders in the original summons lodged defences to the supplementary summons, pleading *lis alibi pendens*; and that the second action was an unwarrantable *accumulatio actionum*, in respect of the dependence of the original action. Plea *repelled*. *Thomson's Trs.* v. *Livingstone*, 1863, 2 M. 114; 36 J. 52.

2027. Summons—Supplementary—New Defender Introduced. — A single heritor raised an action against the other heritors, averring that he and others had paid more, and others less, stipend than was due, and concluding for an accounting. He raised a supplementary summons against a certain heritor, the only conclusion of which was that the heritor should be called as a defender to the original action, and the actions were conjoined. *Held* that the accounting could be insisted in against him. *Bryson* v. *Muir*, 1841, 4 D. 58.

2028. Summons — Supplementary — Reduction.—*Held* that a supplementary summons of reduction was competent, though the reasons were based upon conspiracy and fraud by two individuals, while the original summons only charged the fraud against one of them, yet this was to be regarded not as a contradictory, but as an enlarged, statement of the charge. *Shedden* v. *Patrick*, 1850, 12 D. 694; 22 J. 318.

2029. Summons—Supplementary—Slander—Further Specification of Slander.—A supplementary summons of damages for slander, setting forth the slander founded on in the original summons, together with other instances prior thereto, and referred to generally in the original summons in proof of malice, *sustained*, except as to a statement inconsistent with the original summons. *M'Dougall* v. *Campbell*, 1829, 7 S. 460; 4 Fac. 598.

2030. Summons — Teind — Printing. — Upon a manuscript petition by the ministers of the Barony parish of Glasgow, authority *granted* to the clerk of the Teind Court to sign, and to the Keeper of the Signet to signet, a printed instead of a written copy of a summons of augmentation, the defenders requiring to be called being 8000 in number, and it being stated that a manuscript copy of the summons would extend to 700 pages. *Ministers of Barony*, 1864, 2 M. 469; 36 J. 223.

2031. Summons — Teind — Signature — Writer to the Signet—Teind Clerk.—The subscription of a teind summons by a writer to the signet is not sufficient, that of the teind-clerk being required. *Matheson* v. *Marchioness of Stafford*, 1862, 24 D. 436; 34 J. 211.

2032. Summons — Will — Error in.— A summons *sustained*, though the will contained a warrant to summon the defender "to compear before the said Lords of our Council and Session, in either of the Divisions of the said court at Edinburgh," contrary to the form prescribed by the A. S. 8 July 1831—"to compear before the Lords of our Council and Session at Edinburgh." *Brown* v. *Blaikie* (*Duff's Tr.*), 1849, 11 D. 474; 21 J. 135.

2033. Summons — Will — Incompetent Warrant of Inhibition—Deletion.—Where the will of an ordinary summons contained a wholly incompetent warrant of inhibition, *held* that this was not fatal to the summons, but that deletion, on payment of expense, might be allowed. *Mackenzie* v. *Young*, 1859, 21 D. 304; 31 J. 157.

2034. Suspension — Appeal against Decree Presented to House of Lords—

No Order for Service.—*Held* that it was no ground for suspending diligence on an extracted decree *in foro*, that the suspender had presented a petition of appeal against the judgment to the House of Lords, and that Parliament having risen, no order for service could be obtained till its next meeting. *Glasgow & Londonderry Steam Packet Co.* v. *Clyde Shipping Co.*, 1859, 22 D. 2; 32 J. 2.

2035. Suspension—Assignation of Decree—Averment that Assignation in Trust—Necessity for a Declarator.—The assignee to a decree executed a charge upon it, of which a suspension was brought, on an allegation that the right in the assignee was truly a trust. Consideration of the note was superseded, on the suspender stating that he was prepared to bring a declarator. *Question*, whether the trust could not be proved in the suspension, or whether an action of declarator was necessary. *Cullen* v. *Anstruther*, 1856, 18 D. 592; 28 J. 241.

2036. Suspension or Reduction—Averment that Counsel and Agent had Appeared without Instructions—Necessity for Reduction. — It is not competent to suspend a decreet *in foro*, on an averment that appearance by counsel and agent in the process in which that decreet was pronounced had not been authorised by the suspender, but he must proceed by reduction. *Hamilton* v. *Marshall*, 25 Nov. 1813, F. C.

2037. Suspension — Bankruptcy. — The general creditors of a party whose estates had been sequestrated, conveyed his household furniture to his two daughters, who were his creditors in a certain sum, but did not claim on the estates, and the daughters continued, subsequent to the conveyance, to live in family with him. About ten years thereafter, a poinding having been executed by a new creditor of the household furniture as belonging to him, the court *passed* a note of suspension by the daughters, without caution or consignation. *Fyfe* v. *Woodman*, 1841, 4 D. 255.

2038. Suspension — Caution. — Bill of suspension of a decree of an inferior court *passed* on caution, on the allegation that the suspender was no party to the process, had never authorised appearance to be made, and that a mandate was not implied in the inferior courts. *Dewar* v. *Reid*, 1832, 11 S. 193.

2039. Suspension — Caution — Bill — Reference to Oath.—Under a deposition on reference by the holder of a bill of exchange (on which the Lord Ordinary passed a bill of suspension by the acceptor without caution), the court so far altered as to require caution. *M'Fie* v. *Renwick*, 1835, 13 S. 1119.

2040. Suspension — Suspension without Caution or Consignation — Whole Sum Contained in Bond Admitted not to have been Advanced.—The court *passed*, without caution or consignation, a bill of suspension of a charge for part of the amount contained in a bond, the whole of which was admitted not to have been advanced, and thereafter *suspended*, except for a sum admitted to have been received. *Hamilton or Hotson* v. *Paul*, 1829, 7 S. 479; 9 S. 685; 4 Fac. 623.

2041. Suspension — Suspension Refused on Charger Finding Caution.—A purchaser of brandy gave a bill for the price, and thereafter brought a suspension on the ground of deficiency in quality and quantity. The court, on the charger agreeing to find caution to repay, if necessary, *refused* the bill. *Anderson* v. *Morris*, 1854, 26 J. 459.

2042. Suspension—Caution—Charge for Stipend.—A heritor who held a decree of valuation of his teinds, which was under reduction, received a charge from the minister, on an interim decree of locality, for a sum greatly exceeding his valued teinds. As the minister was insolvent, and the teinds of the other heritors exhausted, so that there could be no ultimate relief against them, the court *passed* a bill of suspension on caution. *Oswald* v. *Martin*, 1835, 14 S. 32.

2043. Suspension — Caution — Charge against Cautioner in a Bank-Credit Bond. — Bill of suspension of a charge against cautioners in a bank-credit bond offered without caution on the ground that though it was declared that the balance should be constituted against them by a stated account there was no warrant for registration of the account, *refused*. *Fisher* v. *Stewart*, 11 Feb. 1824, F. C.; 2 S. 695. Passed on caution and plea repelled, 3 S. 607; and see 7 S. 97; 4 Fac. 89.

2044. Suspension—No Caution Offered—Competency of Passing without Caution.—It is incompetent to pass a bill upon caution offered without caution. *Nisbet* v. *Gibson*, 1830, 3 J. 38.

2045. Suspension — Caution — No Offer of Caution in Note.—A note of suspension containing a reference to oath, but making no offer of caution, having been remitted by the court to be passed without any mention of caution, *held* that in such a case caution must be found, unless specially dispensed with. *Gilbertson* v. *Ballantine*, 1851, 13 D. 995; 23 J. 458.

2046. Suspension — Caution — Averment that Charger had Agreed to Accept a Composition — Cautioner's Liability for Composition.—A suspension of a charge on a bill, on the ground that the charger had agreed to accept of a composition, was passed on caution for the composition. The suspension was refused. *Held* that the cautioner was liable for the composition, although there had been no composition-contract executed. *Allan & Co.* v. *Dundas*, 1826, 4 S. 655.

2047. Suspension — Caution — Expenses. —A party was charged on a decree of the Court of Session, bearing to be *in foro*, and to have proceeded on a petition by an agent against his client under the A. S. Feb. 1806, and that it had been duly served. *Held* competent to pass a bill of suspension on caution for the expenses of the decree only, on the

allegation that it had been served on the opposite agent only, and not on the party. *Caldwell* v. *Campbell*, 1827, 5 S. 715.

2048. Suspension — Caution — Lawburrows.—*Held* that a party charged on letters of lawburrows is entitled to suspend without finding caution, on proof that the application for the letters was unnecessary, and without probable cause. *Gadois* v. *Baird*, 1856, 28 J. 682.

2049. Suspension—Cautioner—Liability for Expenses. — *Question*, whether the cautioner in a suspension is liable for more than the expenses of that process. Special circumstances in which the cautioner *held* not liable for more than these expenses. *Buchanan* v. *Douglas*, 1853, 15 D. 365 ; 25 J. 223 ; 2 Stuart 192.

2050. Suspension—Caution—New Bond Satisfactory to Clerk—Right of Suspender to have old Bond Delivered up to him.—Warrant *granted* to the clerks to the bills, to deliver up to a suspender the bond of caution in the depending process of suspension at his instance, in respect of his producing a new bond of caution, which was reported by the clerks to the bills to be signed by sufficient obligants. *Bett*, 1836, 15 S. 313.

2051. Suspension—Caution—Note Passed on Juratory Caution—Caution not Found and Certificate to that Effect Issued—Competency of Lord Ordinary Recalling Certificate.—A note of suspension having been passed upon juratory caution, a certificate that no caution was found was issued by the Bill Chamber Clerk. *Opinion*, that it was competent to apply to the Lord Ordinary to recall the certificate and allow caution to be received ; but *held* that, in the circumstances of the case, no sufficient grounds had been stated to warrant a recall of the certificate. *Andrew* v. *Colquhoun*, 1853, 15 D. 482 ; 25 J. 293 ; 2 Stuart 287.

2052. Suspension — Suspension Passed without Caution or Consignation.—In the suspension of a charge the charger on a reference to his oath swore that he had received payment of money but that it was not paid in extinction of the debt charged on. *Held* that the suspension should be passed without caution or consignation. *Thomson* v. *Wyld*, 1840, 3 D. 150 ; 16 Fac. 92.

2053. Suspension—Caution — Averment that Creditor had Acceded to a Trust Deed.—A bill of suspension of diligence on the ground that the creditor doing diligence had acceded to the complainer's trust for creditors, *refused* in respect that there was no *prima facie* case of accession and only juratory caution was tendered. *Hamilton* v. *D. of Queensberry's Exrs.*, 1834, 12 S. 766 ; 9 Fac. 406.

2054. Suspension—Sist of Diligence—Caution—Whether Sist Effectual before Caution Found.—Circumstances *held* to form a sufficient excuse to save a party from being subjected in penalties for proceeding with diligence, notwithstanding a sist. *Keltie* v. *Wilson*, 1828, 7 S. 208 ; 4 Fac. 243.

2055. Suspension — Charge on Bond Granted by Suspenders qua Trustees—No Trust Funds—Competency of Deciding Questions of Accounting in Suspensions.—Where trustees, who were charged on a bond granted by them *qua* trustees, brought a suspension of the charge on the ground that they had no trust funds wherewith to meet the bond, *held* that it was competent in that process to entertain such objections for the charger to the correctness of the state of accounts lodged by the trustees by order of the court as could be easily verified or appeared *ex facie* of the state. *Dick's Trs.* v. *Hannah*, 1870, 8 S. L. R. 137.

2056. Suspension — Charge — Defective Charge—Turning Charge into a Libel.—*Fleming* v. *Scott*, 1823, 2 S. 446. *Fraser* v. *Fraser*, 1825, 3 S. 590 ; 21 F. C. 702. *Campbell* v. *Macdonell*, 1827, 5 S. 412 ; 2 Fac. 256. *Caldwell* v. *Campbell*, 1829, 7 S. 545.

2057. Suspension — Charge—Restriction of.—The suspender of a charge on a decree admitted liability for a part of the debt, which he consigned, but he denied the charger's right to the debt. In his answers to the reasons of suspension, the charger "consents to accept of the consigned sum as the suspender's proportion of the debt, and does not now insist in the charge to any greater extent." The suspender did not accept this offer or pay the charger, but continued to dispute his title. Having failed in this, *held* that the charge was not restricted. *Cullen* v. *Anstruther*, 1857, 20 D. 59 ; 30 J. 37.

2058. Suspension—Clerical Error—Commission.—A commission to take the charger's oath was dated, by a clerical error, 21st October, in place of 21st November. The suspender used the commission, and examined the charger under it, without objection. *Opinion* that the error was immaterial. *Rutherford* v. *Robertson*, 1834, 12 S. 391.

2059. Suspension — Consigned Money — Uplifting—Expenses.—The successful party in a suspension, being entitled to consigned money, should crave warrant to uplift it when he obtains decree ; for though he may do so later it will be at his own expense. *Field* v. *Watt's Trs.*, 1865, 3 M. 609 ; 37 J. 303.

2060. Suspension—Competency — Advocations Act, 1838, s. 5—Decree in Absence —Reduction.—*Held* that a decree in an action of reduction, pronounced, "in respect no defences have been lodged," after the defenders had appeared and had satisfied the production, was a decree in absence in terms of the Act 1 and 2 Vict. c. 86, s. 5, and that a suspension was competent. *Grant & Sillars* v. *Marshall*, 1863, 1 M. 1167 ; 35 J. 634. Cf. *Newton* v. *Couper*, 1865, 3 M. 573 ; 37 J. 285.

2061. Suspension — Competency — Bill—Minor.—A charge on a bill accepted by a

minor cannot be suspended on the ground of minority and lesion. Reduction is the only mode of redress. *Waddle* v. *Gibson*, 18 Jan. 1872, F. C.

2062. Suspension — Competency — Complaint as to the Election of a Commissioner of Police.—Suspension is an incompetent mode of complaining of the election of a commissioner of police, after he has been sworn into office and acted for some time in his official capacity. *Mags. of Glasgow* v. *Abbey*, 1825, 4 S. 266.

2063. Suspension — Competency — Conviction under the Excise Statutes.—Suspension is not competent of a conviction under the 138th section of the excise statute, 6 Geo. IV. c. 80, as it did not set forth that the conviction had taken place either on the view of the justices who tried the case, or on the confession of the party, or on proof by witnesses on oath. *M'Donald* v. *Gray*, 1844, 6 D. 1161; 16 J. 505.

2064. Suspension — Competency — Diligence for Levying an Assessment of Statute Labour Conversion-Money.—Circumstances in which the court held a bill of suspension of diligence for levying an assessment of statute labour conversion-money incompetent, and refused the bill. *Ewing* v. *Stirlingshire Road Trs.*, 1837, 15 S. 419; 12 Fac. 363.

2065. Suspension—Competency—Burgh—Legality of Imposing a larger Assessment than is Required—Declarator or Suspension.—In a question with the magistrates of a burgh acting under a local Act, the proper remedy for a ratepayer who wishes to try the legality of imposing a larger assessment than is required for annual expenses in maintaining roads, etc., in order to accumulate a fund for rebuilding a ruinous bridge, is not an action of suspension and interdict, but of declarator. *British Fisheries Society* v. *Mags. of Wick*, 1872, 10 M. 426; 44 J. 248.

2066. Suspension—Competency—Decree Assoilzieing Defender and Finding him Entitled to Expenses—Charge for Expenses only.—A sheriff having assoilzied a party, and found him entitled to expenses, and a charge being given to pay the expenses, *held* that a suspension of the charge was incompetent, the merits not being thereby brought under review. *Simpson* v. *Young*, 1852, 24 J. 588. Cf. *Findlay* v. *Duncan*, 1854, 16 D. 938; 26 J. 487.

2067. Suspension—Competency—Decree by Default. — The Lord Ordinary, in an advocation of a process of removing, in respect of the advocators' failure to find caution for violent profits, and non-appearance, decerned against them in terms of the conclusions of the summons. The advocators having been charged on this decree, presented a note of suspension, offering caution for violent profits and expenses. *Held* that the suspension was incompetent. *Macpherson* v. *Graham*, 1863, 1 M. 973; 35 J. 568.

2068. Suspension—Competency—Decree in foro of Court of Session—Allegation that Suspender was not Aware of the Litigation.—It is incompetent to suspend diligence on a decree *in foro* of the Court of Session, on allegations that the party seeking that remedy was not aware of a litigation having been carried on in his name, and gave no authority for so doing. *Young* v. *List, etc.*, 1862, 24 D. 587; 34 J. 295.

2069. Suspension—Competency—Decree on which a Charge could not Follow.—The prescribed form of a note of suspension, "that the complainer has been charged, or is threatened to be charged," etc., is a mere clause of style, and not to be construed literally, so as to exclude review by suspension of decrees in absence of such a character that a charge could not follow on them. *Lowson* v. *Cooper or Reid*, 1861, 23 D. 1089.

2070. Suspension—Competency—Decree Sought to be Suspended having been Implemented—Expenses not Paid.—The son of a bankrupt alleged that the lease of a farm and all the stocking had been transferred to him prior to the sequestration. The trustee on the bankrupt's estate presented a petition to the sheriff to have the son removed, and for warrant to enter into possession. Decree was pronounced in favour of the trustee, with expenses. The son removed from the farm, but did not pay the expenses. He then raised a reduction of the sheriff's decree, and also brought a suspension, with conclusions for interdict, against the trustee selling the effects on the farm. *Held* that suspension was incompetent, and that there was no ground stated for granting interdict. *M'Dougall* v. *Galt*, 1863, 1 M. 1012; 35 J. 584.

2071. Suspension — Competency — Dividend on Composition-Contract. — In a sequestration, a mandatary voted without challenge. *Held* that neither the bankrupt nor his cautioners were entitled to suspend a charge for dividends upon a composition-contract, on the ground that the debt on which the mandatary voted was the subject of a depending action. *Black* v. *Bentham & Co.*, 1859, 22 D. 215.

2072. Suspension — Competency — Filiation—Proposed Remit to Sheriff to Take Additional Proof.—Circumstances in which suspension of a charge on a decree of filiation pronounced on a closed record, and after proof by both parties, brought solely with the view of getting the cause remitted to the sheriff, with instructions to allow further evidence on a certain part of the case, *refused*. *Crawford* v. *Neilson*, 1861, 34 J. 60.

2073. Suspension — Competency — Interim Execution of a Sheriff Court Decree.—*Held* competent to suspend a charge upon a decree for interim execution of a sheriff court decree *ad factum præstandum*, where such suspension does not involve a review on the merits of the judgment. *Wilson* v. *Bartholomew*,

1860, 22 D. 1410; 32 J. 645. Cf. *Wilson* v. *Bartholomew*, 1860, 22 D. 693; 32 J. 266.

2074. Suspension — Competency — Liability of Owners of Unoccupied Property for Poor Rates. — *Question*, whether it is competent to try in a suspension the liability for poor rates of unoccupied property in respect of ownership. *Tod* v. *Mitchell*, 1858, 20 D. 445; 30 J. 232.

2075. Suspension — Competency — Proceedings under the Militia Acts.—A party who was balloted for under the Militia Acts in place of another who paid the statutory penalty, having presented a bill of suspension and interdict on the ground that such a proceeding was *ultra vires*, *held* that the bill was incompetent. *Chivas* v. *D. of Gordon*, 11 July 1804, F. C.; M. "Jurisdiction" App. No. 12.

2076. Suspension—Competency—Process-Caption.—A vessel's registry certificate having been produced in an action, the agent of the depositor insisted on the return of the process that the certificate of registry might be borrowed up, that the vessel might sail pending a discussion as to whether an arrestment of the vessel had been regularly loosed. The pursuer of the reduction applied for a suspension of the process-caption, and an interdict against the clerks lending up the certificate except for the purposes of the process. *Held* that this proceeding was competent. *Connon* v. *Ballinten*, 1853, 2 Stuart 376.

2077. Suspension — Complainer — Projected Railway Company.—Where a note of suspension and interdict had been presented in name of (among others) a projected railway company, which was not incorporated by Act of Parliament, and which had besides been dissolved, the court appointed the note to be amended by withdrawing the instance of the railway company. *Edinburgh & Perth Rly. Co.* v. *N. B. Rly. Co.*, 1846, 9 D. 307; 19 J. 104.

2078. Suspension — Competency — Question as to Right to the Office of Constabulary of an Ancient Priory.—A suspension is not the proper form of trying the question, whether a party had right to the office of constabulary of an ancient priory, and so entitled to prohibit its being used as a place of burial; and the respondents alleged that there had been an immemorial usage of sepulture there, and denied the title of the suspender. *Lord Lovat* v. *Fraser*, 1845, 8 D. 316; 18 J. 140.

2079. Suspension — Competency — Question as to the Rights of Trustees of a Mortification to Strike Certain Parties off the Roll of Bursars — Necessity for Declarator.—In a question between the magistrates of Lanark and the moderator and minister and eldest bailie of Lanark, as trustees under a mortification made in 1648, as to the right of the latter to strike off the roll of bursars certain parties, *held* that a note of suspension and interdict by the magistrates was not the proper remedy, and therefore it was dismissed. *Observed*, that declarator was the proper form of redress. *Mags. of Lanark* v. *Wyllie*, 1852, 24 J. 536; 1 Stuart 901.

2080. Suspension—Competency—Review of Sheriff Court Interlocutor Granting Interdict. — *Question*, whether a sheriff court interlocutor granting interdict can competently be reviewed by suspension. *Observed*, that suspension of a sheriff court decree for expenses following on a decree of absolvitor is incompetent on grounds involving the merits of the absolvitor. *M'Gregor* v. *Lord Strathallan*, 1862, 24 D. 1806; 34 J. 493.

2081. Suspension—Competency of Second Suspension — Change of Circumstances — Reference to Charger's Oath.—A note of suspension and liberation was presented without caution or consignation, and refused. A second note was then presented, also without caution or consignation, but containing a reference to the oath of the charger. *Held* that this was such a change of circumstances as to render the second note competent. *Allan* v. *Wilkie Brothers*, 1854, 16 D. 917; 26 J. 480.

2082. Suspension — Competency of a Second Note of Suspension.—A second note of suspension, brought to cure a defect in a first, *passed* on the first being withdrawn. *Taylor* v. *Glasgow, Paisley, & Ardrossan Canal Co.*, 1852, 15 D. 14; 25 J. 16; 2 Stuart 8.

2083. Suspension—Competency—Threatened Charge.—It is competent to suspend, if a party have *parata executio* against the suspender, though no charge be given or threatened. *Watson* v. *Merrilees*, 1848, 10 D. 370.

2084. Suspension—Decree in Absence—Consignation of Expenses—Amendment.—*Held* that a note of suspension of a decree in absence, pronounced by a Lord Ordinary, containing a statement of facts and pleas in law, was competent, and amendment allowed to the effect of permitting the suspender to offer (in terms of the stat. 1 and 2 Vict. c. 86, s. 5) consignation of the expenses of the pursuer in taking decree. *Mackenzie* v. *Cameron*, 1853, 15 D. 888; 25 J. 518; 2 Stuart 528.

2085. Suspension—Decree in Absence—Consigned Expenses—Advocation and Suspension Act, 1838, s. 5.—In a suspension of a decree in absence, on consignation of the expenses decerned for, the suspender has no statutory right at once to obtain repayment of the balance of the sum consigned, after payment of the sum awarded by the Lord Ordinary to the charger. *Question*, whether the powers given under 1 and 2 Vict. c. 86, s. 5, to deal with the consigned sum, are given to the Lord Ordinary on the Bills, or to the Lord Ordinary in the cause, after the note is passed. *Roxburgh* v. *Pollok*, 1856, 18 D. 795; 28 J. 340.

2086. Suspension—Decree in Absence—Making up Record.—Where diligence had been done on a decree in absence, obtained in the Court of Session, and a suspension of the decree was brought, the court *refused* to repone the suspender *de plano* against the decree, but

directed a record to be made up in the suspension. *Edinburgh, Perth, & Dundee Rly. Co.* v. *Rowan & Co.*, 1852, 14 D. 1001 ; 24 J. 615 ; 1 Stuart 1038. *Moir* v. *Douglas*, 1053, 15 D. 380 ; 25 J. 231 ; 2 Stuart 215.

2087. Suspension—Decree in Absence—Suspender Allowed to Lodge Defences and Failed to do so—Competency of Second Note of Suspension.—Decree in absence was pronounced against a defender. He suspended, and was allowed to lodge defences in the original action, which he failed to do, and of new decree was pronounced against him. *Held* that this second decree was not in absence, but on the merits ; and therefore that a second suspension was incompetent under 1 and 2 Vict. c. 86, s. 5. *Munro* v. *Rose*, 1854, 16 D. 476 ; 26 J. 222.

2088. Suspension—Decree of Absolvitor.—A decree of absolvitor in the sheriff court having become final, in consequence of all the procurators refusing to sign a petition for the party, and been extracted, the court, in a suspension, *remitted* to the sheriff to proceed in the cause, and, if necessary, appoint a procurator. *Smith* v. *Barnetson*, 1825, 3 S. 365.

2089. Suspension—Decree of Declarator of Nullity of Lease—Summons with Alternative Conclusions.—A mineral lease provided that the tenant might surrender on exhaustion being ascertained by persons of skill mutually chosen. Under this clause a reference was gone into, relative to part of the field which the parties allowed to fall into abeyance. The tenant brought an action against the landlord, to have it found that this reference was in subsistence, and should be proceeded with, or that the landlord was bound to concur in naming referees, and for declarator that the lease was null from that date ; or otherwise, if the landlord did not appear, for declarator that the mineral was exhausted, and the lease null from the said date. Decree went out in absence, in terms of the last alternative conclusion. The landlord suspended, and a record was made up in the suspension. Objection by the complainer, that the respondent could not maintain any of the conclusions of the original action, except the one in terms of which decree was pronounced, *repelled*. *Cochrane* v. *Guthrie*, 1859, 21 D. 369 ; 31 J. 205.

2090. Suspension—Decree in foro—Damages.—A charge on a decree *in foro* for damages cannot be suspended on the ground of illiquid counter claims, although the charger had sued *in forma pauperis*. *Dunbar* v. *Davidson*, 1826, 4 S. 824.

2091. Suspension—Decree in foro Obtained by Default.—Bill of suspension of a decree *in foro*, which had been obtained by default, and through poverty, passed on caution and payment of expenses, a reduction having been brought. *Steel* v. *Black*, 1829, 7 S. 648.

2092. Suspension—Decree in foro.—It is incompetent for a defender to suspend a decree *in foro*, on an allegation that expenses decerned for to the pursuer had been incurred to a person not authorised to act as an agent. *Ewing* v. *Wight*, 1832, 6 W. & S. 222. Affg. 7 S. 618.

2093. Suspension—Decree of Removing—Juratory Caution.—Circumstances in which the court *passed* a note of suspension of a decree of removing on juratory caution. *Logan* v. *Weir*, 1870, 8 M. 1009 ; 42 J. 616.

2094. Suspension—Forgery—Mode of Making up Record.—Where forgery is proponed, the record is to be made up by condescendence of articles improbatory and answers containing articles approbatory. *Golder* v. *Deans*, 1826, 5 S. 161 ; 2 Fac. 108.

2095. Suspension—Forgery—"Competent and Omitted."—A party who presented a bill of suspension of a charge on a bond of caution, and did not plead forgery specifically till a second reclaiming petition, *held* barred from doing so. *Paterson* v. *Sparrow & Co.*, 1821, 1 S. 223.

2096. Suspension and Interdict—Necessity of Interdict Removed by Death of an Heir of Entail—Competency of Deciding Suspension on Merits with Reference to Ulterior Claims of Damages and Expenses.—In a suspension of a sale of wood on the estate of an heir of entail, the heir died after the record was closed, but before judgment on the merits, and it was thus impossible to cut the wood. *Held* that a judgment on the merits of the suspension, as originally brought, could still be pronounced in reference to the ulterior claims of damages and expenses. *Murray* v. *Renton*, 1831, 9 S. 306.

2097. Suspension—Juratory Caution.—Suspension of a decree *in foro* on juratory caution *refused*, the ground of suspension being that the charger had been sequestrated since the original decree was pronounced. *Marshall* v. *Grant*, 1860, 22 D. 926 ; 32 J. 391.

2098. Suspension—Juratory Caution.—In conjoined processes,—the one a petition at the instance of a landlord for interdict against a tenant allowing his sheep to trespass in a plantation adjoining his farm ; the other at the instance of the tenant to have the landlord ordained to put the fences in proper order,—a judgment was pronounced by the sheriff, assoilzieing the landlord in the one action, and granting interdict in his favour in the other. A suspension, presented by the tenant on juratory caution, *refused*. *M'Gregor* v. *Lord Strathallan*, 1862, 24 D. 1006 ; 34 J. 493.

2099. Suspension—Meagre Narrative—Dismissal—Second Suspension.—A suspension of a charge on a bill was presented on the ground of forgery. The narrative in the bill of suspension was scant ; but on reclaiming, additional facts were stated at the bar. The court *refused* the bill, reserving to the suspender to put in a new bill with a fuller narrative. *Wyllie* v. *Brand*, 1836, 14 S. 553 ; 11 Fac. 470.

2100. Note of Suspension—Prayer.—A note of suspension should set forth in its prayer the precise remedy sought. *Wilson* v. *Stronach*, 1862, 24 D. 271 ; 34 J. 128.

2101. Suspension—Prayer of Petition—Amendment.—Prayer of note of suspension and interdict allowed to be amended. *Caledonian Rly. Co.* v. *Buchanan*, 1855, 17 D. 996 ; 27 J. 504.

2102. Suspension — Poor-Rates — Condition of Passing Note.—*Held* that there is no fixed rule that a note of suspension of a threatened charge for £3700 as arrears of poor-rates could be passed only on condition of payment of the full sum claimed, but that it was within the discretion of the court to fix the condition on which the note should be passed ; and the note passed on payment of £1500—the parochial board guaranteeing the repayment of such part of that sum as should be found to be an overcharge. *Glasgow & Ayr Rly. Co.* v. *Abbey Parish of Paisley*, 1850, 13 D. 304 ; 23 J. 127. Cf. *Dunbar* v. *Bell*, 1851, 1 Stuart 51.

2103. Suspension—Process-Caption.—A sheriff court process having gone amissing, after having been borrowed up by the suspender's clerk, the court *refused* to suspend a process-caption, although the suspender offered to find caution for all damage that might be incurred through the suspension of the warrant. *Fleck* v. *Bryce*, 1845, 17 J. 155.

2104. Suspension — Removing — Competency.—It is incompetent, in a suspension of a charge of removing, where the execution is *ex facie* regular, to prove by parole that it is false. *Dun* v. *Craig*, 11 Mar. 1824, F. C. ; 2 S. 797. See also *Calder* v. *Calder*, 1825, 4 S. 331 ; 1 Fac. 170. *Morrison* v. *Forbes*, 1826, 4 S. 668. *Walker* v. *E. of Eglinton's Trs.*, 1827, 5 S. 240. *Dunlop* v. *Nicolson*, 1827, 5 S. 915. *Ramsay* v. *Pettigrew*, 1828, 7 S. 193. *Allison* v. *Miller*, 1829, 7 S. 355. *Cameron* v. *M'Ewen*, 1830, 8 S. 440 ; 5 Fac. 357. *Clarkson* v. *Ball*, 1831, 10 S. 17. *MacQueen* v. *Clyne's Trs.*, 1834, 12 S. 610. *Aitchison* v. *Patrick*, 1836, 15 S. 360 ; 12 Fac. 17.

2105. Suspension—Service—Advocations, etc. (Scotland) Act, 1838, s. 6.—The direction in the Act 1 and 2 Vict. c. 86, s. 6, as to the mode of service of notes of suspension, is imperative ; and it is requisite that a copy both of the note and of the interlocutor ordering service be served upon the respondents. *Anderson* v. *Drysdale*, 1862, 1 M. 46 ; 35 J. 33.

2106. Suspension—Sheriff Court Decree—Interim Decree for Incidental Expenses—Advocations and Suspensions Act, 1838, ss. 4 and 6.—The sheriff, in the course of a process, appointed one of the parties to delete certain matter from his paper, and pronounced an interim decree for the expenses thus occasioned. *Held* that a note of suspension, which was presented under the 4th section of the Act 1 and 2 Vict. c. 86, as if in the case of a decree *in foro*, without being accompanied by reasons, was incompetent, and that it should have been brought in the form prescribed by the 6th section of the Act. *Flowerdew* v. *How*, 1852, 15 D. 198 ; 2 J. 137 ; 2 Stuart 106.

2107. Suspension—Sheriff Court Decree—Competency of Leading Additional Proof in Suspension.—In a sheriff court action the defender's case rested mainly on an account of furnishings produced by a haver, but which was not verified by any witness. No objection having been taken in the inferior court to the account as not being verified, in a suspension at the instance of the defender the court *allowed* him to lead proof in verification of the account, on payment of modified expenses. *Hatton* v. *Buckmaster & Co.*, 1853, 15 D. 574 ; 25 J. 348.

2108. Suspension—Small Debt Decree—Alleged Discharge Thereof.—In a suspension of a small debt decree for the aliment of an illegitimate child, that had been obtained against the suspender by the mother, he founded upon a writing acknowledging the amount in the decree to be settled, which bore to be subscribed by her mark before two witnesses, and upon which he alleged *rei interventus* had taken place, by his having made a payment on the faith of an arrangement then entered into. The mother did not admit having subscribed the document, and denied that she ever consented to discharge the decree. The court *refused* the note of suspension. *Graham* v. *M'Leod*, 1848, 11 D. 173 ; 21 J. 34.

2109. Suspension—Suspension Refused—Suspender Incarcerated—Competency of Thereafter Presenting Note of Suspension and Liberation.—A party who had been charged on a decree, presented a note of suspension, which was refused, and the suspender was incarcerated. *Held* that a note of suspension and liberation on the same grounds which had been repelled in the former note, was competent. *Barr* v. *Wotherspoon*, 1850, 13 D. 305 ; 13 J. 133.

2110. Suspension—Suspension and Liberation—Sheriff Court Decree—Reponing—1 and 2 Geo. IV. c. 38—1 and 2 Vict. c. 86.—A note of suspension and liberation having been presented by a party incarcerated on a sheriff court decree pronounced in absence, on the grounds (1) that imprisonment on the decree in question was incompetent ; (2) that the charge on the decree had been blundered ; (3) that the action was at the instance of a married woman whose husband was alive, which was denied,—the court having determined that the imprisonment was competent, *remitted* to the sheriff to repone and liberate the party incarcerated, upon paying expenses, and finding caution *de judicio sisti*, and to proceed with the merits of the cause. *Cheyne* v. *M'Gungle*, 1860, 22 D. 1490 ; 32 J. 679.

2111. Suspension—Title to Sue—Assignation — Retrocession. — Circumstances in which a charge by an assignee, a professional man, *suspended*, he having granted a retrocession, although he produced a back letter,

saying that the retrocession was to be operative only in a certain event, which had not happened. *M'Donald* v. *Houston*, 1860, 22 D. 674; 32 J. 259.

2112. Suspension—Title to Sue—Suspension of Diligence Affecting Goods belonging to Suspender's Son.—A party presented, in his own name only, a bill of suspension and interdict of diligence affecting goods which he alleged to belong to his son. *Held* that he had no title to do so. *M'Laren* v. *Ramsay*, 1834, 12 S. 515; 9 Fac. 303.

2113. Suspension—Unextracted Decree.—A suspension of an unextracted decree is competent. *Paul* v. *Henderson*, 1867, 5 M. 1120; 39 J. 605.

2114. Suspension—Withdrawal of Charge—Note Passed—Expenses.—Where a charger, upon a note of suspension being presented, withdrew the charge, the court *passed* the note, so that the suspender might be enabled to obtain his expenses. *Henderson* v. *Plenderleath*, 1850, 12 D. 1076; 22 J. 471. Cf. *Douglas* v. *Brand & Brown*, 1853, 15 D. 283; 2 Stuart 148.

2115. Teinds—Valuation—Tacksmen of Teinds—Proving of Tenor of Sub-Valuation — Title to Sue. — Parties who were heritors of a parish, and had obtained from the Crown a lease "for themselves and for behoof of the haill other vassals" of a lordship, and "heritors of lands" of the teinds, *held* to have a good title to pursue a proving of the tenor and approbation of a report of a valuation of the sub-commissioners of presbyteries. *Martin* v. *Sir J. Oswald*, 1840, 15 Fac. 362.

2116. Tender—Sufficiency of Tender after Decree Extracted and Charge Given.—Where a decree has been extracted and a charge given, an unconditional tender of the sum in the decree and dues of extract is the only tender sufficient to stop diligence; and a demand that, as a condition of payment, the extract be delivered up, deprives it of that character. *Inglis* v. *M'Intyre, etc.*, 1862, 24 D. 541; 34 J. 279.

2117. Title to Sue — Adjudication — Sequestration.—The trustee in a sequestration brought a reduction under the Act, 1621, c. 18, against a party who had obtained a conveyance of heritage from the bankrupt. In the course of the litigation the trustee obtained a decree *in foro* against the defender, for certain expenses, and upon the decree he raised this action to adjudge the subjects. There was in court a suspension, at the bankrupt's instance, to which the trustee was a party, of the ground of debt upon which sequestration had issued. *Held* that the defender in the adjudication was not entitled to have it sisted till the suspension should be disposed of. *Ross* v. *Morison*, 1861, 33 J. 369.

2118. Title to Sue — Appeal Pending.—*Gibson* v. *Heriot's Hospital*, 1811, Hume 15.

2119. Title to Sue—Title to Appear—Document of Debt.—A party who alleged that he had right to a document of debt, on which another had raised an action against the debtor, *held* not entitled to appear and prevent decree passing against the debtor; but his rights reserved entire. *Stewart* v. *Stewart*, 1829, 7 S. 440.

2120. Title to Sue—Bankrupt—Assignation — Caution. — The owner of a vessel executed an assignation in favour of one of his creditors, with an obligation to deliver to him "the titles"; and thereafter, in a process of aliment under the Act of Grace, executed a disposition *omnium bonorum* in favour of another creditor, in terms of the Act 6 Geo. IV. c. 62, specially including this vessel, and delivered up to this creditor the certificate of registry; and thereafter presented a bill of suspension of a charge by the assignee for delivery of "the titles." The bill *refused*, in respect of no caution. *Simpson* v. *Adam*, 1827, 6 S. 262.

2121. Title to Sue—Bar.—A defender having consented to a proof on the merits of a case, *held* barred from stating an objection to title. *Lade* v. *Largs Baking Co.*, 1863, 2 M. 17; 36 J. 16.

2122. Title to Sue — Statutory Committee.—A committee of trustees under a local statute found entitled to pursue an action. *Low* v. *Lord Arbuthnot*, 1826, 4 S. 651.

2123. Title to Sue—Committee.—A corporation (Cowan's Hospital) may sue by a committee appointed by a corporate act. *Bow* v. *Patrons of Cowan's Hospital*, 1825, 4 S. 276; 1 Fac. 102.

2124. Title to Sue—No Conclusion in Favour of Pursuer. — A married woman raised a declarator against her children and grandchildren, in which she sought to have it declared that, in virtue of her marriage-contract, a right to certain property had vested in her children. *Held* that as the summons contained no conclusion in her own favour, she had no title to sue. The objection was taken by the court, and the defenders were willing to waive it. *Baillie* v. *Seton*, 1853, 16 D. 216; 26 J. 112.

2125. Title to Sue—Death-Bed—Forgery.—An eldest son, who as "heir-at-law" raised a reduction of a deed of settlement executed by his father and mother, on the ground that the signature of his mother was forged, or, if not forged, that she was on death-bed, *held* entitled to prove the forgery, although the defender consented to decree of reduction on the head of death-bed. *Jamieson* v. *M'Queen*, 1839, 2 D. 147.

2126. Title to Sue—Declarator—Heritable Property.—A party challenged, in the form of a declarator, the title of another, under which he was vested in the subjects. *Held* that although the party had an interest to insist, yet, till the title of the other was reduced, he had no right to sue. *Bellenden* v. *E. of Winchelsea*, 1825, 3 S. 530.

2127. Title to Sue — Deed Granted pendente processu. — *Observed* (*per* Lord Ardmillan) that a party who is substantially in right of a ground of action is entitled to found on a deed granted *pendente processu* to complete his formal title. *Donald* v. *Nicol*, 1866, 5 M. 146; 39 J. 79.

2128. Title to Sue—Defence.—A defence of acquiescence, being on the merits, cannot be discussed in a question as to title to sue. *L. Forbes* v. *Leys, Mason, & Co.*, 1824, 2 S. 603; 5 W. & S. 384.

2129. Title to Sue—Entail—Reduction.—A party libelling a title as heir of entail under a certain deed, raised a reduction of a sale and feudal investiture of lands, concluding for declarator that the lands still formed part of a trust-estate left by the maker of the entail under a separate deed of trust, and also for accounting to the trust-estate. *Held* that the title libelled was not sufficient; and a plea repelled, that enough appeared *ex facie* of the summons to show that the heir of entail was also the beneficiary under the trust deed, and motion refused for leave to amend the libel. *Ross* v. *Paul*, 1840, 1 Robin. 246. Affg. 15 S. 780; 12 Fac. 761.

2130. Title to Sue—Reduction—Entail.—A party raised a reduction of a decree setting aside a discharge of an annuity over an entailed estate, and libelled that he was entitled to sue in virtue of an adjudication of the estate, under which he was infeft; and he produced an adjudication of the liferent interest of the heir of entail in possession, and charter and sasine. *Held* that he had not set forth a proper title to insist in the action. *Graham* v. *Hunter*, 1828, 7 S. 13; 4 Fac. 14. See 9 S. 130; 6 W. & S. 518.

2131. Title to Sue—Entail.—A contingent interest may give a good title to sue. Accordingly the daughters of a person who had granted a deed in contravention of the entail of his estate *held* entitled as presumptive executors of their brother, who was the heir of entail in possession, and who was fatuous, to reduce the bond as *ultra vires* of their father and as affecting their prospective succession to their brother. *Viscountess of Strathallan* v. *Lord Glenlyon's Trs.*, 1837, 15 S. 971; 12 Fac. 890.

2132. Title to Sue—Fatuous Person.—*Held* that an action in the name of a fatuous person, though he was not cognosced, and it was raised for the purpose of having a curator *ad litem* named as soon as it came into court, was incompetent, as there was no proper instance. *Reid* v. *Duff*, 1839, 1 D. 400.

But where a pursuer became insane *pendente processu* a curator *ad litem* was appointed. *Mitchell* v. *Whitelock*, 1864, 3 M. 229; 37 J. 162.

2133. Title to Sue—Lodge of Freemasons.—The office-bearers of a lodge of Freemasons, not being entitled to the privileges of a corporation, are not entitled to sue in their official capacity, in the name of the lodge. *Lawson* v. *Gordon*, 7 July 1810, F. C.

2134. Title to Sue—Treasurer of Mason Lodge.—A Mason lodge sold a lease, and took a bill from the purchaser, in favour of their treasurer, for part of the price (the rest having been paid in cash), executed an assignation of the lease, and obtained a confirmation from the landlord. The purchaser *held* not entitled to resist payment of the bill on the ground of want of title in the treasurer to pursue. *Leslie* v. *Sproat*, 1829, 7 S. 312.

2135. Title to Sue—Joint Tenants.—Although three out of four joint tenants submitted an action of damages, raised for injury done to them in that character, and a decree-arbitral was pronounced, *held* competent for the fourth to waken the action for his own interest therein, and insist in it by himself. *Mackintosh* v. *Robertson*, 1834, 12 S. 321; 9 Fac. 186.

2136. Title to Sue—Lease—Landlord's Sequestration.—The party holding a lease which was challenged by the trustee in the landlord's sequestration brought an action for declarator that the lease was valid and tabled the lease. *Held* that the lease, whether valid or not, gave him a title to sue the action. *Abbott* v. *Mitchell*, 1869, 8 M. 268; 42 J. 121.

2137. Title to Sue—Partner of Extinct Copartnery—Payment to Agent knowing he had no Authority to Receive Payment.—A member to the extent of a fourth share of an extinct copartnery, raised a summons against a railway company, setting forth that, subsequent to the termination of the copartnery, the defenders, in order to obtain possession of certain premises, had paid £700 to the agent of the copartnery, for which they had received a discharge from the other partners, and a letter of guarantee from the agent; that the payment to the agent was not authorised by him; and concluding that the defenders should be ordained to pay him his fourth share. The defenders objected that the summons was irrelevant, seeing that, while it averred that the payment was made to the agent of the copartnery, it averred nothing to show that the payment was not good payment; whereupon the pursuer made an addition to the effect, that if the money was actually paid to the agent, he received it without having, and the defenders paid it knowing that he had not, authority from the pursuer to receive it, or to grant discharge therefor. The court *sustained* the summons as amended. *Smith* v. *N. B. Rly. Co.*, 1850, 12 D. 795; 22 J. 346.

2138. Title to Sue — Pursuers — New Pursuers — Libel. — *Question*, whether new pursuers can be admitted into a libel. *Trinity House of Leith* v. *Mags. of Edinburgh*, 1829, 7 S. 374; 4 Fac. 476.

2139. Title to Sue—Pro indiviso Proprietors.—*Question*, whether a decree for rent in favour of one of several *pro indiviso* proprietors, who was stated in the summons as

suing for himself and the rest, is good. *Bell* v. *Gunn*, 1859, 21 D. 1008; 31 J. 556.

2140. Title to Sue—Reduction.—A party who had right to a property, under condition that, failing heirs of her body, she should be obliged to convey it to A and B in such proportions as she should think fit, disponed it to A, subject to payment of £40 to B, and thereafter disponed it to the exclusion of B. *Held* that B had no title to reduce the latter deed, the former one not being challenged. *Robertson* v. *Megget*, 1822, 1 S. 364.

2141. Title to Sue—Reduction—Averment of Fraud.—The pursuer of a reduction of titles *ex facie* preferable to his own, alleged that they had been made up fraudulently, in knowledge of a prior preferable title in his person, and that the right in one of the parties, through whom the title sought to be reduced was made up, had been merely a trust, granted by a party through whom the pursuer claimed, and that the trust had been extinguished; and concluded for declarator (1) that there had been a trust, (2) that the trust had been extinguished; and also for reduction of the titles. *Held* that the pursuer had a good title to insist both in the declaratory and reductive conclusions. *Clark* v. *Loudon*, 1856, 18 D. 499; 28 J. 187.

2142. Title to Sue — Relief — Pursuer must take Decree against real Defender.—Although a party had been properly called for his interest as defender to an action, in respect of a claim of relief against him by another defender, against whom decree was ultimately given, *held*, in the circumstances, that the pursuer had no title to insist for any decree against the party who had been called for his interest. *Horne* v. *Sir G. Sinclair*, 1838, 16 S. 820.

2143. Title to Sue—Riparian Proprietors—Stream.—In an action of declarator of right to a stream, and against encroachments, the defenders disputed the pursuer's right to ground adjoining the stream, and pleaded that, this being a real action, the pursuer had no title to sue, in respect neither he nor his predecessors were infeft in these grounds. Subsequent to the date of the action, the pursuer completed his title by infeftment in the disputed ground, under a title which had not been previously feudalised. *Held* that the pursuer's infeftment *cum processu*, and the possession alleged by him, were sufficient to sustain his title, and it did not require a prescriptive title to enable him to sue. *Welsh* v. *Rose & Robertson*, 1857, 19 D. 404.

2144. Title to Sue—Service.—*Held* that the defenders in an action could not plead the existence, in a third party, of a preferable right in answer to a title itself better than their own. *Miller* v. *M'Donald*, 1855, 17 D. 973; 27 J. 497.

2145. Title to Sue for Slander.—A corporation cannot sue for damages on account of slander against individual members, but these members must bring actions at the instance of each separately. *Fleshers of Dumfries* v. *Rankine*, 10 Dec. 1816, F. C.

2146. Title to Sue — Unincorporated Societies. — Legacies being left to certain unincorporated societies, and it being declared that the receipt of the treasurer and secretary should be a valid discharge, *held* that the societies were entitled to appear and claim the legacies in a court of law by their own name, or that of their directors with the treasurer or secretary, or in name of the treasurer or secretary alone. *Sommervail* v. *Edinburgh Bible Society*, 1830, 8 S. 370; 5 Fac. 301.

2147. Title to Sue—Writers to the Signet Society.—*Held* that the Keeper and Depute Keeper of the Signet and Commissioners, Treasurer, and Procurator-Fiscal of the Writers to the Signet (who did not aver that they sued on behalf of the Society) had no title to sue an action against a member of the body that certain rules were legal. *Writers to the Signet* v. *Graham*, 1825, 1 W. & S. 538. Revg. 2 S. 214.

2148. Title to Sue—Yacht Club.—"The Royal Northern Yacht Club" has no *persona standi*, and cannot sue as such. *D. of Portland & Others*, 1852, 15 D. 62.

2149. Transference—Against Representatives of Deceased Defender who had not Appeared.—Circumstances in which a pursuer was allowed to proceed with an action without transferring the cause against the representatives of a person deceased who had been called as a defender for his interest but had not appeared in the action. *West Calder Oil Co.* v. *Fell*, 1873, 11 M. 546; 45 J. 350.

2150. Transference — At what Stage Competent.—After decree had been pronounced in an action assoilzieing the defender with expenses, but before the amount had been decerned for, the defender died. *Held* that the pursuer, who intended to appeal to the House of Lords, was entitled to have the cause transferred in the Court of Session against the defender's heir. *Forbes* v. *Clinton*, 1872, 10 M. 449; 44 J. 256.

2151. Transference—Petition and Complaint against Trustee—Alleged Malversation—Conclusions for Removal and an Accounting.—After a petition and complaint had been presented against the trustee on a sequestrated estate, founded on malversation in office, and concluding for his removal and accounting, and an interlocutor and warrant for service had been granted, and answers ordered to be lodged, the trustee died. The court *refused* to transfer the petition and complaint against the trustee's representatives. *Gibson* v. *Barbour's Reps.*, 1846, 8 D. 427; 18 J. 193.

2152. Transference — Right of Way Claimed through an Entailed Estate — Action Transferred against Trustees and Executors and against next Heir of Entail.—In an action at the instance of five pursuers, concluding for declarator that a right of way

existed through an entailed property, for removal of obstructions, and also for interdict and expenses, an interlocutor was pronounced, finding the pursuers entitled to the right of way claimed. The defender having died, an action of transference was raised against his trustees and executors, and the next heir of entail, at the instance of four of the pursuers. *Held* (1) that the action being for a public right, the conclusions might be insisted in by any one of the pursuers, and therefore an action of transference was good at the instance of any pursuer; (2) that there was still a depending process; and (3) that the interlocutor should transfer the process without reservation. *Anderson, etc.* v. *E. of Morton's Trs.*, 1859, 21 D. 1055; 31 J. 597.

2153. Transference—Widow of Defender—Liferentrix — Widow neither Heir in Heritage nor in Moveables. — Decree of transference refused to be pronounced against the widow of a defender, who had received a liferent of his heritable property and a bequest of certain moveables—his heir and executor having both entered to his succession respectively. *Clelland* v. *Baillie*, 1845, 7 D. 461; 17 J. 227.

2154. Transmission of Process from the Sheriff Court.—Where a sheriff court process is ordered by the Court of Session to be transmitted, it is the duty of the sheriff-clerk to transmit it directly to the clerk of the Court of Session process, and not to allow either party's agent to borrow it for transmission. *Innes* v. *Fife*, 1859, 21 D. 1007; 31 J. 554.

2155. Trust — New Trustees—Appointment of by Court.—Under a deed for erecting a church, granted to seven trustees, four being a quorum, it was provided that, when reduced to six, a seventh should be elected by the male church members, whom failing, by the remaining trustees. Four only accepted; and when these were reduced to one, he applied to the court, praying for the appointment of new trustees. The court *found* they had no power to appoint trustees, but remitted to the members of the church who were males to elect new trustees in terms of the trust deed. *Morison*, 1834, 12 S. 307; 1834, 12 S. 547.

2156. Trustee—Culpa.—In an action at the instance of beneficiaries against the representatives of trustees, who were alleged to have occasioned the loss of trust funds, by allowing them to remain unsecured in the hands of one of their number, factor to the trust. Terms of issues adopted to try that question. *Robertson* v. *Mackenzie*, 1854, 26 J. 498.

2157. Trustee—Action against Trustees — Resignation of Trustee after Action Raised but before Defences Lodged—Absolvitor.—In a reduction of a trust deed, a party was called as a defender *qua* trustee, who, after the action had been called, resigned under a power to that effect, but stated that, if compelled to act, he adopted the defences of the other trustees. *Held* that he was entitled to be assoilzied. *Gilmour* v. *Gilmour's Trs.*, 1852, 14 D. 454; 24 J. 222; 1 Stuart 391.

2158. Tutors-Nominate—Authority to Borrow—Nobile officium.—In a petition by a tutor-nominate for authority to borrow to relieve his ward's estate from the diligence of his father's creditors, *held* that there was no such incompetency in the application as to warrant its being refused *de plano*, but that the proper course was to remit for inquiry in the usual way. *Callander*, 1869, 6 S. L. R. 527.

2159. Tutor ad litem — Husband and Wife—Process—Instance—Title to Sue.—A reclaiming note was presented to the court in name of a married woman and her tutor *ad litem*, in an action which had been raised by her against her husband. When the note came to be advised, the husband produced a discharge of the action which the wife had intermediately executed, and also an authority to withdraw the reclaiming note. The tutor appeared, and stated to the court that he could not sanction the step, as being completely hostile to the wife's interests, and he refused to concur, unless authorised to do so by the court, as he stated his opinion to be, that the action was well founded on the merits. The court *refused*, in the circumstances, to call upon the tutor to concur in withdrawing the reclaiming note, but *dismissed* the action, in respect of there being no longer any proper instance. *Graham* v. *Graham*, 1843, 15 J. 231.

2160. Tutor ad litem — Professional Charge.—In a case in which minor children were called along with other defenders, a professional charge by the tutor *ad litem sustained* for examining and superintending the proceedings on their behalf, although no separate appearance was made by him. *Pirie* v. *Collie*, 1851, 13 D. 841; 23 J. 380.

2161. Tutor ad litem—Responsibility.—*Observed*, that neither the ward nor any one else is entitled to insist upon a tutor *ad litem* disclosing the considerations which may have led to his opinions and actions. *Hepburn's Tutor*, 1866, 4 M. 1089; 38 J. 567.

2162. Vacation—Lord Ordinary on the Bills — Power to Deal with Petition for Custody of Children and Interdict—Breach of Interdict.—A petition was, during vacation, presented to the Lord Ordinary on the Bills, praying for the removal of children from the custody of their mother (a widow), on the ground of her misconduct, and, in the meantime, for interdict against her withdrawing them from Scotland. *Held* competent to the Lord Ordinary to interdict the removal of the children; and the mother having, in breach of this interdict, taken them to England, *held* competent to grant a warrant to bring them back, and place them in neutral custody. *E. of Buchan* v. *Lady Cardross*, 1842, 4 D. 1268; 14 J. 415; 5 D. 343; 15 J. 39.

2163. Vacation—Lord Ordinary on Bills — Appointment of a Judicial Factor on a Railway.—A judicial factor who was ap-

pointed over a railway having died, the parties on whose petition the appointment was made presented a petition, during vacation, to the Lord Ordinary on the Bills and to the Court of Session, praying for the appointment of another factor. *Held* that it was competent for the Lord Ordinary on the Bills, during vacation, to supply the vacancy occasioned by the death of the factor. *Primrose* v. *Caledonian Rly. Co.*, 1851, 13 D. 1214; 23 J. 194, 495, 571.

2164. Vacation — Reclaiming Note — Leave.—Leave to reclaim may be given in vacation. *Galloway* v. *Handyside*, 1854, 16 D. 342.

2165. Vacation — Reclaiming Note — Lodging and Boxing. — *Joel* v. *Gill*, 1860, 22 D. 357; 32 J. 159.

2166. Vacation—Recall of Inhibition—Remit to Lord Ordinary on the Bills to Recall.—A petitioner prayed the court to remit to the Lord Ordinary on the Bills in vacation to recall an inhibition. The court *refused* to do so. *Greigs*, 1866, 4 M. 1103; 38 J. 583.

2167. View — Access Allowed to Defender's Works to Inspect Process of Manufacture.—In an action for damages for breach of agreement, in which the defenders obtained a counter issue, whether the pursuer had failed to implement the agreement by not imparting to the defenders full particulars of the process employed by him in a certain manufacture, the court *allowed* the pursuer, his agent, and a man of skill, access to the defenders' works, in order to inspect the process employed by them, with a view to meeting the defenders' case at the trial. *Routledge* v. *Sommerville & Son*, 1866, 4 M. 830; 38 J. 589.

2168. View — Action of Damages for Alleged Infringement of a Patent.—In an action of damages for an alleged infringement of patent, the pursuer moved for an order of inspection of the defender's works by persons of skill. *Held* that an inspection must be allowed, otherwise any patent might be infringed with impunity; and a remit made to viewers to inspect at the sight of the sheriff—the viewers being warned not to use any information which they might so acquire, except for the purpose of giving evidence. *Russell* v. *Crichton*, 1837, 15 S. 1270; 12 Fac. 966.

2169. View—Action with Regard to a Picture—Order on One Party to Make the Picture Accessible to the Other. — An Englishman brought to Scotland for exhibition a picture, which he described as having been formerly in the gallery of a deceased Scots nobleman; and the nobleman's trustees having on an *ex parte* statement obtained and enforced a warrant of the sheriff-substitute, authorising the sheriff-clerk to take possession of the picture, but which was recalled by the sheriff, and the picture restored — in an action by the possessor against the trustees for damages, the court *ordered* the picture to be made accessible to the trustees for seven days previous to the trial. *Snare* v. *Lord Fife's Trs.*, 1851, 13 D. 1353; 23 J. 630.

2170. Waiver — Offer. — An offer by a defender to meet the pursuer in another action if he amends his pleadings is not a waiver of the former. *Gordon* v. *Hughes*, 1819, 1 Bligh 287. Revg. 15 June 1815, F. C.

2171. Wakening and Transference — Against English Executors of Englishman. —Transference *refused* on the ground of no jurisdiction against the two executors-nominate of an Englishman with no property in Scotland, who both resided out of Scotland, though one of them was personally proprietor of Scots heritage, and though the deceased had himself defended the action. *Mackenzie* v. *Drummond's Exrs.*, 1868, 6 M. 932; 40 J. 537.

2172. Wakening and Transference — Action of Affiliation and Aliment.—*Held* (1) that an action concluding for decree of affiliation and aliment for twelve years, for a natural child, is not exhausted by a decree for seven years' aliment, under reservation of the mother's claim for further aliment at the expiry of that period; (2) that such claim for further aliment is a claim of debt transmitting against the representatives of the putative father; and (3) may be insisted in by a transference against them of the original action. *Clarkson* v. *Fleming*, 1858, 20 D. 1224; 30 J. 725.

2173. Wakening — Extracted Process — Consent. — An extracted process cannot be wakened even of consent. *Alexander* v. *Officers of State*, 1845, 7 D. 884.

2174. Wakening — Divorce — Defender Resident Abroad—Personal Intimation.—Where the defender in an action of divorce lived in America, and had received personal intimation under the original process, *held* not necessary to repeat personal intimation under a summons of wakening. *Campbell* v. *Campbell*, 1832, 10 S. 373; 7 Fac. 282.

2175. Wakening — Heir-Apparent — Citation of Heir Cited Subsequently Declared Illegitimate.—The citation of a son as apparent heir of a debtor in a ranking and sale, who held the character of legitimacy, *sustained*, although it was afterwards found that he was illegitimate. *Ferrier* v. *Ross*, 1833, 11 S. 531.

2176. Wakening—Jury Cause in which Issues Adjusted.—In a jury cause, in which issues had been adjusted by the Lord Ordinary, no further proceedings took place, and no interlocutor was pronounced for more than twelve months. The court, on report of the Lord Ordinary, *held* that, under the 47th section of the A. S. 16 Feb. 1841, the case was not asleep. *Bisset* v. *Keay & Others*, 1854, 16 D. 988; 26 J. 615.

2177. Wakening and Transference — Multiplepoinding — Sheriff Court — Advocation — Procedure.—A multiplepoinding raised in the sheriff court was allowed to fall

asleep. Several of the claimants died, and their representatives were resident abroad. The real raiser raised a wakening and transference before the Court of Session, and presented a note of advocation of the original process of multiplepoinding *ob contingentiam*. The court held that the proper course was to get decree of wakening and transference in the Court of Session, and thereafter to bring up the original process by an advocation on the ground of want of jurisdiction in the sheriff; and sustained the wakening and transference, but dismissed the advocation *ob contingentiam* as incompetent. *Crockart* v. *Dundee & Arbroath Rly. Co.*, 1852, 15 D. 202; 25 J. 132; 2 Stuart 103.

2178. Wakening and Transference — Objection that Party against whom it is Sought to Transfer Action Represents Original Defender Generally but not quoad that Action. — *Held* that objections to a summons of wakening and transference—that the party against whom the action is sought to be transferred, though representing the party to the original action generally, does not represent him as regards that action—must be discussed in the original action, and not as defences to the transference. *Parks* v. *E. of Stair*, 1854, 16 D. 1105; 26 J. 596.

2179. Wakening — Original Action at the Instance of Twelve Pursuers—Only Four of these Pursuers in Action of Wakening — Necessity for Having the Remaining Eight Called as Defenders.— In an action of wakening at the instance of four out of twelve of the pursuers of the original process, *held* that the process could not be proceeded in as duly wakened, until all the pursuers, or the representatives of such of them as were dead, had been called for their interest. *Observed*, that such of them as would not concur as pursuers of the wakening might be called as defenders. *Blackwood* v. *Mylne*, 1845, 8 D. 313.

2180. Wakening and Transference — Ranking and Sale — Representatives of Purchaser.—*Held* that a person purchasing at a sale under a ranking and sale, did not become a party to the process, and therefore that it could not be transferred against his representatives. *M'Innes* v. *Brander*, 1844, 6 D. 512; 16 J. 234.

2181. Wakening — Title of Executor-Nominate to Raise before Confirmation.— *Flowerdew* v. *Crichton*, 1849, 11 D. 563; 21 J. 164.

2182. Whole Court—Whether Judgment to be in Accordance with Opinions of the Majority of the Consulted Judges or of the whole Court. — *Held*, notwithstanding the peculiar phraseology of 6 Geo. IV. c. 120, s. 24, that when the judges of one Division require the opinions of the judges of the other Division, and of the permanent Ordinaries, on questions in writing, the judgment to be pronounced is not to be according to the opinion of the majority of the judges so consulted, but to that of the majority of all the judges taken together. *Stewart* v. *Scot*, 1836, 14 S. 692; 11 Fac. 592.

2183. Witness—Commission to Examine —Re-Examination of a Witness already Examined on Commission.—After a witness resident in England had been examined before a commissioner, one of the parties to the action presented a note to the court setting forth that since the examination it had been ascertained that the witness could have given evidence on certain points upon which he had not been examined, and praying to have him examined thereanent. The court being of opinion that a better precognition would have obviated the necessity of a re-examination, *held* that the motion could only be granted on payment by the applicant of £5, 5s. *Gelot* v. *Stewart*, 1870, 43 J. 64.

2184. Witness—Commission to Examine —Medical Witness Residing in England.— Commission *granted* to take the evidence of a medical witness residing in England although not unable to attend the trial by reason of age or permanent infirmity. *Henderson* v. *N. B. Rly. Co.*, 1870, 8 M. 833; 42 J. 485.

2185. Witness—Compelling Attendance of — Arbitration.— A petition praying the court to grant warrant to cite a person residing in England to give evidence before an arbiter in Edinburgh *dismissed* as incompetent. *Highland Rly. Co.* (Petitioners), 1868, 6 M. 896; 40 J. 499.

2186. Witness—List of—In Consistorial Causes.—*Held* that the former practice in the commissary court of furnishing a list of witnesses to the opposite party before a proof is now obsolete. *Steuart* v. *Steuart*, 1870, 8 M. 821; 42 J. 480.

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1. Access—Estate Marching with Burgh Golf Links—Right of Adjoining Proprietors.—The proprietor of an estate marching with golfing links, held by the magistrates of a burgh for behoof of the community, refused to shut up a gateway which had been opened in a wall built by his predecessor upon his own ground exclusively, along the line of march between his property and the links. The magistrates brought an action against him to have it found that they were entitled, on behalf of the community, to the free and uncontrolled use of the links, and to erect a fence on their own ground for the purpose of preventing the defender from passing from his lands on to the links. *Held* that the magistrates were not entitled to prevent any person dwelling on the adjoining lands from passing from these lands on to the links. *Mags. of Edinburgh* v. *Warrender*, 1863, 1 M. 887; 35 J. 526.

2. Boundary—Canal Bank—Tow-Path or Water-Line.—Where a piece of ground conveyed in a contract of ground-annual was described as bounded on one side by the bank of a canal, *held* that this boundary was the exterior line of the towing-path formed on the bank of the canal, and not the water-line of the canal. *Fleming* v. *Baird*, 1841, 3 D. 1015.

3. Boundary—Description in Articles of Roup—Reference to Plans—Inconsistency of Description and Plans.—In a judicial sale of land by lots, the articles of roup gave a different description from that contained in the plans prepared for the sale, which marked out the boundaries, and which were specially referred to in the judicial proceedings in the sale. *Held* that the boundary as laid down upon these plans was the march between the parties. *Glassel* v. *E. of Wemyss*, 1806, 5 Pat. 104.

4. Boundary — Description — Reference to Plan.—A disposition of ground described it as bounded by another property, and referred to a plan whereon this property was delineated as consisting of a house with a projecting outside stair. *Held* that the

purchaser was not entitled to challenge the projection as an encroachment. *Sim* v. *Stewart*, 1827, 5 S. 841.

5. Boundary—Description—Reference to Plan—Existing Boundary.—A proprietor of ground delineated in a feuing-plan the boundaries of the areas to be feued. He himself built three houses and in making the boundaries departed from the plan. One of these houses was sold, and the disposition described the subject as the area of ground marked on the plan. *Held* that the area disponed was not the area shown on the feuing-plan but the area feued off by the existing boundaries. *Paterson* v. *Carnegie*, 1851, 13 D. 997; 23 J. 459.

6. Boundary — Description — Measurement—Identification of Area.—Terms of description in a feu-contract which were *held* sufficiently precise for ascertaining, after a lapse of fifteen years, the extent of the ground feued, without any proof of the actual possession. *Darrock* v. *Ranken*, 1841, 4 D. 219.

7. Boundary — Description — Measurement—Right to Claim Larger Area.—Where a property was described in a contract of ground-annual by certain boundaries, and was also stated to consist of a certain number of square yards "or thereby," and it subsequently appeared that the ground contained within the boundaries was considerably larger in extent than the amount of square yards specified, *held* that the bounding description was conclusive as to the extent of the subject conveyed, and was not liable to be controlled by the statement as to the amount of square yards. *Fleming* v. *Baird*, 1841, 3 D. 1015. *Ure* v. *Anderson*, 1834, 12 S. 494; 9 Fac. 291.

8. Boundary — Description — Measurement.—Designation of boundaries by measurement. *Stewart, etc.* v. *Greenock Harbour Trs.*, 1866, 4 M. 283; 38 J. 148.

9. Boundary — Description — Definition by Measurement or Boundary — River Frontage.—A disponed to B & Co. a piece of ground of which the measurement and the boundaries were given. On the ground being measured off, a strip of 11 inches running along a river boundary had not been included in the measurement. *Held* that the conveyance defined the subject by boundaries and not by measurement, that B & Co. were proprietors with a river boundary, and that the river not being navigable, they were proprietors of one-half of the alveus of the stream *ex adverso* of these lands. *Gibson* v. *Bonnington Sugar Refining Co.*, 1869, 7 M. 394.

10. Boundary—Disappearance of Boundaries—Proof.—The titles to a field described it as being "enclosed by a ditch and feal dyke," and bounded on the north by the "loan at the march-stones set betwixt the town of Cupar and the heritor of Carslogie." The loan and stones having in the course of time disappeared, *held*, in a question as to the boundary between Carslogie and the field (1) upon the titles, that the ditch and dyke at that part belonged in property to the proprietor of the field; and (2) upon the proof, that there had been no contrary possession sufficient to change the right under the titles. *Wilson* v. *Laing*, 1844, 7 D. 113.

11. Boundary—Extent of Boundary—Proof.—Where a subject was disponed as bounded by "the harbour, with the pier intervening, upon the west," and the extent of the "pier" was disputed, proof *allowed* to ascertain what was the extent of the "pier." *Davidson* v. *Mags. of Anstruther*, 1845, 7 D. 342.

12. Boundary—Loch—Right of Feuar in solum Exposed by Drainage.—A party having a feu of a certain number of acres, bounded by a small loch, and having, as the loch was partially drained or gradually dried up, entered into possession of ground left dry, in addition to the number of acres specified in his titles, *held* entitled to obtain an interdict against interference by a neighbour, though not to a possessory judgment. *Glen* v. *Bryden*, 1830, 8 S. 893.

13. Boundary — Alveus of Loch — Property in Shore Exposed by Draining.—*Held* that the proprietor of a loch and its alveus, which had been drained to a considerable extent by operations without his consent, was entitled to have its former limits ascertained and marked off, and to have it declared that he was sole proprietor of the space which had been left dry between the present and former margin, subject to certain servitudes. *Cuningham* v. *Dunlop*, 1838, 16 S. 1080; 13 Fac. 756.

14. Boundary—Alveus of Loch—Ordinary Water-Line.—*Held*, in a question between the proprietor of a loch which had been partially drained, and a conterminous proprietor, who had appropriated part of the alveus by embanking, that the true line of march between the alveus and the property adjacent to the loch was the line which existed when the loch was in its natural and ordinary state, affected neither by floods nor by unusual drought, and that the conterminous proprietor was not entitled to follow the water-line, and take advantage of the artificial receding of the loch. *Baird* v. *Robertson*, 1839, 1 D. 1051; 14 Fac. 1191.

15. Boundary — Road — Right to Use Road.—*Held* that a party whose property was bounded by a road had a right to use it for himself and his tenants, and to open a communication with it (across a footpath which bounded it), provided that such communication was made in the manner least prejudicial to the public. *Moncreiffe* v. *Perth Harbour Commrs.*, 1846, 5 Bell 333; 18 J. 631. Affg. 5 D. 298; 15 J. 366.

16. Boundary Street—Foot Pavement.—A property was described as bounded on the north by George Street. *Held* (1) that the word "street" included the foot pavement, and therefore the boundary was the line between the foot pavement and the feu; (2) that the

feuar had no right of property in the ground under the foot pavement. *D. of Buccleuch* v. *Mags. of Edinburgh*, 1864, 2 M. 1114 ; 36 J. 549. See *Galbreath* v. *Armour*, 1845, 4 Bell 374.

17. Boundary—River—Shifting of Course—Acquiescence.—A river which bounded two estates, gradually, and within forty years, shifted its course, whereby three acres formerly on the one side came to lie on the other. *Held* that as the river formed the boundary, and the change was acquiesced in (seeing it might have been prevented by embankment), the three acres belonged to the estate to which they were formerly opposite. *M. of Tweeddale* v. *Kerr*, 1822, 1 S. 397.

18. Boundary—River Boundary—Right to Island Forming in River.—Two adjoining proprietors on a river *found* entitled to an island which had gradually arisen in the middle of the river *ex adverso* of their respective properties. *Pool* v. *Dirom*, 1823, 2 S. 466.

19. Boundary — Ground Gained from River—Right to Enlarge Channel—Clyde Navigation Acts.—Under the Clyde Navigation Acts, the trustees executed operations whereby the channel was confined, and a portion of ground gained from it *ex adverso* of a party's property described in his titles as bounded by the river, and which property he had acquired subsequently to passing of two of the Acts, and he used and sold this new ground as his property. *Held*, nevertheless, that the trustees were entitled under the Acts to cut down the ground so as to enlarge the channel of the river to its original width. *Todd* v. *Clyde Trs.*, 1841, 2 Robin. 333. Affg. 2 D. 357 ; 15 Fac. 384.

20. Boundary—Sea Boundary—Ground Left by Sea.—The proprietor of lands within burgh bounded by the sea, cannot acquire the ground left by the sea between his property and the sea-flood. *Smart* v. *Mags. of Dundee*, 1797, 3 Pat. 606.

21. Boundary — Sea-Flood — Right to Shore and Seaware.—A party got a disposition from magistrates of a burgh to a subject bounded "by the sea on the south part," or, as expressed in his sasine, "by the sea-flood." *Held* that his right was not limited by the high-water mark, or by the sea at its flood in ordinary tides, but that it included the shore as originally existing, and as acquired by embankment of the sea and the seaware thereon. *Leven* v. *Mags. of Burntisland*, 1812, Hume 555.

22. Boundary—Seashore—Right to Enclose Shore.—A party whose titles to his property specified one of his boundaries to be "the seashore," *held* entitled to enclose the shore. *Mags. of Culross* v. *Geddes*, 1809, Hume 554.

23. Boundary—Per fluxum maris—Right to Recover Ground from Sea. — The proprietor of a feu which lay within burgh, and was described as bounded *per fluxum maris ex australi*, *held* entitled to pass a public road which lay to the south of the subject, and to recover ground from the sea, although, from toleration, the magistrates had been in the constant use of appropriating the contiguous shore for various purposes. *Mags. of Culross* v. *Geddes*, 7 Dec. 1809 ; *Campbell* v. *Brown*, 18 Nov. 1813, F. C., note to p. 447.

24. Boundary—Sea or Seashore—Right to Shore and to Gain Ground.—A party who under a feu-contract had right to ground described as bounded by the sea or seashore, *found* entitled to the property of the shore, and to gain ground from the sea, so far as not inconsistent with the rights of the public or the superior's right of harbour. *Boucher* v. *Crawford*, 30 Nov. 1814, F. C. *Campbell* v. *Brown*, 18 Nov. 1813, F. C.

25. Boundary — Seashore — Right to Extend towards Sea.—If one of the boundaries in a bounding title be the unappropriated seashore, *held* that the proprietor may, if there be no interjected property, extend his boundary towards the sea. *Suttie* v. *Gordon*, 1837, 15 S. 1037.

26. Boundary — Sea-Flood — Right to Foreshore.—A superior was infeft under a Crown charter in lands bounded by the "water of Tay" on the north, with a right of harbour, and a portion of them was feued, which was described as bounded by "flood-mark" on the north, and a sub-feu was granted of a part which was described as bounded by the "sea-flood on the north." *Held*, in a question with the sub-feuar, that the superior had right to the property within high-water mark of ordinary spring tides. *Berry* v. *Holden*, 1840, 3 D. 205 ; 16 Fac. 161.

27. Boundary—"Seashore"—Right to Enclose Sands — Right and Interest of Crown.—A feuar whose superior was infeft under the Crown in a barony situated on the seacoast, with a clause of parts and pertinents, *held* from him a piece of ground, which was described in the feu-right as the eighth of an acre, as staked off and measured, and marked upon a plan, and as bounded upon one side by the "seashore." The feuar having commenced to extend the wall of his property a distance of thirty feet towards the sea, and beyond high-water mark in ordinary spring tides, thus enclosing a portion of a tract of sands of which from time immemorial the public had enjoyed the use for the purpose of walking, etc., *held*, in an interdict presented at the instance of the Officers of State before the work was completed, that the Crown had a title to challenge the encroachment for behoof of the public, and that the feuar had no right, under the title to his property, to enclose the space of sands ; and interdict *granted* accordingly. *Question* as to what is the proper and legal character of the Crown's right and interest in the shores of the realm. *Officers of State* v. *Smith*, 1849, 6 Bell 487 ; 21 J. 534. Affg. 8 D. 711 ; 18 J. 364.

28. Boundary — Sea-Flood — Right to Alluvium.—The proprietor of lands held of the Crown, and situate on the banks of a navigable river, feued certain portions thereof,

which in the feu-contracts were described as bounded on one side by the sea-flood. *Held* that the superior's whole right seaward had been conveyed to the vassals, and that he had no title to alluvial ground subsequently deposited between their feus and the sea. *Hunter, etc.* v. *Lord Advocate, etc.*, 1869, 7 M. 899; 41 J. 513.

29. Boundary — Undefined Boundary — Proof of Possession.—Where a boundary is undefined by the titles it must be determined by proof of possession. *Girdwood* v. *Paterson*, 1873, 11 M. 647; 45 J. 406. *Kedslie* v. *Drysdale*, 1828, 6 S. 879.

30. Cemetery — Private Cemetery — Rights of Proprietors and of Lairholders.—Of thirteen thousand "lairholders" in a private cemetery eleven raised an action against the proprietors of the ground to compel them to divest themselves of the property in favour of trustees, to transfer the management of the cemetery to a committee of the lairholders, and for declarator that the defenders were not entitled to derive profit from the interment fees, with other conclusions regarding the mode of burial, etc. *Held* (1) that the pursuers as individual lairholders had a sufficient title to sue, but that they could only insist in the conclusions of the action to the extent of vindicating their own alleged rights, and not those of the whole body of lairholders; (2) that the right of the pursuers, both at common law and *ex contractu*, was not a right of property in the lairs allocated to them, but only a right to use the same in perpetuity for the purpose of sepulture, with a corresponding obligation on the proprietors of the cemetery to dedicate it exclusively to the same purpose; (3) that the proprietors of the ground were entitled to derive a reasonable profit from interment fees; and (4) that in these circumstances the defenders were entitled to absolvitor. *Cunningham, etc.* v. *Edmiston, etc.*, 1871, 9 M. 869; 43 J. 468.

31. Common Property—Common Passage—Free Ish and Entry—Encroachment.—A party had right of free ish and entry by a passage between two streets, and alleged that he had a common property in its *solum*. He had been in the use of the passage for a long term of years. *Held* that he was entitled to an interdict against encroachments on the passage by a conterminous proprietor, who alleged that he held the exclusive property of the *solum* of the passage, and that he had left ample space for the ish and entry of the first party. *Ferrier* v. *Walker*, 1832, 10 S. 317.

32. Common Property—Exclusive Use—Area.—*Question* as to the right of two adjacent proprietors of houses in Heriot Row, Edinburgh, to the exclusive use of an area. *Purdie* v. *Aytoun*, 1830, 8 S. 457.

33. Common Property — Moveables — Joint Product—Bankruptcy of one Producer—Rights of Parties.—A contracted to build for B a hearse for a specified sum, on condition that B should contribute certain portions of the materials and workmanship. B contributed his share, and the materials furnished by him were affixed to the hearse so that they could not be detached without injury to the general fabric. A became bankrupt before finishing the hearse, which was in his possession. *Held*, in a question between B and the trustee in A's sequestration, that the parties were joint-proprietors of the subject in proportion to the value of their respective contributions. *Wylie & Lochhead* v. *Mitchell*, 1870, 8 M. 552; 42 J. 258.

34. Common Property—Mutual Gable—Liability for Half Cost.—A feuar who had built a house of three storeys high, *held* bound to pay one-half of the value of a mutual gable, although his neighbour's house was four storeys high. *Ness* v. *Ferries*, 1825, 4 S. 7.

35. Common Property—Mutual Gable—Liability for Half Cost.—The feuar of a building stance *held* liable to pay for one-half of the mutual gable of a house erected on the adjoining feu, although the respective feu-contracts only declared that the feuar should have a claim against his neighbour for this expense, but imposed no corresponding obligation to pay it, and although the feuar so found liable had not erected any house on his own stance. *Mackenzie* v. *Mackenzie*, 1829, 8 S. 74. See 9 S. 44.

36. Common Property—Mutual Gable—Liability for Half Cost.—Two parties feued adjoining building stances under articles of roup, by which each feuar was bound to bear half the expense of the mutual gables. One of them erected a house, and the other gave up his share, which the superior accepted. *Held* not thereby relieved of his obligation, in a question with the other feuar as to paying for one-half of the gable of the house. *Thorburn* v. *Pringle*, 1832, 10 S. 1822.

37. Common Property—Mutual Gable—Share of Cost.—*Held* that the right to claim a share of the expense of a mutual gable from the adjoining proprietor was real, and passed by a conveyance of the tenement, as it stood, without any special mention of it. *Hunter* v. *Luke*, 1846, 8 D. 787; 18 J. 410.

38. Common Property—Mutual Gable—Singular Successor—Implied Obligation—Right to Claim Half Cost.—A feuar built a house having a gable, which was partly built upon the adjoining feu. There was no contract or agreement providing for the gable being so built as to serve for a mutual one, nor for any future claim by the feuar against his neighbour for the expense. Both the house and the adjoining feu having been disponed to third parties, and the adjoining feu having been built upon, and the gable appropriated as a mutual one by the builder, *held* (1) that the mutual gable was not an illegal encroachment upon the adjoining feu; (2) that the right to claim half the expense of building it transmitted without conveyance against singular successors; (3) that such right was inherent in the subject, and existed as

a ground of liability against the adjoining feuar from the time the mutual gable was erected, but that the term of payment did not arrive till the gable was appropriated. *Law* v. *Monteith*, 1855, 18 D. 125 ; 28 J. 44.

But a feuar who has built a house on his feu cannot sue a co-feuar for half of the expense of the gable if the co-feuar has not built, although there is an obligation to build imposed on him in his charter. *Guthrie* v. *Young*, 1871, 9 M. 544 ; 43 J. 344.

39. Common Property—Mutual Gable—Title to Sue for Value.—*Held* that a superior having feued out a piece of ground for building, without reservation of any claim on account of an adjoining mutual gable (to which he alleged right by virtue of an assignation), had no title to sue the feuar for his share of the value of the mutual gable. *E. of Moray* v. *Aytoun*, 1858, 21 D. 33 ; 31 J. 19.

40. Common Property—Mutual Gable—Liability for Expense—Preferable Claim in Bankruptcy.—A and B feued two adjoining stances, both feu-contracts declaring that the gables should be mutual, and should be built to the extent of one-half on the adjoining feus, and the cost thereof borne equally by the feuars, to whom they should belong in common. This provision was declared to be a real burden on the feu. *Held* that A having built a mutual gable which was made use of by B, was entitled to be ranked preferably on B's sequestrated estate for one-half of its price. *Rodger* v. *Russell*, 1873, 11 M. 671 ; 45 J. 417. *Wallace* v. *Brown*, 21 June 1808, F. C. ; M. "Personal and Real" App. No. 4.

41. Common Property—Mutual Gable—Projection over Centre Line.—The proprietor of a house *held* entitled to prevent his neighbour from projecting any cornices or ornamental building across the centre line of their mutual gable, though only to the extent of a few inches, and without doing him any injury. *Miln* v. *Mudie*, 1828, 6 S. 967. *Hazle* v. *Turner*, 1840, 2 D. 886.

42. Common Property—Mutual Wall—Heightening.—The titles of parties declared that a march wall was to be kept 6 feet high. *Held* that when several feet of earth had accumulated around the foot of this wall that a party was not bound to allow it to be increased in height so as to keep it 6 feet above the surface. *Williamson* v. *Hill*, 1831, 9 S. 269 ; 3 J. 166.

43. Common Property—Mutual Wall—Heightening.—Bill of suspension *passed* and interim interdict *granted* against carrying into execution an interlocutor, in absence, by the dean of guild of a royal burgh, authorising one of two conterminous proprietors to heighten a mutual wall, and prohibiting the other proprietor and his tenants from piling peat-stacks against the wall. *Warren* v. *Marwick*, 1835, 13 S. 944.

44. Common Property—Mutual Wall—Heightening.—By a feu-contract the feuars were bound to erect sufficient division walls between their feus, to be built and maintained at their mutual expense, such walls not to exceed 8 feet in height except with consent of the conterminous proprietor, and in no case to exceed 10 feet. A feuar having, without consulting the conterminous proprietor, built a wall 6½ feet in height and furnished it with a copestone, *held* not entitled without such consent to raise it to the height of 8 feet. *Dow & Gordon* v. *Harvey*, 1869, 8 M. 118 ; 42 J. 60.

45. Common Property—Mutual Wall—Wall Built on one Feu—Right of Adjoining Feuar.—By local custom in Aberdeen, one who pays for 4½ inches of a mutual gable is entitled to take band therein to the depth of 9 inches, and to build on 9 inches of its breadth. One of two conterminous feuars built upon the extremity of his feu, and the other paid for 4½ inches of the gable. Both parties had acquired their feus from the same author, under dispositions of the same date, containing a declaration that in the event of the disponee building on the extremity of his march, the adjoining feuar should be entitled to take band on paying an equivalent therefor. *Held* that the effect of this clause was to secure to either feuar the privilege of a mutual gable in the event of his neighbour building upon the verge of his own feu, and that the party paying for 4½ inches of the wall was entitled to take band in the usual way. *Walker, etc.* v. *Sherar*, 1870, 8 M. 494 ; 42 J. 225.

46. Common Property—Mutual Wall or Private Wall.—Circumstances in which *held* that a wall on the boundary of a feu was wholly upon that feu, and that certain superstructures raised thereon by the proprietor of the adjoining feu must be removed. *Taylor & Co.* v. *Smellie*, 1869, 6 S. L. R. 677.

47. Common Property—Road—Disposition with "Use or Privilege"—Right to Build.—In the division of a property between two heirs-portioners the disposition to A disponed "the use or privilege" of two roads, while that to B conveyed that of one only. A's representative having claimed the right to build on the road conveyed to A alone, *held* that it remained common property subject to a servitude of road, and could not be built on. *Rodger* v. *Miller*, 1822, 1 S. 520.

48. Common Property—Space between Gables.—Two conterminous proprietors having erected houses, leaving a small vacant space of ground between their respective gables, and their properties being divided by a wall which each claimed as his property, *held* that one of the parties was entitled to have the vacant space shut up. *Connal* v. *Coldstream*, 1829, 7 S. 726.

49. Common Property—Title—Property or Servitude.—Terms of titles upon which it was *held* that the right of one of two proprietors in a passage, forming the common access to the two properties, was not an exclusive right of property in his favour burdened

by a servitude of access in favour of the other, but that it was common property, and could not be altered without the consent of both. *Richmond* v. *Shaw & Sons*, 1868, 5 S. L. R. 308.

50. Common Interest—Common Close—Exclusive Use of Portion—Possession.—A party who had long been in use to deposit dung on a space at the side of a common close, and over which an outside stair, formerly belonging to a building erected on his property, projected, having surrounded the space with a wall to keep in the dung, and possessed it for seven years, *held* entitled to keep up the wall. *Wilson* v. *Pattie*, 1829, 7 S. 316.

51. Common Interest—Common Passage—Right to Erect Bridge over Passage.—Certain feuars of urban subjects were bound by their titles to leave "a lane or passage of the breadth of twelve feet" along the east side of their respective feus, for the use of themselves, the other feuars, and the neighbourhood. Each proprietor was taken bound to causeway the portion of the lane on his own feu. *Held* that a feuar who was proprietor of subjects on each side of the lane was not entitled to erect a bridge over it. *Mackenzie* v. *Carrick, etc.*, 1869, 7 M. 419 ; 41 J. 233.

52. Common Interest—Common Close—Signboard.—*Held* that one of several owners of houses in a common close in Edinburgh was entitled to paint a sign on the lintel of the entrance to the close. *Monro* v. *Davidson*, 1808, Hume 518.

53. Common Interest — Signboard — Tenement.—A tradesman living in a court or cul-de-sac is not entitled to put up his signboard on the wall of the tenement fronting the street. *Laurie* v. *Drysdale*, 13 May 1812, F. C.

54. Common Interest—Shop-Sign—On Passage Wall — Servitude of Entry.—A party having a servitude, or reserved burden of entry, *held* entitled to put his sign on the wall of the passage. *Walker's Trs.* v. *Learmonth & Co.*, 1824, 3 S. 288.

55. Common Interest—"Mean Property"—Use of Passage for Carts — Extent of Privilege.—A and B purchased two lots of the same property, and A was bound not to build upon an area into which two doors from a tenement on B's lot opened, and which it was declared should be "mean property for the preservation of light." A was also bound to allow a cart-way from B's lot along the east boundary, and this privilege of cart-entry was inserted in B's titles. *Held* (1) that the area was not common property ; and (2) that while B had right to a cart-way, he was not entitled to make use of it for loading or unloading carts thereon. *Baird* v. *Ross*, 1836, 14 S. 528. See 6 W. & S. 127.

56. Common Interest — Tenement — Meaning of Term.—*Held*, on construction of a clause in a statute relating to the police of a burgh, that the term "tenement of land" was properly applicable to a single or individual building, although containing several dwelling-houses with separate means of access, but under the same roof and enclosed by the same gables. *Scott* v. *Commrs. of Police of Dundee*, 1841, 4 D. 292 ; 14 J. 121.

57. Common Interest—Tenement—Damage to Lower Flat by Water—Culpa.—*Held* that the proprietor of a flat in the possession of a tenant was liable to the occupant of a shop beneath for damage caused by the culpable negligence of such proprietor in allowing a water-pipe in his flat to be in a defective and insufficient state. *Campbell* v. *Kennedy*, 1864, 3 M. 121 ; 37 J. 62.

58. Common Interest — Tenement — Alteration of Upper Flat — Consent of Lower Proprietors.—*Held* that the proprietor of the upper storey and garrets of a house, consisting of several storeys belonging to different persons, cannot raise the walls and alter the shape of the roof, so as to convert the garrets into an attic storey, without the consent of the inferior proprietors. *Sharp* v. *Robertson*, 5 Feb. 1800, F. C. ; M. "Property" App. No. 3. See also *Cuddie* v. *M'Kechnie*, 1804, Hume 516.

59. Common Interest — Tenement — Alterations by Lower Proprietor.—The proprietor of a lower storey of a tenement is not entitled, without the consent of the proprietors of the higher storeys, to make very material alterations on the walls, such as may naturally excite apprehension of danger, though reported by tradesmen to be safe. *Ferguson* v. *Marjoribanks*, 12 Nov. 1816, F. C. *Pirnie* v. *MacRitchie*, 5 June 1819, F. C.

60. Common Interest—Tenement—Dangerous Alterations. — A, without judicial authority, made alterations on a tenement, of which the under flat belonged to him, and the upper to B, whereby B's flat was injured and endangered. The court *ordered* the premises to be restored to a state of absolute security, without regard to the expense. *M'Nair* v. *M'Lauchlan*, 1826, 4 S. 546.

61. Common Interest — Tenement — Alterations by Lower Proprietor. — The proprietors of the upper floors of an urban tenement are not entitled to object to alterations proposed to be made by the proprietor of the lower floor to convert it into shops, where they can be made without danger. *M'Kean* v. *Davidson*, 1823, 2 S. 480. *Denniston* v. *Bell*, 1824, 2 S. 684. *Murray* v. *Gullan*, 1825, 3 S. 639. *Gray* v. *Greig*, 1825, 4 S. 104. *Brown* v. *Boyd*, 1841, 3 D. 1205.

62. Common Interest—Tenement—Re-Erection—Alteration by Lower Proprietor.—*Question*, whether the proprietor of the ground floor of a house which has been taken down, is entitled, on its re-erection, to have a sunk storey, without the concurrence of the proprietors of the upper flats. *Stewart* v *Blackwood*, 1829, 7 S. 362 ; 4 Fac. 453.

63. Common Interest — Tenement — Alteration by one Proprietor—Common Stair.—Bill of suspension *passed* to try

whether the proprietor of a flat and of the attics in a common tenement, where the access to the attics was by a stair within the flat, be entitled to prolong the common stair, so as to make it the access to the attics. *Sandy* v. *Innes*, 1823, 2 S. 221.

64. Common Interest — Tenement — Alteration by one Proprietor — Material Interest—Mutual Gable.—Two contiguous tenements, consisting each of several flats, had one entry from the street and one staircase in common, and both the entry and staircase were within one of the tenements. The staircase ran up alongside of the mutual gable, and the proprietor of a flat struck out a new door through the wall dividing his house from the staircase, to which the proprietor of the corresponding flat of the contiguous tenement objected. *Held* that the former was entitled to make the door, in respect that the wall was not common property nor part of the common stair, and that the party objecting had not shown any material interest encroached upon by the operation. *Ritchie* v. *Purdie*, 1833, 11 S. 771.

65. Common Interest — Tenement — Upper Flat—Use of Space between Ceiling and Roof—Common Stair—Passage of Flue.—The proprietor of a house containing two square storeys and an unoccupied space between the upper storey and the roof, sold and conveyed the "upper flat," inserting in his disposition an obligation on the purchaser to maintain the roof. *Held* that the purchaser had right to the space between the ceiling of his flat and the roof of the house, and was entitled to make rooms in it. Also *held* that the proprietor of the upper floor of a house and underground cellars had no right to carry a flue from the cellar to the roof through a staircase in which he had not an exclusive right of property. *Taylor* v. *Dunlop*, 1872, 11 M. 25; 45 J. 24.

66. Common Interest — Tenement — Alteration on Upper Flat—Overhanging Projection.—A tenement within burgh, belonging to two proprietors, was described in the titles of both as bounded by the street, although in point of fact an area intervened between the wall and the street. The frontage of the under tenement had been extended towards the street, and been so possessed for upwards of seven years. *Held* that the proprietor of the under tenement was not entitled, without instructing injury, to object to a proposed overhanging projection from the wall of the upper tenement. *Urquhart* v. *Melville*, 1853, 16 D. 307; 26 J. 137.

67. Common Interest—Tenement—Right of Property in Cellar—Possession.—In an action by the owner of part of a tenement against the other proprietor for declarator that the pursuer had right to a cellar in the area, which cellar was mentioned in the titles of neither party, one defender maintained that he had possessed for twenty years. *Held* that averments of possession without title were competent to support a claim of property in the cellar, and a proof *allowed*. *Cunningham* v. *Gemmell*, 1853, 2 Stuart 340.

68. Common Interest — Tenement — Erection by Landlord—Adjoining Tenant.—A landlord let, as separate tenements, a street flat and a sunk area. Before the entry of the tenant of the street flat, an ornamental front had been put on the shop in the sunk area. *Held* that the tenant of the street flat was entitled to prevent the landlord from taking down this front and substituting another of the same height but projecting 3 feet from the wall. *Blanc* v. *Greig*, 1856, 18 D. 1315; 28 J. 668.

69. Common Interest — Tenement — Upper and Lower Proprietor—Cornice.—In a question between the owner of a lower shop and the owner of a shop immediately above, *held* that neither party was entitled to use a cornice or belting which divided the one floor from the other. *Murray* v. *M'Kenzie*, 1812, Hume 520. See also *Dickson* v. *Morton*, 1824, 3 S. 310.

70. Common Interest — Tenement — Use of Machinery on Lower Storey.—Interim interdict *granted* to a tenant of an upper floor in Thistle Street, Edinburgh, against the use, by his landlord, of a steam engine, boiler, and machinery for a printing establishment on the lower floor, subject to an experiment being made under judicial inspection as to whether they might be used without causing injury or discomfort. *Johnstone* v. *Constable*, 1841, 3 D. 1263.

71. Common Interest — Tenement — Division Line between Flats—No Boundary in Title—Possession.—The owners of a shop, who were tenants of the sunk flat below, obtained from the owner of the sunk flat permission to enlarge their shop window by lowering the sill, whereby the window of the sunk flat was dimished in size, on condition that on demand the latter window should be restored to its original state. The owners of the shop having sold their property, in an action raised against the purchaser by the owner of the sunk flat to have his window restored to its former condition, *held* that the purchaser's right did not extend beyond the boundary of his property, and that as the titles of the subjects did not define the boundary between the flats, it fell to be determined by the possession of the defender's authors under their title as proprietors of the shop. *Girdwood* v. *Paterson*, 1873, 11 M. 647; 45 J. 406.

72. Common Interest — Tenement — Rights of Access to Sunk Storey.—In a question between the proprietors of the upper storeys of a tenement (who had access to their cellars situated in the sunk storey by a lower stair leading from the common stair, but no exclusive right to the lower stair) and the proprietor of the shop and sunk storeys, *held* that he was entitled to let the sunk storey as a separate dwelling, with access by the lower stair, although the shops and sunk storeys communicated with each other by an inside stair. *Anderson* v. *Saunders*, 1831, 9 S. 564.

73. Common Interest—Tenement—Right of Access — Interdict. — The proprietor of a tenement let to a tenant the second flat, the access to which was by a door from the street through a passage and up a common stair; and after the tenant had entered, the landlord made an opening for a door at the end of the passage, so as to give access from the street to a printing establishment erected in a meuse lane behind. *Held* that the tenant was entitled to interdict against the use so proposed to be made of the passage. *Alexander* v. *Couper*, 1840, 3 D. 249; 16 Fac. 193.

74. Common Interest—Tenement—Right of Access—Exclusive Use—Right to Interdict Alterations by Proprietor.—The tenants of the third and fourth flats of an urban tenement enjoyed for several years, in common with the tenants of the two lower flats, the exclusive use of the principal stair and relative back stair leading to the upper flats, and the exclusive use of a water-closet at the top of the principal stair. The proprietor having built a new tenement on the immediately adjoining area, *held* that the tenants of the upper flats were entitled to interdict him from removing the water-closet, and striking out a door at the side thereof in the wall of the principal staircase, for the purpose of obtaining access to the new tenement by the principal staircase and back stair. *Begbie & Co.* v. *Frame*, 1857, 20 D. 81; 30 J. 52.

75. Common Interest—Tenement—Reserved Right of Access—Effect of Non-Use—Negative Prescription.—A tenement was conveyed by the original builders, in different storeys, to different purchasers, the ground and sunk storeys being conveyed to one with an entry directly from the street, and the upper storeys to others, with an entry by a common stair. In the titles of all these parties there was reserved to the proprietor of the ground storey a right of opening up and using at any time a door or entry which had originally existed, opening into his storey from the common stair, off the upper floors of the tenement. *Held* that this reserved right being *res meræ facultatis* was not affected by the negative prescription and was not lost *non utendo*. *Gellatly* v. *Arrol*, 1863, 1 M. 592; 35 J. 360.

76. Common Interest—Tenement—Staircase Wall—Exclusive Property.—A party was infeft in the two upper storeys of a tenement, and jointly with the proprietor of the third storey, in the common stair and staircase. *Held* that they had the exclusive property of the walls of the staircase, and were entitled to prevent the proprietor of the flat entering from the street from putting a show-window in, or otherwise operating upon, the wall of the staircase fronting the street. *Graham* v. *Greig*, 1838, 1 D. 171.

77. Common Interest—Use of Stair Built on Joint Property—Averment of Exclusive Use for Prescriptive Period.—*Held*, on a construction of the title deeds to two contiguous tenements in Glasgow, that they excluded the pretensions of the proprietor of one of the tenements to the sole and exclusive use, as an access to his tenement, of a stair built on a piece of ground held *pro indiviso* by the proprietors of both; and averments by the said proprietor, to the effect that for upwards of forty years, and from the time when it was built, the staircase had been used and possessed by him and his authors exclusively as an access to his tenement, *held* irrelevant and insufficient to exclude the right of the other *pro indiviso* proprietor of the ground on which the staircase was built to use the stair. *Leck* v. *Chalmers*, 1859, 12 D. 408; 31 J. 223.

78. Commonty — Act of Ownership — Effect of Single Act.—A single act of ownership by ploughing a piece of ground about forty years ago, but which was followed by its being dealt with as commonty, *held* not relevant to infer an exclusive right to the ground. *Watt* v. *Paterson*, 1813, 2 Dow 25.

79. Commonty—Evidence of Commonty or Exclusive Property.—*Question* as to what was the proper evidence of commonty or exclusive property of lands in the Highlands, remitted for review. *Lord Seaforth* v. *Hume*, 1814, 2 Dow 338.

80. Commonty — Exclusive Possession by one Proprietor — Disuse — Onus.—*Held* (1) that an absolute right of property in what was formerly a commonty can only be constituted by exclusive possession inferring such a right, and not by mere disuse by the other proprietor during the prescriptive period; (2) that the onus lies upon the party asserting the right of property. *Hunter* v. *Cochrane*, 1867, 4 S. L. R. 79.

81. Commonty — Division — Servitude — Title to Sue.—*Found* that a person having only a right of servitude is entitled to pursue a division of commonty under the Act, 1695, c. 38. *Trotter* v. *E. of Marchmont, etc.*, 1736, 1 Pat. 186. Affg. M. 2462.

82. Commonty — Division — Servitude — Title to Sue.—*Held* that a servitude over a commonty gives no title to bring an action of division under the Act, 1695, c. 38. *Gall* v. *Greenhill*, 31 May 1810, F. C.

83. Commonty—Division—Title to Sue.—Where feuars of lands within a burgh of barony had a conveyance of "a right to the common hill of A," *held* that they had a title to pursue a process of division, although the magistrates of the burgh alleged that the hill had been possessed under the charters to the burgh from time immemorial as the exclusive property of the burgh, but no mention was made of it in the charters. *Henderson* v. *Malcolm*, 29 June 1815, F. C.

84. Commonty—Division—Title to Sue — Trustees. — Under a deed conveying an estate to trustees with a clause empowering them "to do everything relative to the management of my estate and affairs that I could do myself,"—*found* that the trustees were not entitled to raise an action of division of commonty. *Graham's Trs.* v. *Boswell*, 1830, 9 S. 121; 6 Fac. 79.

85. Commonty—Division—Title to Sue—Principle of Division.—A udal proprietor in Zetland has a good title to pursue a process of division of commonty; and in such division, the conterminous heritors, including a udal proprietor and a proprietor of lands who was infeft in the lordship of Zetland, *held* entitled to allotments of the common, in proportion to the number of merks land belonging to them respectively. *Spence* v. *E. of Zetland*, 1839, 1 D. 415.

86. Commonty — Division — Servitude Right — Prescriptive Use.—The proprietor of a moor (over which several heritors had rights of servitude) possessed other lands to which no servitude on the moor belonged, but the tenants of which were in use for above forty years of pasturing cattle in common with the occupiers of the dominant lands. *Found*, in a process of division of the moor, that the proprietor (besides one-fourth *tanquam præcipuum*) was entitled to a share in respect of these other lands. *Trotter* v. *E. of Marchmont*, 1736, 1 Pat. 186. Revg. 1734, M. 2462.

87. Commonty—Division—Principle of Division — Valuation. — The proprietor of lands to which a right of commonty was attached *held* entitled to get a share of the commonty, in proportion to the valued rent of his lands. *Small* v. *Ferguson*, 10 Feb. 1804, F. C.; M. "Commonty" App. No. 3.

88. Commonty — Division — Act, 1695, c. 38.—*Held*, in dividing a moss which had been possessed according to the extent of the adjacent lands lying in front of it, that the rule of the Act, 1695, c. 38, was not to be followed, but "that the boundaries of the property of each heritor must be fixed according to the extent of the respective lands lying along the front of the moss to the centre thereof." *Campbell* v. *Lord Douglas*, 17 May 1804, F. C.; M. "Commonty" App. No. 4.

89. Commonty — Crown Property — Division—Act, 1695, c. 38.—A commonty, of which the property is vested in the Crown, and possessed by an heritable ranger, cannot be divided under the Act, 1695, c. 38, although the Crown do not oppose. *Sandilands* v. *Mags. of Falkland*, 19 Jan. 1809, F. C.

90. Commonty — Division — Possession by Superior—Right to Share in Division. —The proprietor of a barony, to which a commonty belonged, feued the barony in portions, giving to some of the feuars a right of property in the commonty, and to others a right of servitude only. *Held*, in an action of division of the commonty, that he was entitled to share in the commonty effeiring to the valued rent of those portions feued with servitudes only, although he had had no possession, except through the servitude men, for more than forty years. *D. of Buccleuch* v. *Erskine*, 16 June 1812, F. C.

91. Commonty — Division — Rights of Parties Ruled by Possession. — *Held* that possession is the only rule as to the right of parties in the division of a commonty, and not the priority of their rights over the commonty. *Hepburn*, 2 Feb. 1814, F. C.

92. Commonty — Action of Division — Measure of Award of Property. — In a process of division of a common, an extent of property was awarded corresponding to the proven value of the servitude; and a demand for the property over which the servitude had been exercised, *refused*. *M'Kenzie* v. *Mags. of Montrose*, 1823, 2 S. 558.

93. Commonty—Division—Principle of Valuation.—An action of division of commonty of lands in Shetland *sustained*, although there existed no valuation; but the division ordered to be made according to merks, agreeably to which the taxes were levied. *Bruce* v. *Grierson*, 1823, 2 S. 573.

94. Commonty — Division — Act, 1695, c. 23.—A field exceeding four acres is not liable to division under stat. 1695, c. 23, although intersected by a road, and the parts on each side of the road do not extend to four acres each. *Burns* v. *Bogle*, 1829, 7 S. 415; 4 Fac. 518.

95. Commonty — Division — Competency of Justices to Determine Objection. — In a process of division of runrig before justices of the peace, it is incompetent for the justices to determine an objection taken by a party to a portion of the land sought to be divided being included in the division, that it is his own exclusive property, and not subject to division. *Davidson* v. *Heddell*, 1829, 8 S. 219.

96. Commonty — Division — Rights of Parties after Allotment.—A party *interdicted*, who, after a commissioner in a division of commonty had approved of a division and allotment of it, began to carry off stones from a lot marked off to another, and to break up the surface. *Smith* v. *Webster*, 1831, 9 S. 401.

97. Commonty — Division — Competency —Effect of Decree-Arbitral.—A process of division of commonty under the stat. 1695, c. 38, was brought in 1767, and submitted to arbiters, who divided it, except a part of a moss which they decerned to remain common. A second process of division of that part *dismissed* as incompetent, in respect of the decree-arbitral. *Johnson* v. *Johnston*, 1831, 10 S. 70.

98. Commonty—Division—Dismissal of Action—Right of Property—Effect of Disposition.—In a process of division of commonty, a defender having established that it was his sole property, action *dismissed*. *Question* as to the effect of a dispositive clause with all and sundry mosses, etc., and parts and pertinents, in conferring a right of property in part of a common. *Bain* v. *Mags. of Wick*, 1834, 12 S. 522.

99. Commonty—Division—Liability for Clerk's Account.—A proof was led and the term was circumduced in a process of division of commonty, and the clerk drew up a prepared

state, in common form, under the instructions of one of the parties to the process. *Held* that he was entitled to decree for his account against all the parties, reserving to them their relief *inter se*. *Brodie* v. *Lord Cawdor*, 1836, 14 S. 1097; 11 Fac. 910.

100. Commonty—Division—Liability for Land Surveyor's Account.—A land surveyor who was employed, on application of parties, in a process of division of commonty to survey, make plans, and lay off the ground, *held* entitled to payment of his account from any of the parties applying for his appointment *in solidum*, and that decree might be pronounced in the process. *Wilson*, 10 July 1813, F. C.

101. Commonty — Division — Right to Share Vested in Vassal — Principle of Valuation for Division.—In a division of a commonty between the Crown and two proprietors holding feu of the Crown, *found* (1) that where lands are held by infeftment in feu, the title to the share in the commonty effeiring to such lands is vested in the vassal, and not in the superior; and (2) that the valuation of the feu-duties must be deducted from the Crown's *cumulo* valuation as appearing in the cess-books, and added to the valuation of the lands of the vassals. *Her Majesty's Advocate* v. *Balfour*, 1838, 16 S. 420; 13 Fac. 364.

102. Commonty — Division — Acts of Possession—Competency.—In an action of division of commonty between several adjoining proprietors, part of the lands was claimed by one of the proprietors as his exclusive property. *Held* (1) that another proprietor, who claimed a right of common property over it, was not entitled to found on acts of possession by other proprietors, who themselves disclaimed any right of common property over it; and (2) that the process was not one in which a question of right of property or servitude right could competently be tried. *Gordon* v. *Sir Jas. Grant*, 1850, 13 D. 1; 22 J. 171.

103. Commonty — Division — Title to Defend — Immemorial Possession. — *Held* that feuars and inhabitants of a village are entitled to a proof of their immemorial possession of an adjacent commonty; and if such possession is proved, they have a title to support their appearance in defence in an action of division of commonty. *Hunter* v. *Mailler*, 1854, 16 D. 641; 26 J. 302.

104. Commonty—Division—Principle of Division—Valuation or Possession.—*Question* whether, in the division of a commonty, the valued rent of the lands belonging to the claimants, or the extent of possession had by each in the common, is to be taken as the rule for allocating the share of commonty to the several claimants. *Lord Blantyre* v. *Jaffray*, 1856, 19 D. 167; 29 J. 82.

105. Commonty — Division — Improved Ground — Compensation — Allotment at Unimproved Value.—In the division of a commonty, a proprietor who has encroached on the common by cultivating land in various parts thereof, is not entitled to compensation, though it is reasonable that where land so improved falls within the portion of the commonty allotted to him, he should get it at its unimproved value. *Innes* v. *Hepburn*, 1859, 21 D. 832; 31 J. 463.

106. Commonty — Division — Improved Ground—Allotment at Improved Value.—Where a heritor has improved the border of a common, lying next to his property, in a division of the common, the improved land is to be allotted to him at its improved value. *Kinloch*, 14 Jan. 1814, F. C.

107. Commonty—Division—Liability for Teind—Effect of Decree of Division.—Runrig lands situated in two parishes were divided by the sheriff, who found that the proprietors should be liable in teind as if no division had been made. The whole lands were localled on in proportion to their situation in both parishes in three successive localities. In a new locality a singular successor in one parcel of the lands objected. *Held* that the allocation of stipend by the sheriff was incompetent. *D. of Buccleuch* v. *Milne & Erskine*, 1868, 6 M. 765; 40 J. 394.

108. Commonty—Division—Title — Title to Found Prescription.—The proprietor of an estate, whose titles included a *pro indiviso* right of commonty, obtained a portion of the common on a division, and afterwards purchased twelve acres, the portion allotted to the proprietor of an adjoining estate, from whom he obtained a disposition with a *de me* blench holding. No infeftment followed, but the purchaser possessed the twelve acres as part of his estate. Thereafter he expede a Crown charter to the estate, with pertinents, and *cum libera communitate*, and he was infeft. *Held*, in a question with a singular successor to the adjoining estate, that the title to the commonty contained in the Crown charter was a habile title to which to ascribe his prescriptive possession of the twelve acres. *Walker* v. *Milne*, 1871, 9 M. 823; 43 J. 575.

109. Commonty—Muir—Claim of "Free Use."—A claim of right to "the free use" of a muir, as in times past, is too vague a claim to be the subject of action. *Henderson* v. *E. of Minto*, 1860, 22 D. 1126; 32 J. 519.

110. Commonty — Possession — Damages for Excessive Possession. — A claim of damages for alleged excess in the possession of a common by one of the common proprietors prior to decree of division, *refused*. *Houston* v. *Dempster*, 1835, 13 S. 492.

111. Commonty—Proof—Usage and Possession.—A right of common having been claimed in certain lands, there being no written evidence of the right, *held* that sufficient usage and possession had not been proved, the lands being such that trespasses might easily be committed. *Fraser* v. *Chisholm*, 1814, 2 Dow 561.

112. Commonty—Action of Removing—Title to Sue.—A party who, out of thirty-six, *held* thirty-five and a half parts of a commonty, brought an action of removing against the

other (who held the other half part, and had erected a fishing-berth and wharf on the property). *Found* not entitled to pursue, reserving to bring an action to ascertain the extent, and obtain possession of his part of the property. *Bruce* v. *Hunter & Leach*, 16 Nov. 1808, F. C.

113. Commonty — Right of Property — Title.—Titles "with parts and pertinents, used and wont," and "with the privilege of sheiling," *held* not to import a right of property in a common, unless so explained by the possession had thereupon. *E. of Airlie* v. *Rattray*, 1835, 13 S. 691.

114. Commonty—Servitude or Property —Forty Years' Possession.—A party claimed a share of a commonty as his property, which was opposed on the ground that he had only a servitude. The respective titles not being inconsistent with these opposite allegations, the claimant *required* to show forty years' possession. *Graham* v. *Rennie*, 1822, 1 S. 536.

115. Commonty — Servitude Right or Common Property — Sand and Gravel in River-Bank.—The proprietor of a house and garden in a burgh of barony claiming a servitude of taking sand and gravel from the bank of a river, as subsisting in favour of him and other proprietors in the burgh, is not entitled to found on the possession of the other proprietors, and is not bound, in order to support his action, to plead a right of commonty in the bank. *Aikman* v. *D. of Hamilton*, 1832, 6 W. & S. 64. Revg. (in part) 1830, 8 S. 943.

116. Commonty — Title—Description in Charter — Inconsistent Claim. — Where a charter described lands and the pertinents as lying within a particular parish, *held* not competent for the proprietor, in a process of division of a commonty, to claim a share, in so far as situated within another parish. *Hepburn* v. *D. of Gordon*, 1823, 2 S. 525.

117. Commonty — Title — Description in Charter — Inconsistent Possession. — *Held* that the proprietor of a barony, with a clause of parts and pertinents, whose titles described his lands as lying within a particular parish, could not acquire, by prescriptive possession, any right of common property in lands lying beyond the limits of that parish. *Gordon* v. *Sir Jas. Grant*, 1850, 13 D. 1; 22 J. 171.

118. Commonty—Right to Cut Peats—Assignation of Right — Objection by pro indiviso Owner.—*Held* that one of the *pro indiviso* proprietors of a commonty was entitled to prevent a stranger from cutting peats in it, although the privilege of doing so belonged to the other proprietors, and they had assigned it to the stranger. *Wilson* v. *Buchanan*, 1800, Hume 120.

119. Commonty—Use—Pasturage.—One of several co-proprietors of commonty, immemorially used for pasturage, *held* entitled, notwithstanding the dissent of another co-proprietor, to drive off deer, and to prevent them from resting and pasturing upon it. *Robertson* v. *D. of Atholl*, 1 Dec. 1814, F. C.; 6 Pat. 72. Affg. 22 May 1810, F. C.

120. Commonty—Use—Right to Grant Shooting Lease.—One of two co-proprietors of a commonty *held* not entitled to grant for rent a lease of it for shooting the game upon it, without consent of the other co-proprietor, this being an extraordinary use of it. *Campbell* v. *Campbell*, 24 Jan. 1809, F. C.

121. Commonty—Use by Tenants of Proprietor—Objection by Owner of Servitude. —Interdict by a proprietor, to whose estate was attached an undefined servitude of pasturage over a moor, against tenants of one of the *pro indiviso* proprietors of the moor grazing cattle on it—their doing which was contrary to their leases, but consented to by their landlord—*refused*. *Scott* v. *M'Dowall*, 1857, 19 D. 769; 29 J. 358.

122. Encroachment—Title to Prevent—General Conveyance.—*Observed*, that a general conveyance of all land which might belong to a party at his death, would be a sufficient title to prevent encroachment on any property shown to have so belonged to the granter. *Mackie's Trs.* v. *Reekie*, 1832, 11 S. 157.

123. Encroachment—Acquiescence—Loss of Right to Object.—A feuar, whose northern boundary was a street, the *solum* of which belonged to the magistrates, obtained a warrant from the dean of guild for an erection within his own ground. The feuar subsequently made the erection, but projected it to the extent of two feet upon the street. No objection to the encroachment was taken by the magistrates. Upwards of thirty years after, the feuar applied for a warrant to make further alterations, the proposed operation being entirely within the boundary of the feu. *Held* that as the acquiescence in the encroachment had not been qualified by any conditions, the magistrates were not entitled to object to the alteration proposed, no damage being alleged. *D. of Buccleuch* v. *Mags. of Edinburgh*, 1865, 3 M. 528; 37 J. 266.

124. Excambion—Agreement to Excamb —Interdict.—A party having agreed to excamb part of a field for an equal piece of ground belonging to a company who wished to build stables on the field, but which it was stipulated should be erected at a particular spot, and the company proceeded to build at a different part of the field before the excambion was complete, the court *passed* a bill of suspension and interdict. *Innes* v. *Union Canal Co.*, 1824, 2 S. 687.

125. Excambion — Proof — Verbal Contract — Possession. — A verbal contract of excambion may be explained by the subsequent possession of the parties; and circumstances in which two portions of private roads, after having been built upon for years without challenge, were *held* to fall within the contract. *Lord Melville* v. *Wilson*, 1829, 7 S. 889; and 1830, 8 S. 841.

126. Excambion—Proof—Right of Lease — Singular Successor. — Circumstances in which *held* that sufficient real evidence existed of a contract of excambion between a landlord and tenant, relative to a very inconsiderable portion of certain subjects which were held under a lease for ninety-nine years, so that the tenant enjoyed a right of lease in the portion acquired by the excambion, which was good against the purchaser of the landlord's estate. *Kennedy* v. *Carlyle*, 1836, 15 S. 102.

127. Foreshore—Barony Title—Right of Property—Nature of Right.—In an action of declarator to establish the right of the Crown to a portion of the foreshore *ex adverso* of the defender's lands, *held*, in respect of the defender's title of barony, and possession of the foreshore for the period of prescription, that the foreshore belonged to the defender, and that the acts of possession must be referred to the right of property, and not to a right of servitude. *Question*: What is the nature of the right of the owner to the seashore? *Lord Advocate* v. *M'Lean*, 1866, 38 J. 584.

128. Foreshore — Crown Charter — Implied Grant.—Long continued possession *held* to imply a right to foreshore as a pertinent of an estate held under a crown charter not expressly giving the vassal any right below high-water mark. *Agnew* v. *Lord Advocate*, 1873, 11 M. 309; 45 J. 214.

129. Foreshore—Enclosure without Title—Right to Interdict against Public.—A proprietor enclosing land on the shore of a tidal river *ex adverso* of his property, having neither title to nor exclusive possession of the foreshore, *held* not entitled to interdict interference by a member of the public asserting public rights. *Hagart* v. *Fyfe*, 1870, 9 M. 127; 43 J. 97.

130. Foreshore — Erections — Interests Infringed. — In an action for removal of erections on the foreshore, *held* that the pursuers must state specifically the interests said to be infringed. *Lord Advocate* v. *Raynes & Co.*, 1859, 21 D. 717.

131. Seabeach — Meaning — Encroachment—Title to Sue.—*Held* (1) that the term "seabeach" in a title is of the same meaning as "seashore"; (2) that a private party had no title to complain of encroachments on the seashore, and that it being *inter regalia*, the Crown alone could do so. *Sir D. Cameron* v. *Ainslie*, 1848, 10 D. 446; 20 J. 139.

132. Seashore—Encroachment—Title to Sue.—*Held* that private parties had a right to complain of encroachments on the seashore, when their complaint was maintained merely as accessory to their claim to a right of way. *Cuthbertson* v. *Young*, 1854, 17 D. (H. L.) 2; 1 Macq. 455; 26 J. 310.

133. Seashore—Right of Property—Accessory Right.—Circumstances in which *held* that a neighbouring proprietor had established a right of property in subjects adjoining the seashore (over which a servitude *spatiandi* had been proved to exist in favour of the magistrates of the burgh), and of property on the beach as an accessory to them, while the magistrates were entitled to a corresponding servitude over the beach as an accessory to their servitude. *Mags. of Dundee* v. *Hunter*, 1858, 20 D. 1067; 30 J. 646.

134. Seashore—Use of Piers—Free Ports or Private Property.—A proprietor of land on the seashore erected piers, partly below high-water mark and partly on his own ground, and not abutting on any public road. Their erection was sanctioned by the Admiralty. Steamboats plied daily, except on Sundays (on which days the piers had been closed), and landed passengers, for payment of dues, according to rates fixed by the proprietor. *Held* that the piers were not to be regarded as free ports, but were the property of the proprietor; that he was entitled to interdict *uti possidetis* against steamboat proprietors plying to or landing passengers on them on Sunday. *Colquhoun* v. *Paton*, 1859, 21 D. 996; 31 J. 550.

135. Seashore—Reclaimed Ground—Enclosure without Title—Right to Interdict.—Proprietors, in a burgh, of ground adjoining the seashore, whose titles gave them no right thereto but that of access, and who had assisted in reclaiming from the sea *ex adverso* of their properties a piece of ground which had remained unenclosed for more than seven years, *held* to have a sufficient title to object to any part of the said piece of ground being enclosed by another proprietor whose property and titles were in a similar position to theirs, although he was proceeding with the sanction of the magistrates, who themselves had no title to the seashore. *Irvine* v. *Robertson*, 1873, 11 M. 298; 45 J. 209.

136. Freehold Qualification — Lands of Old Extent—Mode of Proof—Extract of Unauthenticated Service.—The entry of a service in the fragment of a book which had lain in the Register House from a period beyond the memory of man, and which purported to be minutes of the proceedings of a sheriff court, having been recorded in Chancery, without any previous proceedings to have the authenticity of the document determined by the court,—an extract thereof *held* not sufficient evidence of old extent to warrant enrolment as a freeholder; and a party enrolled thereupon *ordered* to be struck off the roll, without allowing him to establish the authenticity. *Campbell* v. *Murray*, 1831, 9 S. 861; 6 Fac. 585.

137. Freehold Qualification—Error in Sasine and Crown Charter — Effect of Resignation and Subsequent Infeftment.—A party holding a disposition was infeft, but in the record of the sasine a mistake was made as to his name. He obtained a Crown charter, on which he claimed to be enrolled as a freeholder, but he was rejected in respect of the error in the record. He then resigned on the

procuratory in the disposition, and obtained a charter of resignation, and assigned the open precept to another, who was infeft. *Held* (1) that, notwithstanding the previous infeftment, it was competent to expede the charter of resignation, and take infeftment; and (2) that the freeholders were not entitled to inquire into the validity or invalidity of the former infeftment. *Kibble* v. *Stewart*, 16 June 1814, F. C.

138. Joint Ownership—Creditor of Individual—Poinding.—It is incompetent for a creditor of an individual to poind property alleged to belong to him jointly with another. *Fleming* v. *Twaddle*, 1828, 7 S. 92.

139. Joint Ownership—Distinct from Joint Right of Use.—Averments which *held* irrelevant, as not distinguishing between a joint right of property and a joint right of use. *Young* v. *Tennant & Co.*, 1860, 22 D. 1415; 32 J. 705.

140. Joint Ownership—Division and Sale—Estate Incapable of Division.—Under a summons of declarator by three heirs-portioners against a fourth to have it found that an heritable subject was incapable of division, and concluding for a sale and division of the price, the court, although there was no opposition, *directed* a proof to be taken, and thereafter *declared* in terms of the summons. *Bryden* v. *Craig*, 1837, 15 S. 486.

141. Joint Ownership—Management of Estate by one Owner—Commission.—One of two joint proprietors of an estate purchased on speculation, not allowed to charge a commission for his trouble in management. *Hunter* v. *Cochrane's Trs.*, 1831, 9 S. 477.

142. Joint Ownership—Reference to Oath—Oath of one Owner.—In an action for reduction of a missive of sale brought by two *pro indiviso* proprietors (the sellers), the purchaser proposed to refer a point to the oath of one of the pursuers. The reference was *refused* on the ground that the alleged sale was a sale of the entire property, and the interest of one pursuer could not be affected by the oath of the other. *Dickson, etc.* v. *Blair*, 1871, 10 M. 41; 44 J. 40.

143. Joint Ownership—Share in Gardens—Liability for Assessment—Transfer of Share.—A party who signed an acceptance of a transfer of a share in public gardens, and an obligation to abide by the regulations, attended meetings, and enjoyed the privileges of a shareholder during his life. *Held* liable to the other shareholders for his proportion of annual assessment, although the transfer of his share had not been signed by himself in the transfer-book of the co-proprietors in terms of their regulations; and that his representative, who had also used the privilege of a shareholder, was liable for the assessments imposed after his death, although he did not make up a title to the share in the transfer-book in terms of the regulations. *Bell* v. *Lady Ashburton*, 1835, 13 S. 920; 10 Fac. 683.

144. Joint Ownership—Title to Sue—Co-Proprietors Abroad.—In defence to an action by a *pro indiviso* proprietor, relating to the property, it was pleaded that the action had been raised without the concurrence of the co-proprietors. These last were abroad, and had not been heard of for several years, but were called as defenders. Defence *repelled*. *Johnston* v. *Crawfurd*, 1855, 17 D. 1023; 27 J. 250.

145. Joint Ownership—Title to Sue—Declarator of Marches.—One *pro indiviso* proprietor has no title to sue a declarator of marches against the proprietor of adjoining lands. *Miller* v. *Cathcart*, 1861, 23 D. 743; 33 J. 380.

146. Joint Ownership—Title to Sue—Waiver of Objection.—In an action at the instance of the proprietors of one-half of a property held *pro indiviso*, after a proof had been allowed and taken, the defenders objected that the pursuers had no title to sue, in respect the other *pro indiviso* proprietors did not concur in the action. *Held* (1) that the defenders, by going to proof, had waived the objection; and (2) that it was also incompetent for them to plead the objection, in respect they had stated no plea against the pursuer's title, and that they could not raise it as an answer to a plea of the pursuer's, that, being proprietor *pro indiviso* of one-half of the subjects mentioned in the summons, he was entitled to decree as concluded for. *Lade, etc.* v. *Largs Baking Co.*, 1863, 2 M. 17; 36 J. 16.

147. Joint Ownership—Title to Sue—Declarator of Property.—Where one of several *pro indiviso* proprietors raised an action with conclusions (1) for declarator of exclusive right of property; (2) for declarator of exclusive possession for forty or at least for several years; and (3) for removal of alleged illegal obstruction, *held* that as the action was only insisted in to the effect of preventing encroachment on ground in the possession of the *pro indiviso* proprietors, the pursuer had a good title to sue. *Laird* v. *Reid*, 1871, 9 M. 699; 43 J. 336.

148. Joint Ownership—Title to Sue—Action of Removing.—*Held* that two of three joint-proprietors had no title to sue a removing from the subjects held in joint property without the authority, express or implied, of the third. *Grozier* v. *Downie*, 1871, 9 M. 826; 43 J. 456.

149. March Fence—Application of Act, 1699, c. 17.—The Act, 1699, c. 17, as to planting and enclosing, applies only where the advantage from the dyke is equal to the expense of building and keeping it up. *E. of Cassillis* v. *Paterson*, 28 Feb. 1809, F. C.

150. March Fence—Act, 1669, c. 17—Natural Boundary—Disproportionate Expense — Visitation by Sheriff. — The Act, 1669, c. 17, does not apply (1) where there is in existence a natural boundary of steep cliffs, involving little danger of trespass; nor (2) where the expense of erecting a fence would

be disproportionate to the value of the pieces of ground to be benefited. The procedure laid down in Act, 1669, c. 17, whereby the sheriff may be required to visit the marches, is imperative, and cannot be supplied by a remit to a man of skill even of consent. *Lord Advocate* v. *Sinclair*, 1872, 11 M. 137 ; 45 J. 86.

151. March Fence—Erection—Act, 1661, c. 41—Application of Act where March a Burn—Jurisdiction.—In an action at the instance of a proprietor of lands, concluding to have a conterminous proprietor ordained to concur in erecting a march fence, in terms of the Act, 1661, c. 41—*held* (1) that the court were not entitled in that action to ordain a straightening of the marches ; (2) that the Act applied where the march was a burn, and that a fence constructed along the margin of the burn on the pursuer's lands, with suitable watering-places, would be a fence in the sense of the statute, so as to subject the neighbouring proprietor in one-half of the expense of construction, the latter having refused the option of calling on the pursuer to erect the fence partly on the one side of the burn and partly on the other, with cross-gates over it ; and (3) that the Court of Session has jurisdiction in an action laid on the Act, 1661, c. 41. *Pollock* v. *Ewing*, 1869, 7 M. 815 ; 41 J. 433.

152. March Line—Common Property—Right to Set up Stones.—The march line between two neighbouring estates is the common property of the proprietors of the estates, and one proprietor cannot set up march-stones on that line, unless either with consent of the conterminous proprietor, or under judicial sanction. *Stewart* v. *Sangster*, 1849, 11 D. 1176 ; 21 J. 463.

153. March—Determination of March—Evidence—Natural March.—In a declarator for having the march between two properties determined, *held* that, in the circumstances, regard was to be had to the real evidence arising from natural marches in hill grounds. *Whitson* v. *Ramsay*, 1813, 5 Pat. 664.

154. March—Determination of March—Presumption for Straight Line.—The two extremities of a march being ascertained, but there being no evidence as to the intermediate points, and the distance being short, circumstances in which it was *presumed* that a straight line between the two points was the proper march. *Ewing* v. *Lennox*, 1828, 6 S. 417.

155. March—Determination of March—Foreshore—Line Perpendicular to Average Coast-Line.—In an action between the proprietors of adjoining properties on the shore of an open bay as to the mutual boundary on the foreshore, *held* that the legal boundary was a perpendicular line let fall seaward from the end of the land march upon a straight line drawn in a direction parallel to the coast, representing the average line of coast between two points fixed by the court, as affording, in the circumstances, a reasonable basis for the average. *M'Taggart* v. *M'Douall*, 1867, 5 M. 534 ; 39 J. 274.

156. March—Determination of March—Evidence—Natural Features of Ground.—In questions of disputed hill-marches, where the titles throw no light on the matter, and where the proof of possession on both sides is doubtful, weight will be given to the presumptive real evidence furnished by the natural features of the ground. *Lumsden* v. *Gordon*, 1870, 42 J. 530.

157. March—Determination of March—Foreshore — Perpendicular to Average Centre Line of Tidal River.—In a question between two conterminous proprietors as to the division of foreshore on the river Clyde, *held* that the boundary line must be settled on the principle of ascertaining the average line of the centre of the river at a low water, opposite the properties, and dropping a perpendicular from that average line on the land boundary between the properties at high-water mark as that existed before any part of the shore-ground was gained from the sea by either party. *Laird* v. *Reid*, *et e contra*, 1871, 9 M. 699 ; 43 J. 336.

158. March—Determination of March—"Middle Line" of Tidal River. — In a question between two conterminous proprietors as to the boundary between their properties in so far as it consisted of shore-ground, the court remitted to a man of skill to lay down on a map "a straight line representing the average direction of the middle line of the river Clyde at low-water" between certain points. *Held* that under this interlocutor the middle line to be taken was the middle line of the whole estuary of fresh and salt water, and not the middle line of the running stream of fresh water only. *Laird* v. *Reid*, *et e contra*, 1871, 9 M. 1009.

159. March Fence or Private Property—Hedge and Ditch—Onus of Proof.—The proprietor of certain lands divided them into two farms, A and B, by a hedge and ditch. He afterwards sold the farm of A, which was described in the conveyance as bounded on the north by the farm of B. Some years after, the then proprietor of A raised an action against the proprietor of B, concluding for declarator that the hedge and ditch were neutral property, and that they together constituted the march fence. The defender maintained that the hedge alone was the march, and claimed exclusive right to the ditch, which adjoined his property. *Held* that the hedge and ditch not having been originally formed as a march fence the onus lay upon the pursuer of showing that they had subsequently been adopted as such by the adjoining proprietors, and upon the evidence that the pursuer had failed to establish this. *Strang* v. *Steuart*, 1866, 4 M. (H. L.) 5 ; 38 J. 223.

160. March Fence—Maintenance—Fence on one Proprietor's Ground.—One of two adjoining proprietors *held* not obliged to "cock" a hedge and fill up a ditch, they being on his own property, and forming the fence between the two properties. *Girvan* v. *Smith*, 1829, 8 S. 173 ; 5 Fac. 162.

161. March Fence—Obligation to Fence—Mill-Lade—Glasgow Police Act, 1866 (29 and 30 Vict. c. 283).—*Held*, in an application requiring the owner of a mill-lade to fence it, that it was irrelevant to allege as a defence that the mill-lade ran alongside a public road, the trustees vested with which were bound and had been in use to fence it. *Lang* v. *Bruce*, 1873, 11 M. 377.

162. March Fence—Straightening of March—Right of Servitude.—Circumstances in which *held* that the march between two properties having been straightened and settled by agreement of parties, neither had a right of servitude of any kind over the lands of the other. *Rutherfurd* v. *Stormonth*, 1803, 4 Pat. 515.

163. Neighbourhood — Building — Connecting Roofs.—*Question*, whether an adjoining rural proprietor is entitled, without the consent of his neighbour or the authority of the sheriff, to build a house and to connect the roof with that of his neighbour. *Stewart* v. *Robertson*, 1823, 2 S. 503.

164. Neighbourhood — Embankment on Stream—Acquiescence.—A proprietor whose embankments on a stream were challenged by the owners of mills, averred that their authors saw the operations carried on without objection, but did not allege that they remained silent after they found that the injury was thereby done to them. An issue of acquiescence *refused*. *Johnston* v. *Scott*, 1834, 12 S. 492.

165. Neighbourhood — Embankment on Tidal River — Injury to Opposite Proprietor.—In an action by a proprietor on a tidal stream, not navigable, against an opposite proprietor, for the removal of an embankment formed to protect his lands from the tide, which embankment the pursuer alleged was causing damage to his lands; *held* that the pursuer must prove not only that he has suffered substantial damage, but that the damage has been wrongfully caused by the defender. *Lindsay* v. *Thomson*, 1866, 5 M. 29; 39 J. 22.

166. Neighbourhood — Encroachment — Injury to Adjoining Buildings—Liability for Expense.—*Held* (1) that a proprietor is not entitled so to build that his wall shall overhang his neighbour's ground; and (2) that if buildings are, without judicial authority, erected in juxtaposition to existing buildings, so as to injure them, through want of skill or prudence on the part of the proprietor, he is liable in damages. *Question*, if judicial authority is applied for, whether the applicant will be liable in the whole expense necessary for the security of ill-constructed existing buildings. *M'Intosh* v. *Scott & Co.*, 1859, 21 D. 363; 31 J. 200.

167. Neighbourhood—Erection of Quay — Injury to Salmon-Fishings. — Circumstances in which, the Court of Session having held that certain parties were not entitled to erect a new quay or pier on their own lands, as it would be injurious to the salmon-fishings of a neighbour, the cause was *remitted* for reconsideration. *Berrys* v. *Stewart*, 1815, 6 Pat. 102.

168. Neighbourhood—Erections on Property.—Buildings erected by a party on his own property *found* to be *in emulationem vicini*, and ordered to be removed to another part of it. *Ross* v. *Baird*, 1829, 7 S. 361.

169. Neighbourhood — Erection — Intercepting Light or Air.—A party who had been allowed by an adjoining proprietor to erect a shed, the roof of which was let into and supported by the wall of a dwelling-house belonging to that proprietor, *interdicted* from putting up a board on the roof of that shed to intercept the light or air of a window in the wall of the dwelling-house. *Scott* v. *Cassels*, 1835, 13 S. 776; 10 Fac. 517.

170. Neighbourhood—Injury to Adjoining Premises—Quarry—Evidence of Wrongful Working.—Circumstances in which, although premises sustained considerable injury from the descent of débris and water from the fall of a hill or brae where there was a working quarry, the court *held* that there was not sufficient evidence to establish that the injury was occasioned by any wrongful working of the quarry. *Thomson* v. *Gray*, 1842, 5 D. 377; 15 J. 156.

171. Neighbourhood — Muir-Burning — Injury to Adjoining Lands — Culpable Negligence.—*Held* that muir-burning being a lawful act, the proprietor of the lands where it took place was not liable for injury caused by the extension of the fire to adjoining lands, unless *culpa* on his part were averred and proved. *Mackintosh* v. *Mackintosh*, 1864, 2 M. 1357; 36 J. 678.

172. Neighbourhood — Operations on Property—Injury to Adjoining Premises.—A proprietor is liable in damages for injury done to adjoining property by improperly excavating the foundation of his house. *Callendar* v. *Eddington*, 1826, 4 Mur. 108.

173. Neighbourhood — Operations on Property—Injury to Adjoining Premises.—Where a house has been injured by operations on a contiguous house, the proprietor of the former is entitled to damages, although the operations have been legally executed. *Robertson* v. *Hamilton's Trs.*, 1825, 4 S. 6. *Douglas* v. *Monteith*, 1826, 4 Mur. 130.

174. Neighbourhood—Operations on Property—Danger to Adjoining Tenement.—*Held* that the feuar of a building stance in a street was not entitled to excavate, for the purpose of making a sunk area, in respect that the operation would be attended with danger to the adjoining tenement. *Murray* v. *Johnston*, 1834, 13 S. 119.

175. Neighbourhood — Overlooking — Lights.—A proprietor raised his garden wall to exclude the power of looking into the garden, and so darkened his neighbour's lights. *Held* entitled to do so. *Dunlop* v. *Robertson*, 1803, Hume 515.

176. Neighbourhood — Overlooking — Lights.—A proprietor *found* entitled to place on his own ground a wooden screen very near the windows of the house of a neighbour, so as to secure the privacy of a garden. *Glassford* v. *Astley*, 12 May 1808, F. C.; Hume 516; M. "Property" App. No. 7.

177. Neighbourhood — Proximity of Public Well—Encroachment.—A singular successor to a property in a town is not entitled to insist on the removal of a well, erected in front of it by the magistrates for the public convenience, except in so far as it encroaches on his private property, it having stood without objection for thirty-five years. *Allan* v. *Swan*, 1824, 3 S. 82; 1827, 5 S. 261; 2 Fac. 153.

178. Neighbourhood — Use of Ground above Coal-Workings—Rights and Liabilities of Coal Proprietor.—Where the property of the soil has been separated from that of coal below it, the proprietor of the coal cannot, if there be no special stipulations, control the proprietor of the soil in his use of it, either in building or otherwise; but question reserved as to what damages the coal proprietor should be liable in if injury were done to the buildings by his operations. *Dunlop's Trs.* v. *Corbet & M'Nair*, 20 June 1809, F. C.

179. Neighbourhood — Coal-Workings — Use of Surface to Convey Water Drawn from under Adjoining Lands.—A party who had a reserved right of coal in an estate, carried an existing level under the bed of a stream into adjoining lands (to the coal of which he had also right), so as to drain the coal of these lands, brought the water thereof within the estate by means of a steam engine, and there raised it and threw it on part of the surface of the estate. *Found* that he was not entitled to do so. *Turner* v. *Ballandone*, 1834, 7 W. & S. 163. Affg. 10 S. 415.

180. Neighbourhood—Singular Successor—Liability for Damage Caused by Predecessor—Coal-Workings.—A feu-disposition, conveying a coal-field to three parties, contained a condition that they and their heirs and disponees should pay, jointly and severally, all damage to the lands that might be occasioned in working the coal, and that this condition should be engrossed in all future dispositions, under pain of nullity. *Held* that singular successors were liable each for the damage occasioned by his own workings, and not for damage occasioned by the workings of former proprietors. *Baird's Trs.* v. *Mitchell*, 1851, 13 D. 982; 23 J. 445.

181. Neighbourhood—Use of Property—Dangerous Trade.—A party interdicted from using a thatched house as a smithy, in the neighbourhood of thatched houses and the sheriff-clerk's office in Lanark. *Vary* v. *Thomson, etc.*, 2 July 1805, F. C.; M. "Public Police" App. No. 4.

182. Parts and Pertinents — Bounding Title — Prescriptive Possession.—A party having a bounding charter, claimed a strip of land and a piece of moss ground as part and pertinent, without proving forty years' possession. Claim *repelled*. *Smyth* v. *Allan & Others*, 1813, 5 Pat. 669.

183. Parts and Pertinents — Bounding Title — Reclaimed Ground.—Circumstances in which a piece of ground, formerly a marsh, flooded at high tide, but reclaimed, *held* to belong to the proprietor of the adjacent ground, who held of the magistrates of a burgh, though he had a bounding charter, but with a clause of parts and pertinents. *Duff* v. *Mags. of Inverness*, 1813, 5 Pat. 762.

184. Parts and Pertinents — Bounding Title—Right to Alveus of River.—Lands acquired by a railway company under its statutory powers, and described in the conveyance as consisting of so many acres, and as delineated on a plan by certain lines, with pertinents, *found* to be held under a bounding title, and not to carry with them as a pertinent any right to the alveus or channel of an adjoining river beyond the boundary marked on the plan. *N. B. Rly. Co.* v. *Mags. of Hawick*, 1862, 1 M. 200; 35 J. 94.

185. Parts and Pertinents—Barony Title—Foreshore—Limpets and Shellfish.—The owner of lands adjacent to the sea, and erected into a barony, with a clause of part and pertinent and a general grant of fishing, has not, as such, a sufficient title to exclude the public from taking limpets and other shellfish adhering to the rocks below high-water mark on the shore of his lands, provided these rocks are accessible without trespass. *Sir John Hall* v. *Whillis*, 1852, 14 D. 324; 24 D. 124; 1 Stuart 265.

186. Parts and Pertinents—Title—Prescriptive Possession — Onus. — It is not sufficient for a proprietor founding on a conveyance of heritage, with parts and pertinents, as a prescriptive title to lands not mentioned in the conveyance, to show that he has possessed them along with the principal lands for forty years, but the onus lies upon him of showing that he has had possession of them as pertinents of the principal lands. *Lord Advocate* v. *Hunt*, 1867, 5 M. (H. L.) 1; 39 J. 248; L. R. 1 Sc. App. 85.

187. Parts and Pertinents—Ground not Mentioned in Title—Proof of Possession.—Two baronies, A and B, the titles to which contained clauses of parts and pertinents, were erected into one, C. The proprietor sold a portion of A, with parts and pertinents. Thereafter a competition arose between his heir and the heir of the purchaser as to a tract of ground belonging to A, not expressly contained in either of their titles, but claimed by both as part and pertinent of their respective lands,—by the heir of the purchaser in exclusive property, and by the heir of the seller in common property. *Held* that the heir of the seller had a title on which to prove prescriptive possession of commonty, or of servitudes in the ground; and that as both parties claimed under clauses of part and pertinent, the extent

of their respective rights fell to be determined by proof of the state of possession. *Sir J. Carnegie* v. *MacTier*, 1844, 6 D. 1381 ; 16 J. 435, 453, 585.

188. Parts and Pertinents—Loch—Exclusive Possession—Title.—Exclusive right to a loch only partly surrounded by the lands of B claimed in virtue of title to the "lands of B with the pertinents," and of exclusive possession of the loch following thereon. Terms of titles under which the loch *held* not to have been made a pertinent of the lands. *Scott* v. *Lord Napier*, 1869, 7 M. (H. L.) 35 ; 41 J. 475.

189. Parts and Pertinents—Possession—Eel-Cruives.—A right to eel-cruives in a river may be acquired by possession under an infeftment in lands adjacent to the river, with part and pertinent. *Braid* v. *Douglas*, 24 Jan. 1800, F. C. ; M. "Property" App. No. 2.

190. Parts and Pertinents—Immemorial Possession against Express Title.—A proprietor having from time immemorial possessed certain ground as part and pertinent of his estate, which possession was fortified by a possessory judgment and the evidence of a plan by the Crown surveyor, when the estate was vested in the Crown, *held* entitled to the exclusive right and possession in preference to another party whose titles bore expressly to convey the property of said grounds. *Mackenzie, etc.* v. *Mackenzie, etc.*, 1818, 6 Pat. 376.

191. Parts and Pertinents—Privilege of Hunting—Effect of tenendas Clause.—*Held* that although a proprietor alleged immemorial possession of the privilege of hunting in a neighbouring forest, yet such a right was not validly conveyed by insertion in the *tenendas* clause of his charter, nor was it capable of being acquired as part and pertinent. *E. of Aboyne* v. *Farquharson*, 22 April 1818, F. C. ; 6 Pat. 380. Affg. 16 Nov. 1814, F. C.

192. Parts and Pertinents — Right to Sand, Wreck, or Seaware—Title—Possession.—*Held* that the proprietor of an estate on the seacoast, bounded by the sea, who was infeft "with parts, pendicles, and pertinents," but whose titles did not set forth that the sea was the boundary, nor conveyed expressly the shore, and who averred uninterrupted possession for time immemorial, had a good title to insist in a declarator of his exclusive right to the shell-sand, wreck, or seaware on the shores of his lands, and for interdict prohibiting certain parties from carrying away any part thereof. *Macalister* v. *Campbell*, 1837, 15 S. 490 ; 12 Fac. 456.

193. Parts and Pertinents — Right to Gather Sea-Wreck and Ware—Title—Implied Grant.—The occupant of lands lying near but not adjacent to the seashore, brought a declarator of his right to gather sea-wreck and ware on the shore, *ex adverso* of the lands of a proprietor who possessed under Crown titles, with a clause of parts and pertinents. Although there was not a sea boundary expressed in the titles, his lands were in fact bounded by the sea. The pursuer averred no prescriptive use of the right claimed. *Held* that although the titles of the defender did not contain any express grant of the seashore, or of wreck and ware, he had a sufficient title to resist the conclusions of the action. *Paterson* v. *M. of Ailsa*, 1846, 8 D. 752 ; 18 J. 370.

194. Parts and Pertinents — Right to Gather Seaweed and Ware—Title—Prescriptive Right.—A proprietor of a barony, bounded by the sea, although the seashore was not specified as the boundary in the Crown charter, *held* to have exclusive right to the seaweed and ware cast on the shore *ex adverso* of his lands ; and an averment that the public had been in use to take the seaware and sand for upwards of forty years, *held* not relevant. *Lord Saltoun* v. *Park*, 1857, 20 D. 89 ; 30 J. 54.

195. Parts and Pertinents — Right to Gather Wrack and Ware — Title — Prescriptive Possession.—A barony extending along the shore, was held with "wrack and ware." An inland portion was sold, as possessed by A, a tenant, with parts and pertinents. A was entitled by his lease to take cast ware. This privilege having been exercised for twenty-five years by the purchaser, it was *held* that the purchaser, having no express grant of cast ware, and no prescriptive title, was not entitled to take it from the shores of the barony by virtue of his clause of parts and pertinents. *Baird* v. *Fortune*, 1861, 23 D. (H. L.) 5 ; 4 Macq. 127 ; 33 J. 437.

196. Parts and Pertinents—Right to Wreck — Title — Possession — "Wrak and Waith."—An island was conveyed "*cum pertinentiis*," by a Crown charter of *novodamus*, whereby it was erected into a barony. The tenendas clause enumerated, *inter alia*, "wrak, waith, ware," but these words were not included in the dispositive clause, although they were introduced in the dispositive clause of various subsequent Crown charters by progress. *Held* that the defender's titles, followed by possession for the prescriptive period, were sufficient to establish a right to wreck. *Observed*, that in the grant of an island or coast estate, the word "wrak" when standing in connection with "waith" (*i.e.* derelict), signifies "wreck," and not seaware. *Lord Advocate* v. *Hebden*, 1868, 6 M. 489 ; 40 J. 254.

197. Parts and Pertinents—Road—Form of Title.—Forms of title deeds, by which property was conveyed with parts and pertinents, under which it was *held* that a road was not included. *Mitchell* v. *Wauchope*, 1842, 4 D. 1489.

198. Parts and Pertinents—Seashore—Sandbank.—A sandbank thrown up by the sea, and covered in ordinary tides by the sea, situated within a hundred yards of the lands of a proprietor, *held* to be pertinent of the lands. *Innes* v. *Downie*, 1807, Hume 552.

199. Parts and Pertinents—Servitude or Right of Property — Prescriptive Possession.—The rights in a muir of two proprietors of lands adjoining thereto having been determined, by an old decree, to be of property in

the one and servitude in the other, *held* that no possession by the latter (whose titles bore "parts and pertinents"), consistent merely with a right of servitude, could confer on him by prescription a right of property in the muir. *E. of Fife's Trs.* v. *Cumming*, 1831, 9 S. 336.

200. Parts and Pertinents — Separate Title—Prescriptive Possession.—*Held*, in a question as to whether lands were included in an entail, that although extending to more than 800 acres, and formerly held under a separate title, they were merged in a larger estate by possession, as part and pertinent, during the years of prescription. *Sir J. Dalrymple* v. *E. of Stair*, 1841, 3 D. 837; 16 Fac. 885.

201. Parts and Pertinents — Separate Title—Possession.—Circumstances in which *held* that lands acquired by a separate disposition (the procuratory or precept in which was never executed for more than a century) were not possessed as part and pertinent of other lands of greater extent, so as to be held included in an entail under the title and denomination of these other lands. *King* v. *E. of Stair*, 1846, 5 Bell 82; 18 J. 402. Affg. 6 D. 821; 16 J. 378.

202. Parts and Pertinents—Udal Tenure —Immemorial Possession.—*Held* that a party was entitled to tangle, seaware, kelp, and pasturage as immemorially possessed by him, though his property was at a distance from the shore, and though he could produce no written title, the tenure being udal. *Richan* v. *Stove, etc.*, 1816, 6 Pat. 146.

203. Public Burden — Constitution. — To constitute a public burden, there must either be a statute, or an uninterrupted uniform practice for a sufficient time, to justify it. *Scott* v. *Wilson*, 1829, 5 Mur. 57.

204. Public Burdens—Clause of Relief—Statute Labour.—A clause, by which a disponer bound himself to relieve a purchaser "from payment of all burdens which do or can affect the lands and teinds," excepting schoolmaster's salary and cess, *found* not to include statute labour, nor, consequently, the conversions introduced by a subsequent Act of Parliament. *Johnston* v. *Home*, 13 June 1800, F. C.; M. "Public Burden" App. No. 1.

205. Public Burdens—Relief—Teinds—Undisclosed Augmentation.—Circumstances in which it was *held* that a proprietor who had sold part of his lands, specifying the proportion of teind to be paid out of them, but not adverting to the circumstance that an augmentation had been granted a few months before, which had not been localled nor paid, was not bound to relieve the purchaser of the surplus burden. *Baird's Trs.* v. *Lord Lynedoch*, 1830, 8 S. 622.

206. Public Burdens—Relief—Liability of Singular Successor where Obligation only in Original Charter.—A feu-charter, dated in 1718, bound the superior to relieve the vassal of all public burdens. The representatives of the vassal were successively entered on precepts of *clare constat*, which made no mention of the obligation of relief. In 1858 the superior, who was a singular successor of the granter of the original feu-charter, declined to insert the obligation of relief in a renewal of the investiture. *Held* that the superior, although a singular successor, and not warned by the records of the existence of such a burden, was bound to insert in the renewal the same obligation of relief as existed in the original charter. *Hope* v. *Hope*, 1864, 2 M. 670; 36 J. 334.

207. Real Burden — Annuity—Title to Sue.—A party having wadsetted his lands, created annuities in favour of five daughters, real burdens on the reversion. On the death of each, the annuity payable to her was to be paid to her children. Two out of seven children of one of the daughters who had died, brought against the holder of the wadset, who was in possession, a declarator of redemption. *Held* (1) that being direct disponees, their right became complete by the fact of their surviving their mother, and required neither service nor confirmation; (2) that the right to the annuities was not *pro indiviso*, requiring the concurrence of all the children to enforce it; (3) that the annuities being real burdens on the reversion, they were entitled to bring the action without going against the heir in right of the reversion. *Wright* v. *Turner*, 1865, 17 D. 629; 27 J. 262.

208. Real Burden — Assignation — Discharge.—A disponee was infeft in lands under burden of £100, payable to a third party, who assigned it to another, and the assignation was intimated to the disponee, and recorded in the Register of Sasines. *Held* that the real burden was validly transferred by the intimated and recorded assignation, and was preferable to a discharge subsequently granted by the creditor to a purchaser of the lands. *Miller* v. *Brown*, 1820, Hume 540.

209. Real Burden—Assignee Preferred to Arresting Creditor.—*Held* that an assignee to a debt being part of and made a real burden on heritage was preferable to an arresting creditor, although a personal bond had been granted for the debt. *Rowand* v. *Fleming*, 1825, 3 S. 469.

210. Real Burden—Constitution—Right of Pre-Emption.—A party who obtained a disposition to lands, granted a back bond, giving the superior a right of pre-emption. No infeftment was taken on the disposition, and the clause in the bond never entered into the investitures. *Question*, whether the right of pre-emption was not a real burden on the lands, and effectual against creditors. *Preston* v. *E. of Dundonald's Crs.*, 1802, 4 Pat. 331.

211. Real Burden — Constitution — Conditional Obligation.—A disposition and deed of settlement imposed an obligation on the disponee to pay a certain provision, in the event of his selling the lands. *Held* that this did not constitute a real burden. *Forbes's Trs.*

v. *Gordon's Assignees*, 1833, 12 S. 219; 9 Fac. 137.

212. Real Burden — Constitution — Mineral Workings — Obligation to Pay Damages.—In a feu-disposition an obligation on the disponees and their heirs or disponees to pay damages occasioned by the working of coal, appointed to be engrossed in the infeftment, and in future transmissions and investitures, under pain of nullity, *held* not to be a real burden. *Baird's Trs.* v. *Mitchell*, 1846, 8 D. 464; 18 J. 207.

213. Real Burden — Constitution — Obligation ad factum præstandum—Singular Successor.—If an obligation *ad factum præstandum* be made the condition of a feudal grant, and enter the investiture of the disponee, it may be enforced against a singular successor, though neither declared a real burden, nor protected by an irritancy. *Tailors of Aberdeen* v. *Coutts*, 1837, 2 S. & M'L. 609; 1840, 1 Robin. 296. Affg. 1834, 13 S. 226.

214. Real Burden — Constitution—Payment to Third Party.—A party disponed his estate "under the reservations, provisions, and conditions underwritten," and bound himself to infeft the disponee, A, "under the burdens, provisions, and conditions after expressed"; and one of these was thus expressed: "Providing always, as it is hereby expressly provided and declared, that the said A and his foresaid, by their acceptation hereof, shall be bound and obliged to make payment" of £800 to a third party; and it entered the sasine. *Held* that it did not constitute a real burden on the lands. *Martin* v. *Paterson*, 22 June 1808, F. C.; M. "Personal and Real" App. No. 5.

215. Real Burden — Constitution—Payment of Debts.—An estate being conveyed by *inter vivos* deed to a person in liferent and others in fee under burden of payment of the grantor's debts, *found*, in a competition between the grantee of the liferent escheat of the liferenter and debtors of the grantor, that the debts were not real burdens on the estate. *Lord Lovat* v. *Dowager Lady Lovat*, 1721, Robert. 355.

216. Real Burden — Constitution—Past and Future Debts—Rights of Purchaser as against Creditor.—A disposition by a father to his son bore that it was under burden of all debts contracted or to be contracted by the father. In a question between a *bona fide* purchaser from the son and the holder of bonds from the father (which were not recorded till after the recording of the disposition to the purchaser), *held* that the debts were not real burdens and the purchaser preferred. *Duff* v. *Gordon*, 1721, Robert. 372.

217. Real Burden—Constitution—List of Debts.—A trust deed was granted, conveying an estate for *inter alia* payment of debts, but without declaring these purposes real burdens upon the estate. A list of creditors and their debts was at same time subscribed as relative to the trust deed, and ordered to be inserted in the Register of Sasines, which was done accordingly. The estate having been afterwards brought to a judicial sale, *held* that these debts were not created real burdens. *Chalmers* v. *M'Kenzie's Crs.*, 1795, 3 Pat. 417.

218. Real Burden—Constitution—List of Debts.—A disposition of lands was granted, under declaration of a real burden consisting of the seller's debts and referring to a list appended to and subsequently recorded with the disposition in the Books of Council. Seisin was taken and recorded, subject to the above burden, but without engrossing the list. *Held*, in a question with a purchaser, that the debts were not made real on the lands. *M'Donald* v. *Place*, 1821, Hume 544.

219. Real Burden—Constitution — Temporary Restrictions.—Temporary restrictions as to building in a contract of sale of heritage *held* not to import a real burden, but only a personal obligation on the part of the purchaser and his heirs. *Corbett* v. *Robertson*, 1872, 10 M. 329; 44 J. 195.

220. Real Burden—Constitution—Burden not Mentioned in Title.—A party, "with and under the burdens, conditions, and reservations after expressed," disponed lands to another, and specified a certain sum as a burden. The obligation to infeft was expressed in similar terms, and it was declared in the precept of sasine that all the burdens should be engrossed in the infeftments, and sasine was taken in these terms. *Held*, in a question with a singular successor (in whose title the burden was not mentioned), that it did not form a real burden on the lands. *M'Intyre* v. *Masterton*, 3 Feb. 1824, F. C.; 2 S. 664.

221. Real Burden — Constitution — Precentor's Salary. — The proprietor of an estate had paid the precentor's salary for upwards of a hundred years. The lands were subsequently sold by judicial sale. *Held* that the purchaser was not bound to continue the payment. *Traill* v. *Dangerfield*, 1870, 8 M. 579; 42 J. 280.

222. Real Burden — Constitution — Resignation ad remanentiam.—It is competent to constitute a real burden on lands by a resignation *ad remanentiam*, effectual against a singular successor. *Wilson* v. *Fraser*, 1824, 2 Shaw's App. 162. Affg. 13 Feb. 1822, F. C.; 1 S. 316.

223. Real Burden—Constitution—Warrandice against Augmentation. — Warrandice against ministers' augmentations *found* to have been created a real burden on the lands. *Johnston* v. *Ramsay*, 1824, 3 S. 33.

224. Real Burden — Constitution — Provisions to Children.—By bond of provision a father provided certain sums to his three daughters, and by subsequent deed the then proprietor of the estates empowered persons named to recover these provisions after his death by appointing a factor on part of the estates and applying the rents thereby in pay-

ment. *Held* that the provisions were real burdens on the estate although not claimed till several years after the grantor's death. *Lord Lovat* v. *Dowager Lady Lovat*, 1721, Robert. 355.

225. Real Burden — Constitution—Provisions to Widow and Children—Reference to Bond of Provision.—A disposition to a son, "providing" that he should be bound to pay an annuity to his mother, and certain provisions to the younger children, in terms of bond of provision granted of even date with the disposition, but which were not enumerated in the deed or in the precept of sasine, *held* not to have made the provisions to the wife and children real burdens on the estate conveyed. *Cameron* v. *Cameron's Crs.*, 1781, 2 Pat. 572. Affg. M. 10265.

226. Real Burden—Constitution — Provisions to Widow and Children — Annuity.—Terms of a disposition, under which provisions were *held* to be made real burdens in favour of a widow and children. *Question*, how far an annuity, payable partly out of the annual proceeds of the estate and partly out of the profits of a trade enjoined to be carried on after the disponer's death, was a real burden on the estate. *Wyllie* v. *Allan*, 1830, 8 S. 337.

227. Real Burden — Constitution—Provisions to Children and Issue—Annuity.—A party, by testamentary disposition, provided an annuity to each of his five daughters, to be continued, upon their deaths respectively, in favour of their children (then unborn); and in like manner, upon the death of the children, to be continued in favour of grandchildren; declaring these provisions to be a real burden upon the lands disponed, and providing that they should enter the records; and infeftment having been taken accordingly, *held* that a real burden was effectually created in favour of the whole three generations of annuitants. *Erskine* v. *Wright*, 1846, 8 D. 863; 15 J. 548.

228. Real Burden—Discharge.—A general service is a sufficient title to the heir of the creditor to discharge a real burden over an estate. *Cuthbertson* v. *Bar*, 7 March 1806, F. C.; M. "Service" App. No. 2.

229. Real Burden—Discharge by Assignee—Personal Bond.—The seller of an estate reserved part of the price in the disposition as a real burden, and at the same time got a personal bond for the amount. *Held* that an assignee to the bond was entitled to discharge the burden, although it was not mentioned in the assignation. *Baillie* v. *Laidlaw*, 1821, 1 S. 108.

230. Real Burden—Discharge—Multiplepoinding.—Lands cannot be declared to be disencumbered of a real burden in a process of multiplepoinding as to the price, brought by a purchaser, except on full payment or a discharge. *Little* v. *Wightman*, 1829, 7 S. 224; 4 Fac. 281.

231. Real Burden—Obligation to Implement Author's Contracts — Liability of Successors.—A party whose predecessor had accepted a conveyance under burden of implementing all contracts of his author, in reference to certain lands, *held* liable to be pursued by the person in right of the obligation in one of these contracts. *Horne* v. *M. of Breadalbane's Trs.*, 1835, 13 S. 296; 10 Fac. 163. Rev. on an objection to the title, 1842, 1 Bell 1.

232. Real Condition — Disponee Taken Bound to Grant Personal Obligation—Liability of Singular Successors.—A disposition bound the disponees and their heirs and singular successors to grant, within six months, personal obligations for performance of all the conditions of the titles. A singular successor acquired the subjects under the conditions of that disposition, and after holding them for some years again sold them. Before he was divested of the subjects he was called on by the superiors to grant the personal obligation provided for in the titles. *Held* (1) that the condition of perpetual personal liability was not a real condition of the right attaching to singular successors by the very fact of becoming proprietors of the subjects; (2) that the defender had not by the special terms of the disposition undertaken the liability sought to be imposed on him. *Leslie, etc.* (*Mags. of Aberdeen*) v. *Wyllie*, 1870, 43 J. 95.

233. Real Condition—Obligation not to Build—Conditional Extinction.—*Held* that a building erected on ground belonging to A, but subject to an obligation not to build, in favour of an adjacent tenement belonging to B, who alleged that the building had been erected of consent, upon condition of part of it being used and occupied as part and pertinent of his tenement, was the absolute property of A, so long as it was allowed to stand, in the absence of any competent evidence of the alleged agreement. *Leck* v. *Chalmers*, 1859, 21 D. 408; 31 J. 223.

234. Reserved Right — Perpetuity — Transmissible to Singular Successors.—Circumstances in which *held* that a special privilege of diverting a stream for manufacturing purposes reserved on the sale of certain lands in favour of the lessees of a portion of the lands excepted from the sale, was reserved in perpetuity, and not merely for the duration of the lease, and was transmissible to a singular successor in the excepted portion of the land. *M'Intyre, etc.* v. *Orr, etc.*, 1868, 41 J. 112.

235. Restriction in Use — Moveable Property—Implied Condition—Public Purpose.—A party was requested by subscribers to sit for his portrait, as in reference to a public purpose, and did so. *Held* that the property in the portrait was in the subscribers, and that the party's son and representative had no title to insist that it should not be diverted from that purpose. *Clerk* v. *Adam*, 1832, 6 W. & S. 141. Revg. 9 S. 708; 6 Fac. 467. 1832, 10 S. 864.

236. Sale—Assignation of Missives of Lease — Personal Obligation — Right of Lessor to Resile.—After missives of sale of lands, the purchaser entered into missives for

a lease of the minerals. The purchaser failed to implement the conditions of sale, and afterwards both parties renounced the transaction. Thereafter the property was sold to a second purchaser, who got a disposition containing an assignation by the first purchaser of the missive of lease. *Held* that there had never been a completed contract of lease, and that the personal obligation to grant the lease, and the real right to the lands, were not so combined in the person of the second purchaser as to entitle him to compel the lessors to enter into a lease in terms of the missives. *Weir* v. *Dunlop & Co.*, 1861, 23 D. 1293 ; 33 J. 652.

237. Sale—Assignation of Rents—Legal and Conventional Terms.—An estate, partly arable and partly pastoral, was sold with entry at Whitsunday 1807, and right "to the crop and year 1807." It was under lease to a tenant whose entry to the grass was at Whitsunday 1803, and to the arable land at the separation of the crop of that year, the rent being payable at Candlemas and Martinmas thereafter. The tenant paid the rent due at Candlemas and Lammas 1807 to the seller. *Held* that he had paid rightly, and was therefore not liable to the purchaser nor the seller in repetition. *Shephard* v. *Watherston*, 1817, 5 Dow 278.

238. Sale—Assignation of Rents—Legal and Conventional Terms.—Lands were sold, with entry at Martinmas, under a lease fixing the tenant's entry at Whitsunday as to the grass, and the separation of the crop as to the arable ground, and the first half-year's rent was payable at the Candlemas after the first term of Martinmas for the possession from Whitsunday to Martinmas. *Held* that the purchaser was not entitled to the rent payable at the Candlemas after his entry. *Penman* v. *Ker*, 1828, 6 S. 940 ; 3 Fac. 986.

239. Sale—Assignation of Rents—Legal and Conventional Terms.—By articles of roup it was declared that Martinmas 1843 should be the purchaser's term of entry, and that he should have right to the rents "falling due from and after the said term." *Held* that he was not entitled to the rents payable at Whitsunday and Candlemas 1844 for crop and year 1843. *Stevenson* v. *Moncrieff*, 1845, 7 D. 418 ; 17 J. 205.

240. Sale—Assignation of Rents—Legal and Conventional Terms.—In a lease of lands, it was provided that the rent for the crop of each year should be payable, one-third at Martinmas of that year, and the other two-thirds at the Lammas of the following year. The lands were sold under articles of roup, which declared that the purchaser's entry should be to the houses and grass at Whitsunday, and to the arable lands at Martinmas 1823. The purchaser received from the tenant payment of the rents for the crop of 1823. *Held*, in an action by the seller against the purchaser, for payment of the rent of that year, that the purchaser had drawn the rent of crop 1823 erroneously, and that he was bound to pay it to the seller. *Sir J. G. Sinclair* v. *Sinclair*, 1847, 10 D. 190 ; 20 J. 49. See *Shand's Trs.* v. *Mackie*, 1850, 12 D. 739 ; 22 J. 257.

241. Sale—Assignation of Rents—Legal and Conventional Terms.—By a disposition the purchaser was to have right to the rents payable "for possession" subsequent to Whitsunday, the term of his entry. The subjects were pastoral, and the tenant's entry had been at Whitsunday. The rents, under the leases, were payable at Martinmas and Whitsunday for the first crop and year. *Held* that the purchaser, and not the seller, had right to the rents payable at Martinmas. *Hunter* v. *Stewart*, 1857, 20 D. 60 ; 30 J. 45.

242. Sale—Assignation of Rents—Legal and Conventional Terms — Forehand or Backhand.—Under a missive of sale and a disposition, the seller was to have right to "the rents of crop 1856, being those payable at Candlemas and Lammas 1857." The purchaser's term of entry was Martinmas 1856, and the seller uplifted the rents at Candlemas and Lammas 1857. In point of fact the rents were forehand, and those payable at Candlemas and Lammas 1857 were for crop 1857. *Held* that the purchaser was entitled to the rents payable in 1857. *Dalrymple* v. *Bruce*, 1860, 22 D. 1177 ; 32 J. 537.

243. Sale—Assignation of Rents—Legal and Conventional Terms — Forehand or Backhand.—A purchaser bought an estate, with right to the rents "payable for the period of possession from and after Whitsunday 1862," which was declared the term of his entry. The estate consisted of arable farms let to various tenants, with entry to the houses and grass at Whitsunday, and to the arable land at the Candlemas preceding, and in some cases at the separation of the crop of the preceding year—the first half-year's rent being payable under the leases at Martinmas following the entry to the houses and grass. *Held* that the rents payable under the leases at Martinmas in each year were the first half of the rents for the crop of that year legally due and payable at Whitsunday, and therefore that the purchaser had no right to the half-year's rents payable at Martinmas following his entry. *Murray's Trs.* v. *Jardine*, 1865, 3 M. 845 ; 37 J. 433.

244. Sale—Assignation of Writs—Warrandice in Relief.—An assignation of writs in a feu-disposition does not convey any right to warrandice in relief over other lands. *Hamilton* v. *Lady Montgomerie*, 1834, 12 S. 349 ; 9 Fac. 210.

245. Sale—Assignation of Writs—Unexecuted Precept—Teinds.—A party obtained a right to teinds by a disposition with precept, but not followed by infeftment ; and thereafter he conveyed the lands, out of which the teinds were payable, to a purchaser, with a general assignation of writs, but without expressly disponing the teinds. *Held* that the purchaser was entitled, in

virtue of the assignation to the writs, to take infeftment on the unexecuted precept in the disposition of teinds. *Mansfield* v. *Robertson*, 1835, 13 S. 832; 10 Fac. 595.

246. Sale—Assignation of Writs—Construction—Corroboration of Precise Grant—Assignation by Party Uninfeft.—An assignation of writs and titles made in corroboration of a precise grant carries nothing beyond what is included in that grant; but an assignation not connected with such a grant will pass the full right constituted by the titles assigned. An assignation of writs and titles in a deed executed by a person uninfeft in lands but having right to an unexecuted procuratory of resignation made by a person infeft comprehends the unexecuted procuratory. *Renton* v. *Anstruther*, 1843, 2 Bell 214; 1 Bell 129; 16 S. 184; 13 Fac. 197.

247. Sale—Assignation of Writs—Warrandice against Augmentations—Conveyance of Superiority.—A being infeft in certain lands and teinds, under a conveyance which contained warrandice against future augmentations, granted a feu-disposition to B, and thereafter disponed the superiority to C with an assignation to the writs and "clauses of warrandice therein contained." B then reconveyed the *dominium utile* to A. *Held* that the disposition to C did not carry the right of relief against augmentations. *Trinity Hospital* v. *Nisbett's Trs.*, 1851, 13 D. 1161; 23 J. 550.

248. Sale—Bona fides—Insane Author.—The purchase of an estate by a party in the knowledge that his author had derived it from an insane person *held* not good. *Hamilton* v. *Harvey*, 1818, 2 Mur. 38.

249. Sale—Judicial Sale—Purchase by Counsel in Process.—It is no objection to a judicial sale, that the property was purchased by a counsel who had signed a *pro forma* petition in the process. *E. of Wemyss* v. *Sir J. Montgomery*, 1824, 2 Shaw's App. 1.

250. Sale—Sale by Auction or Private Sale—Liability for Duty—Acts 17 Geo. III. c. 50, and 19 Geo. III. c. 56.—A party exposed an estate for sale by auction, stating that he would not sell it for less than £50,000; and no offers being made, he said he was ready to treat by way of private contract, whereupon he met with several persons in a private room, and then informed them that he would take in private offers exceeding £50,000, and the highest would be preferred; and several having been lodged, he on the same day accepted of the highest. *Held* that this was a sale by auction under the Acts 17 Geo. III. c. 50, and 19 Geo. III. c. 56, and so liable in duty. *Walker* v. *Advocate-General*, 1813, 1 Dow 111.

251. Sale—Sale by Auction—Sequestrated Estate—Offers by or on Behalf of Bankrupt—Liability of Preceding Offerer.—A bankrupt, at a public sale of his sequestrated estate, having made an offer, was informed by the judge of the roup that it could not be received; and having then stated that he was offering for a third party, was told that this must be done by some other person; whereupon another made the offers, and was preferred. It having been proved that the judge knew that the offers were truly for the bankrupt himself, *held*, in a question as to the liability of a preceding offerer to pay the price which he had offered, that he was not liable. *Anderson* v. *Stuart*, 18 Dec. 1814, F. C.

252. Sale — Sale by Auction — Second Exposure — Statutory Advertisement. — Under the powers of a private Act an estate was exposed for sale, but no purchaser appeared. The proprietor applied to the court for authority again to expose the estate at the same upset price, but with certain slight alterations on the conditions of roup. *Held* that the statutory advertisements need not be repeated. *Lord Macdonald*, 1855, 17 D. 598.

253. Sale — Sale by Auction — Offer for Trust Estate by Residuary Legatee — Reduction of Offers. — Trustees exposed heritage to sale under articles of roup, specifying an upset price, and declaring that the highest offerer was to be preferred to the purchase. A party offered the upset price, and the property was knocked down to him at a considerable advance, after competition with the person entitled to the residue of the trust estate, who was the only other offerer. The purchaser raised an action against the exposers and residuary legatee, concluding for reduction of the minute of sale so far as it embraced any offer except that of the upset price; for declarator that he purchased at the upset price, and that the exposers should be decerned to convey the lands to him, on payment of that amount. *Held* that the sale was really for behoof of the residuary legatee; that he was virtually the exposer, and incapacitated from bidding at the sale, and his offers illegal; that it was unnecessary to aver fraud or collusion on his part; and that the pursuer sought the proper remedy in concluding for reduction of all offers subsequent to the offer of the upset price. *Faulds* v. *Corbet*, 1859, 21 D. 587; 31 J. 313.

254. Sale — Auction — Purchase by Exposing Trustees — Title to Reduce — Written Contract. — *Held* that although beneficiaries might be entitled to set aside a sale of heritage by auction if it were proved to have been sold to an agent of the trustees who exposed it, third parties were not entitled to reduce it on this ground. *Question*, how far the rule of law which requires a written contract in sales of heritage applies to sales of heritage by auction. *Aberdein* v. *Stratton's Trs.*, 1867, 5 M. 726; 39 J. 362.

255. Sale — Articles of Roup — Disposition — Ambiguity — Reference to Advertisement. — Where a portion of burgh property was sold by public roup under 3 Geo. IV. c. 91, and pursuant to advertisement as required by that Act, and the advertisement

was referred to in the articles of roup and the disposition, *held* that it was competent to refer to the advertisement to explain an ambiguity in the terms used for describing the boundaries of the subject in the disposition to the purchaser. *Davidson* v. *Mags. of Anstruther*, 1845, 7 D. 342.

256. Sale—Articles of Roup—Construction.—*Held* incompetent to control or modify the construction of articles of roup, by production of correspondence between the common agent and the judicial factor, or by any declaration as to the meaning thereof. *Stevenson* v. *Moncrieff*, 1845, 7 D. 418; 17 J. 205.

257. Sale—Non-Compliance with Conditions of Roup—Time-Limit Exceeded.—By articles of roup it was provided that the subjects "should be exposed to sale at the upset price of £180, during the running of a half-hour sand-glass, and the person offering the said sum, if no other shall appear, or the highest offerer at the outrunning of the glass, shall be preferred to the purchase"; and in place of a sand-glass, a watch was, without objection, used; and a competition took place and was not ended at the lapse of the half-hour. No means were taken to stop the watch during the competition. *Held* that this should have been done; and the sale *held* inept at the instance of the unsuccessful competitor. *Burns*, 27 Nov. 1807, F. C.; M. "Sale" App. No. 4.

258. Sale—Non-Compliance with Conditions of Roup—Failure to Find Caution—Measure of Damages.—A party bought lands at a judicial sale under articles of roup, which stipulated that, on failure to grant bond for the price, the purchaser should, besides incurring a penalty of a fifth part more than the price, forfeit his right in the purchase; and the purchaser having failed, *held*, in an action of damages against him, that he was liable for the difference between the price which he agreed to give and the price to be got at a new sale, and the difference between the interest of the price and the rents till they should be sold, but in no case to exceed the penalty. *Johnstone's Trs.* v. *Johnstone*, 19 Jan. 1819, F. C.

259. Sale—Non-Compliance with Conditions of Roup—Failure to Find Caution.—*Held*, in an action by a purchaser of an estate sold by auction, one of the articles of which was, that he should, within fourteen days, grant bond for the price, with a sufficient cautioner, to the satisfaction of the exposer, that although he proposed a party as cautioner, yet as no bond was presented within the fourteen days, he was not entitled to implement. *Menzies* v. *Barstow*, 1840, 2 D. 1317.

260. Sale—Non-Compliance with Conditions of Roup—Failure to Find Caution.—A purchaser, under articles of sale at auction, by which it was stipulated that if security for the price were not found within ten days, he should forfeit his right to demand implement, *found* to have failed to comply with the stipulation, and his interest declared forfeited. *Kennedy* v. *Ramsay's Trs.*, 1847, 9 D. 1333; 19 J. 564.

261. Sale—Conditions of Roup—Failure of Highest Offerer to Find Caution—Devolution on Next Offerers.—A property was exposed to sale under a condition that the highest offerer should find caution for payment of the price within thirty days, failing which, the purchase should devolve on the immediately preceding offerer under the same condition, and so on; and after a competition between A, B, and C, in which C having made an offer, A made a higher one, and B a higher, whereupon A made the last and highest offer; but A having failed to find caution, notice was given to B, and he having also failed, notice was given to C. *Held*, in a question between A and C (1), that A's right, as highest offerer, was forfeited without a clause of irritancy; and (2) that A was not entitled to have the purchase devolved on him as the offerer between B and C, but that C was entitled to it. *Davidson* v. *Kerr*, 19 Jan. 1815, F. C.

262. Sale—Conditions of Roup—Liability of Purchaser to Perform Obligations—Duty of Personal Inquiry.—A purchaser at a public roup, under a condition "that the purchasers shall be obliged to perform all the obligations prestable by the proprietor to the said tenants and possessors of the lands, in so far as not already implemented and performed," is bound to satisfy himself, by personal inquiries at the tenants, how far these obligations have been performed; and is not entitled to relief from the seller (a trustee), in respect of a statement in answer to an inquiry, that he understood that they had all been performed, whereas they were not so. *Murray* v. *Selkrig*, 26 Jan. 1815, F. C.

263. Sale—Conditions of Roup—Sufficiency of Title—Expense of Completion.—In articles of roup of heritable property, the seller declared that certain specified titles were to be completed as a sufficient progress, and with which the purchaser should be considered to have satisfied himself, and it should not be in his power to state any objection to the title deeds or to the disposition to be granted by the seller in consequence of the said titles. *Held*, in a suspension by the purchaser of a charge for the price, objecting not to the title or right as bad in itself, but that the form of the title to part was incomplete, that the expense of making it complete must fall on the purchaser. *Anderson* v. *Matheson*, 4 Dec. 1818, F. C.

264. Sale—Conditions of Sale—Undisclosed Encumbrances—Rights and Liabilities of Purchaser.—A party sold an heritable property, on condition *inter alia* that the purchaser should procure him an ensignсy in the army, and pay a debt affecting the property. It was afterwards ascertained that the debt exceeded the sum specified, and that inhibitions had been executed; and the purchaser refused to procure the ensignсy till the property was relieved from these encumbrances.

Held that the purchaser was liable only for interest on the price of the ensignсy, and not for the pay and emoluments thence arising; and that he was entitled to insist, before payment, that discharges of the real burdens should not only be produced, but that they should be duly recorded. *Cargill* v. *Craigie*, 1822, 1 Shaw's App. 134.

265. Sale—Conditions of Sale—Purging of Encumbrances — Payment of Price. — Lands were exposed to sale under articles of roup, by which the price was to be paid at Whitsunday, and the encumbrances purged at Martinmas. They were afterwards privately sold, under a declaration that the price should be paid at Martinmas, and the other conditions should be in conformity with the articles of roup. *Found* that the encumbrances were to be purged *simul et semel* with the payment of the price. *Forbes's Trs.* v. *M'Intosh*, 1822, 1 S. 497.

266. Sale—Conditions of Roup—Valid Title—Right of Purchaser to Object to Title—Right to Resile.—A trustee in a sequestration put up to roup a property disponed to him by the bankrupt's wife. The articles of roup mentioned this disposition and bound the exposer to deliver it and the conveyance to the bankrupt's wife to the purchaser. The property was purchased. In a suspension by the purchaser, *held* that the trustee was bound to give a valid title; that the wife's disposition without her husband's consent was bad, and therefore the title offered was invalid; and that the terms of the articles of roup did not bar the purchaser from stating the objection. *Dick* v. *Cuthbertson*, 1826, 2 W. & S. 522.

The trustee having obtained a disposition from the wife and husband and tendering a good title, *held* the purchaser could not resile from the bargain. *Ibid.*, 1831, 5 W. & S. 712. Affg. 9 S. 93; 6 Fac. 68.

267. Sale — Conditions of Roup — Price Paid before Fulfilment — Right of Purchaser.—Heritable subjects burdened with debt were exposed to sale under articles of roup, on the narrative that they were consented to, and that, before payment of the price, an assignation to the debt was to be granted by the creditor; and the purchaser paid the price to the exposer without obtaining an assignation. *Held* that although the creditor attended and offered at the sale, the debt still remained a burden on the property. *Crawford* v. *Walker*, 1827, 5 S. 259.

268. Sale — Conditions of Roup Approved by Court—Objection to Title—Incompetency of Altering Conditions.—The court having found that trustees were bound, in terms of a trust deed, immediately to expose lands to sale, and having approved of articles of roup containing a clause of warrandice in terms thereof, *held* that although objections were stated by intending purchasers to the sufficiency of the title, which were not without foundation, yet it was not competent to alter the conditions, and the lands must be exposed under the articles of roup. *Darling* v. *Adamson*, 1837, 15 S. 672.

269. Sale—Conditions of Roup—Arbitration Clause—Suspension of Charge for Price.—Under articles of roup it was conditioned that, in case of any dispute as to the title, the seller and purchaser should submit the matter to an arbiter named; and a dispute having arisen, the seller gave a charge for the price, and the purchaser presented a note of suspension, in answer to which the charger pleaded the submission, and stated his readiness to go to the arbiter. *Held*, in passing the note, that he ought not to have given the charge. *Stewart* v. *Lang's Trs.*, 1839, 2 D. 167.

270. Sale—Conditions of Roup—Search of Encumbrances — Obligation to Clear Record.—A person to whom lands had been conveyed in trust for the payment of creditors, brought them to sale, and by the articles of roup bound himself to furnish searches of encumbrances up to the date of the trust-disposition; but subsequently to that date, and prior to the sale, the truster conveyed the lands, under burden of his own liferent, to his grandson, who was infeft, and his sasine recorded. *Held* that this was an encumbrance of which the seller was bound to purge the record. *Robertson* v. *M'Gregor*, 1840, 3 D. 213.

271. Sale — Conditions of Roup — Purchaser Barred from Objecting to Title.—A property was sold under a bond and disposition in security, which contained an obligation on the creditor to account to a third party for part of the sum secured by it. By the articles of roup it was declared that the seller was not to purge any encumbrances subsequent to the date of the bond, and that the purchaser was to satisfy himself as to the validity of the title, and to take it as it stood. The purchaser having refused to pay the price, on the grounds (1) that the disposition must be concurred in by the party to whom the creditor was to account; and (2) that the property was burdened by a bond to the agent of the seller, of which the purchaser was not aware at the time of the purchase,—*held* that the purchaser was barred by the articles of roup from objecting to the title of the seller, and from a right to have any encumbrance of later date than the original bond purged. *Young* v. *Grierson*, 1849, 11 D. 1482; 21 J. 576.

272. Sale — Conditions of Roup — Warrandice—Obligation of Purchaser to Satisfy Himself — Right to Resile. — A piece of ground with the buildings thereon was sold by roup, the articles providing that warrandice should be from fact and deed only, that the purchaser should satisfy himself as to the titles and subject and should not be entitled to object to the title or withhold payment on any pretext. The buildings sold were built partly on ground which did not belong to the seller. *Held* that the purchaser was entitled to resile from the bargain because of this, and was not barred by the clause in the articles.

Hamilton v. *Western Bank*, 1861, 23 D. 1033; 33 J. 519.

273. Sale—Conditions of Sale—Incapacity to Fulfil Conditions.—A by a minute of sale bound himself to sell a piece of ground to B under certain conditions. In an action at the instance of B to compel A to grant a disposition, A averred that B had incapacitated himself from fulfilling the conditions. The court, before answer, *appointed* B to lodge a draft of the disposition which he proposed that A should execute. *Corbett* v. *Robertson*, 1871, 8 S. L. R. 631.

274. Sale—Entry—Liability for Tenants' Improvements.—Where an estate was sold on 5th March 1834, under a condition that the purchaser should be bound to pay the meliorations due under the current leases to the tenants at the expiry of their leases, *held* that although his entry was at Whitsunday, and several of the leases ended at that term as to the houses and grass, but as to the arable part of the farm not till the crop was reaped, the purchaser was liable for the meliorations due under these leases. *Stewart* v. *E. of Dunmore's Trs.*, 1837, 15 S. 1059; 12 Fac. 974.

275. Sale—Error in Description—Knowledge and Acquiescence of Purchaser—Personal Bar.—A proprietor who was infeft in ground "bounded on the south by the water of Leven," sold a part of it adjacent to that water for a quay to the magistrates of Dumbarton by a missive, and the magistrates, without completing a title, built a quay on it. *Held*, in a question with a subsequent purchaser of the ground, who got a title with the above boundary, and who was in the knowledge of the conveyance to the magistrates, and acquiesced in their operations, that he was barred from claiming the part sold to them. *Lang* v. *Mags. of Dumbarton*, 29 June 1813, F. C.

276. Sale—Missives of Sale—Sufficiency of Title.—Circumstances which *held* not sufficient to void a sale of property, although the missives on one side declared that unless the titles were found sufficient the bargain was to be null. *Bruce* v. *Cleghorn*, 1785, 3 Pat. 5.

277. Sale—Missives—Improbative Missive—Rei interventus.—A party sold a house, and granted an improbative missive to the purchaser, agreeing to pay the expense of an entry with the superior; and the purchaser paid the price, and received possession. *Held* that the obligation was effectual *rei interventu*. *Parker* v. *Izat*, 1803, Hume 915.

278. Sale—Missives of Sale—Final Contract—Prior Communings.—A conveyance referred to letters of a preceding treaty but did not specify what letters. *Held* (1) that the letters were not incorporated in the final contract; and (2) that they could not be used in evidence to contradict the conveyance. *Gordon* v. *Hughes*, 1819, 1 Bligh 287. Revg. 15 June 1815, F. C.

279. Sale—Missives of Sale—Essential Condition—Obligation to Give Possession.—A stipulation in a missive of sale, that possession should be given at Whitsunday, *held* to be an essential condition; and the seller being unable (although by fault of a third party) to give entire possession at that time, *found* that the buyer was not bound to pay the price. *Hunter* v. *Carsewell*, 1822, 1 S. 248.

280. Sale—Terms of Missives—Servitude or Personal Obligation.—*Question*, upon the terms of missives of sale, whether a permanent servitude *altius non tollendi* was constituted, or a mere personal obligation. *Cowan* v. *Stewart*, 1872, 10 M. 735; 44 J. 424.

281. Sale—Offer—Extent of Offer.—A general offer for lands, to which a right of pasturage in a common was attached, *held* to include that right. *Brisbane's Trs.* v. *Crawford*, 1826, 4 S. 422.

282. Sale—Offer—Offer of Price Includes Interest.—An offer of a price for lands necessarily includes an offer of interest on the price from the date of possession. *Speirs* v. *Ardrossan Canal Co.*, 1827, 5 S. 764.

283. Sale—Offer and Acceptance—Concluded Contract.—Letters which were *held* not to constitute a concluded contract. *Milne* v. *Marjoribanks' Trs.*, 1837, 2 S. & M'L. 494. Affg. 14 S. 533; 11 Fac. 442.

284. Sale—Offer and Acceptance—Concluded Contract.—Negotiations by letters which were *held* not to have constituted a concluded contract of sale. *Bakers of Edinburgh* v. *Hay & Others*, 1868, 6 S. L. R. 144.

285. Sale—Improbative Offer—Right to Resile.—*Held* that a contract for the sale of heritage by mutual missives of offer to purchase and of acceptance, not followed by *rei interventus*, might be resiled from by either party, the offer being neither holograph of the offerer, nor tested. *Goldston* v. *Young*, 1868, 7 M. 188; 41 J. 122.

286. Sale—Offer and Acceptance—Concluded Contract.—A, proprietor of land, wrote —"I agree to accept an offer of £12,600 from B, provided he couples his offer with" a certain condition. B wrote accepting the offer, subject to the condition. *Held* that there was a concluded contract of sale between the parties, and that, on fulfilment of the condition, B was entitled to a disposition. *Bate* v. *Corstorphine*, 1869, 6 S. L. R. 401.

287. Sale—Offer and Acceptance—Incomplete Contract—Effect of Interdict.—Where a contract of sale of heritage by the managers of a charitable corporation was incomplete in consequence of the acceptance of their offer being improbative, and various members of the corporation had obtained interim interdict against the managers carrying out the sale, *held* that the acceptance could not be amended by a subsequent missive holograph of the acceptor, and that a new contract for a price smaller than one which was offered by the complainers could not be entered into till the questions raised by the interdict

had been settled. *Law* v. *Douglas*, 1871, 44 J. 17.

288. Sale—Offer and Acceptance—Added Condition.—A person offered to purchase a house at a certain price on condition that the seller should give a clear title. The proprietor accepted the offer, but with the condition that no search should be given. *Held* that the intending purchaser not having consented to the seller's condition there was no sale. *Dickson* v. *Blair*, 1871, 10 M. 41; 44 J. 40.

289. Sale — Obligation for Ground-Annual—Implied Personal Obligation of Purchaser.—A party purchased a piece of ground, and accepted a disposition, declaring the consideration to be a ground-annual, and the disposition and lands burdened with the payment of it, but not containing any express personal obligation on the purchaser. *Held* that he was personally liable in payment, and could not relieve himself by throwing up his right to the ground. *Mags. of Inverness* v. *Bell's Trs.*, 1827, 6 S. 100; 3 Fac. 133.

290. Sale—Obligation of Purchaser to Accept or Resile—Objection to Title.—Circumstances in which *held* that the purchaser of certain houses was bound to accept the title offered by the seller with absolute warrandice, or give up the bargain. *Hepburn* v. *Aikman*, 1773, 2 Pat. 326. Affg. M. 14179.

291. Sale—Obligation of Purchaser to Carry out Stipulations of Lease.—A singular successor *held* bound by a stipulation in a lease to pay for the value of houses erected prior to his purchase of the property. *Fraser*, 1824, 2 Shaw's App. 37.

292. Sale—Obligation of Purchaser to Satisfy Himself—Implement of Burdens—Warranty.—A purchaser is presumed to satisfy himself of the burdens and obligations affecting the subjects sold. Circumstances which were *held* not to amount to a warranty that these burdens had been implemented. *Murray* v. *Selkrig*, 26 Jan. 1815, F. C.

293. Sale—Obligation of Purchaser to Satisfy Himself—Bar.—Lands were exposed to sale, under a condition that "the purchasers should, before offering, satisfy themselves as to the validity and sufficiency of the title deeds." *Held* that a purchaser was barred from objecting to the regularity and completeness of the titles. *Carruthers* v. *Stott*, 26 May 1825, F. C.; 4 S. 34.

294. Sale—Obligation of Purchaser to Satisfy Himself—Objection to Validity of Title.—An obligation on a purchaser to satisfy himself with the progress, does not preclude an objection to the validity of the title offered. *Waddel* v. *Pollock*, 1828, 6 S. 999; 3 Fac. 1017.

295. Sale — Obligation to Relieve of Latent Burdens—Undisclosed Sublease.—Circumstances under which it was *held* that a purchaser of an estate was entitled to be relieved of a latent burden created by a subtack, and which could not be discovered from the rights on which the tenants possessed. *Ferrier* v. *Mudie*, 1823, 1 Shaw's App. 455.

296. Sale—Obligation on Purchaser to Relieve of Debts—Liability for Debt under Trust Deed Irregularly Reduced—Title of Beneficiary to Sue.—A truster appointed his trustees to pay £500 to his sister, and the trust deed was reduced by his son *ex capite lecti*, without calling his sister: the estate was sold by the son's representative, on condition of the purchaser relieving the representative of all debts due by the son on the estate. *Held* that the sister had no title to pursue a direct action for the £500 against the purchaser. *Binning* v. *Blane*, 1824, 2 S. 680.

297. Sale — Obligation to Relieve of Burdens—Over Feu-Duty.—A party sold lands to another for £10,000 and payment of one penny feu-duty, and the lands were burdened with a feu-duty of £340 and ten bolls of barley yearly to the superior. *Held* that the seller was bound to relieve the buyer of this burden, and implement the sale. *Paton* v. *Stuart*, 1825, 3 S. 653.

298. Sale—Obligation of Seller—Warrandice.—A seller *found* liable either to implement an obligation of warrandice and pay rents, or repay the price. *Crichton* v. *Gilbertson*, 1822, 1 S. 340.

299. Sale—Obligation to Give Clear Title—Remit to English Counsel.—A party sold lands in England, and bound himself to give a clear marketable title. A remit made to English counsel, to give an opinion whether this had been done or not. *Bourne* v. *Gairdner*, 1823, 2 S. 212.

300. Sale—Obligation to Give Clear Title—Delay—Right of Purchaser to Repetition.—Where a seller had for five years delayed to give a clear title to a property, a purchaser *found* free from the sale, and entitled to repetition of the price. *Fleming* v. *Harley's Trs.*, 1823, 2 S. 373 and 374.

301. Sale—Obligation to Clear of Encumbrances.—The purchaser of land is not bound to accept a disposition till heritable debts and inhibitions be purged. *Horne* v. *Kay*, 1824, 3 S. 81.

302. Sale—Obligation of Seller to Make up Title—Expense.—The seller of an heritable property is bound to make up a valid title at his own expense, unless the purchaser has explicitly consented to take the title as it stands in the person of the seller. *Smith* v. *Aiken*, 1827, 5 S. 340; 2 Fac. 201.

303. Sale—Obligation to Clear Record—Adjudication beyond Prescriptive Period.—The seller of an heritable property, under articles of roup binding him to purge encumbrances, must clear the record of an adjudication, although led more than forty years previously, on a debt which was not denied to have been paid. *Mitchell* v. *Thomson's Trs.*, 1827, 6 S. 135.

304. Sale—Obligation to Give Entry and Valid Title—Delay—Right of Purchaser to Resile.—A party purchased a piece of ground in February 1824, under a stipulation that the

seller was to give him entry and a valid title by Whitsunday. A dispute arose as to whether the purchaser was not entitled to get free of the bargain. This dispute became the subject of a submission, wherein decree (in favour of the seller) was not pronounced till April 1825. *Held* that the purchaser was not entitled to repudiate the bargain, though a title was not offered till November thereafter. *Ross* v. *Southern Districts Market Co.*, 1829, 7 S. 738.

305. Sale—Obligation to Give Valid Title—Delay—Right of Purchaser to Resile.—A purchaser of land *held* not entitled to get rid of his bargain, on the ground of delay on the part of the seller for two years to give a valid title. *Smith* v. *Aitken*, 1829, 8 S. 84.

306. Sale—Obligation to Give Complete Title—Liability for Delay.—The seller of an heritable property *held* liable to the purchaser in damages, and in relief of claims of damage against him, in consequence of delay on the part of the seller's agent to furnish *tempestivé* a complete title. *Little's Trs.* v. *Spankie*, 1830, 8 S. 418.

307. Sale—Obligation to Give Disencumbered Title—Sequestrated Estate.—Lands forming part of a sequestrated estate were exposed to sale under articles of roup, which provided that the purchasers should not be entitled to retain the price, on pretence of seeing to the application thereof; and a purchaser paid the greater part of the price to the trustee, who placed the same to the credit of the estate, and after some time became bankrupt, and resigned, without having cleared off an heritable debt burdening the lands. *Held*, in an action against his successor in office, that the creditors were bound, either to give the purchaser a disencumbered title, or to repeat the part of the price formerly paid by him. *Moir* v. *Paul*, 1830, 8 S. 823; 5 Fac. 657.

308. Sale—Obligation to Give Clear Title — Unrecorded Burdens. — A purchaser of heritage, who was made aware after the sale, but before he received a title or paid the price, that burdens existed on the title of the seller, *held* entitled, although the burdens did not appear on the record, to insist that the consent of the parties having right to the burdens should be obtained. *Ralston* v. *Farquharson*, 1830, 8 S. 927.

309. Sale—Obligation to Clear Record—Inhibition against Bankrupt Author.—The seller of an estate, which he had derived through a conveyance from a bankrupt and his trustee under a sequestration, *held* not bound to purge the record of an inhibition against the bankrupt, which had not been recorded till after the sequestration. *Sprot's Trs.* v. *Mackenzie's Trs.*, 1830, 9 S. 120.

310. Sale — Obligation to Give Clear Title — Right of Purchaser to Retain Amount of Debts—Prescribed Debts.—The court *refused* to declare debts allocated on a property sold under a ranking and sale prescribed by the lapse of forty years, and *allowed* a new purchaser of the property to retain in his hands a sum equal to the amount of the debts affecting the property. *Falconer* v. *Campbell*, 1821, 1 S. 214.

311. Sale—Obligation to Give Clear Title—Delay—Right of Purchaser to Resile.—A delay for six months after the sale of an heritable property on the part of the seller in providing a good title *held* not to entitle the purchaser to resile. *Raeburn* v. *Baird*, 1832, 10 S. 761; 7 Fac. 583.

312. Sale — Obligation to Give Clear Title — Right of Purchaser to Reject — Objections to Title. — Objections to titles which *held* sufficient to entitle a purchaser to reject a property bought by him. *Brown* v. *Cheyne*, 1833, 12 S. 176.

313. Sale—Obligation to Give Valid Title—Denial of Sale and Title to Sell—Competency.—In an action by the seller for implement of an alleged sale of heritable property, *held* competent for the defender to deny that the pursuer had a valid right or title to the property, and at the same time to deny that the sale took place, and that the pursuer could not insist for implement without being ready to produce a valid title. *Robertson* v. *Rutherford*, 1840, 2 D. 1494.

314. Sale—Obligation to Give Clear Title—Liability of Seller for Expenses.—The purchaser of an estate is entitled not merely to a title that will secure him against eviction but to one so free from fault as to secure him against risk of trouble and expense; and the seller is liable in the expense of any judicial proceeding which may be necessary to put the title beyond question. *Dunlop* v. *Crawford*, 1850, 12 D. 518; 22 J. 154.

315. Sale — Obligation to Give Clear Title—Liability of Seller for Expenses.—Although certain objections to the title in a sale of land, under the Entail Amendment Act, were repelled, the purchaser was *found* entitled to the expense of the suspension, as part of the expense of the sale. *Kerr* v. *M. of Ailsa*, 1854, 17 D. (H. L.) 11; 1 Macq. 736; 26 J. 525.

316. Sale—Obligation to Give Clear Title—Delay—Right of Purchaser.—Before a title was tendered in a sale of ground, or possession taken, the occupant of a portion of the ground used inhibition against the seller, and raised an action against him for implement of an alleged agreement to feu the portion of ground so occupied by him. Failing a guarantee the purchaser declined meantime to complete the sale. The action was unsuccessful, and the transaction of sale was then carried into effect, but the disposition bore the term of entry to be two years and a half later than was originally contemplated. *Held* that the purchaser was warranted in so declining to complete the transaction, and that he was not liable either to pay interest on the price, or to relieve the seller of the ground-annual for the intervening period. *Rodger* v. *Brown*, 1859, 21 D. 1022; 31 J. 585.

317. Sale—Obligation to Exhibit Prescriptive Progress—Continuing Obligation.—A party purchased a coal-field under articles of roup obliging the seller to exhibit to the purchaser, along with the disposition to be granted, a valid and sufficient progress of writs to the extent of a prescriptive title, which the seller should be bound to make furthcoming to the purchaser upon all necessary occasions. *Held* that although the purchaser received a disposition on which he was infeft and entered into possession, the seller was bound by the obligation to exhibit a progress of titles, so as to enable the purchaser to protect his right against a threatened eviction. *Bald* v. *Scott*, 1841, 3 D. 564; 16 Fac. 595.

318. Sale—Obligation of Seller to Relieve from Encumbrance.—A party having sold an heritable subject, and received the price, *ordained* to relieve the purchaser from an heritable bond affecting the property. *Kettle* v. *Scott*, 1832, 11 S. 147.

319. Sale—Obligation to Clear of Encumbrances—Undisclosed Servitude.—A proprietor sold a piece of ground, without mentioning the existence of a negative servitude previously erected and sold to a neighbouring proprietor. *Held* that he must either purge the servitude within a reasonable time, or that the purchaser was entitled to be free of the bargain. *Urquhart* v. *Halden*, 1835, 13 S. 844; 10 Fac. 619.

320. Sale—Obligation of Seller in Warrandice—Eviction.—A party who granted a disposition of subjects with absolute warrandice to the extent of the price paid, *held* liable, on the eviction of the property, to repay the amount of the price, the obligation not being satisfied by the possession of the disponee previous to eviction. *Galloway* v. *Galloway*, 1838, 1 D. 74.

321. Sale—Obligation to Deliver—Right of Purchaser to Resile.—The seller of a house undertook to have it valued and delivered to the purchaser in February 1823. The house not having been delivered in July 1826, the purchaser *held* entitled to abandon the purchase. *Hutchinson* v. *Scott*, 1830, 8 S. 377.

322. Sale — Price — Failure to Find Security—Resale.—Where a purchaser did not find satisfactory security for payment of the price within the time specified in the minute of sale, *held*, in the circumstances, that the seller was entitled to sell the property to another. *Anderson* v. *Anderson*, 1759, 2 Pat. 22.

323. Sale — Price — Error Induced by Seller — Duty of Purchaser. — A party purchasing an estate in a ranking and sale insisted on an abatement of the price, in respect that the teinds had been erroneously stated to be valued and exhausted. *Held* that he must be presumed to have satisfied himself by inquiry of the circumstances and situation of the estate; and there being no *mala fides* on the part of the seller, plea *repelled*. *Ferguson* v. *Mossman*, 1797, 3 Pat. 531.

324. Sale—Payment of Price—Refusal to Pay until Discharge of Encumbrances—Right of Warrandice. — The purchaser of lands over which a real right of warrandice existed, having been sold as free from encumbrances, and he having refused to pay the price till the right of warrandice was discharged, the court *repelled* the objection. *Trs. of Durham* v. *Graham*, 9 July 1800, F. C.; M. 16641.

325. Sale—Payment of Price—Retention in Respect of Terce.—A singular successor who had purchased a property, *found* entitled to retain a part of the price during the subsistence of the widow's terce as a preferable burden. *Boyd* v. *Hamilton*, 7 Mar. 1805, F. C.; M. 15874.

326. Sale—Payment of Price—Trustee in Bankruptcy—Undischarged Inhibition.—The purchaser of an heritable property which has been sequestrated under the Bankrupt Act, must pay the price to the trustee, although an inhibition used by a creditor of the bankrupt has not been discharged. *Ferrier* v. *Pennycuick*, 8 July 1812, F. C.

327. Sale — Failure to Pay Price — Effect.—In May 1811 A agreed to sell lands to B, £4000 of the price to be payable at Whitsunday 1812. B failed to pay. A signed but did not deliver a disposition, and in 1813 he raised an action to have the sale declared null. B failed to consign (as ordered) the £4000. *Held* that the sale was null. *Black* v. *Dick*, 1814, Hume 699.

328. Sale—Payment of Price—Retention — Encumbrances. — A purchaser of land granted bond to pay the price on being relieved of all encumbrances. *Held* entitled to retain *hoc statu* a part of the price corresponding to debts allocated on the property till relieved thereof, although it was alleged that the debts were prescribed. *Falconer* v. *Campbell*, 1821, 1 S. 214.

329. Sale — Payment of Price — Retention for — Relief of Burdens — Exoneration.—Lands burdened with annuities were judicially sold under articles of roup, declaring that the purchaser should retain as much of the price as would pay the annuities; and the purchaser granted a bond of caution for the price without any such condition being introduced *in terminis*. *Held* that he was not entitled to exoneration on consigning the price. *Learmonth* v. *Common Agent in Ranking of Parkhall*, 1822, 1 S. 476.

330. Sale—Liability for Price—Investiture of Public Officer.—*Question* as to the liability of the purchaser of the Old Post Office, Edinburgh, to pay the price, in respect that the property was held by a public officer for behoof of the public, and he had not connected himself with the vassal last infeft. *Black* v. *Lorimer*, 1822, 1 S. 521.

331. Sale—Payment of Price—Objection to Title—Consignation.—A party purchased a lease, forming part of a sequestrated estate, and objected to pay the price, alleging that an assignation, forming part of the bankrupt's

title, which was burdened with a sum exceeding the price, was awanting. The court *ordered* the price, to be consigned, reserving all objections. *Ferrier* v. *Wallace*, 1823, 2 S. 285.

332. Sale—Payment of Price—Right of Seller to Reconveyance on Non-Payment.—A party, who had offered to purchase a superiority got a disposition from the seller, was infeft and possessed the same. At the rate of the transaction the buyer and seller had differed as to the price, and the seller had offered to cancel the disposition. Over thirty years later the seller *held* entitled to a reconveyance, the price not having been paid. *Stirling* v. *Honeyman*, 1824, 2 S. 765.

333. Sale—Price Payable by Instalments—Right of Purchaser to Pay up Overdue Instalments.—A party sold a property to another at a price payable by instalments, on the condition that if he should "suffer any two of the said instalments to run into the third unpaid," he authorised the seller to resume possession and sell the property. *Held* competent for the purchaser, in a suspension and interdict of a sale, to pay up the instalments which had run into a third. *Wilson* v. *Pollock & Co.*, 1824, 3 S. 1.

334. Sale—Payment of Price—Pending Process.—Pending a declarator that the seller of a piece of land within burgh should be decerned to disburden it of a servitude, which had not been made known to the purchaser at the time of purchase, the court *passed*, on caution, a bill of suspension of a charge of payment for the price. *Urquhart* v. *Halden*, 1833, 11 S. 854.

335. Sale — Payment of Price—Conditional Payment—Repetition.—A sold to B the interest in certain lands in Upper Canada, assigned to him by C by a Scots deed, it being stipulated that the price should be repaid if B, within nine months, should show an opinion of a lawyer of Upper Canada that the conveyance to A by C was not effectual. *Held* that production of an opinion by a lawyer of Montreal, in Lower Canada, was sufficient implement of the stipulation to entitle B to repetition. *Peebles* v. *Grahame*, 1834, 12 S. 701.

336. Sale — Payment of Price — Unqualified Receipt.—An unqualified receipt for the price of a house in a disposition, *held* not to be qualified by a letter from the purchaser to the agent of the seller, bearing, "I only paid you £320 of the price, and the balance thereof I have accounted for to him (the seller); at least I will relieve you of the same at his hands." *Clark* v. *Glen*, 1836, 14 S. 966.

337. Sale—Payment of Price to Seller's Agent — Discharge — Collusion.—A party's agent, by his instructions, sold a lease. The party forwarded to the agent an assignation containing a receipt and discharge for the price, which the agent delivered up to the purchaser on receiving the price. *Held*, in an action by the seller against his agent and the purchaser for payment of the price, that no circumstances of collusion between them were established, sufficient to take off the effect of the discharge, and the purchaser therefore *assoilzied*. *Swan* v. *Baird*, 1836, 15 S. 251.

338. Sale—Payment of Price—Delivery of Title.—The magistrates of a burgh sold to trustees, under the authority of a statute, their rights in the port and harbour (with some reservations); and having received bonds for the price, granted a discharge and renunciation in favour of the trustees. It having been subsequently found that the magistrates were bound to execute and deliver to the trustees a feudal conveyance to the harbour and its privileges, *held* that the period of the payment of the bonds having arrived, the magistrates were entitled to refuse delivery of the title till they received payment. *Dundee Harbour Trs.* v. *Mags. of Dundee*, 1842, 4 D. 758.

339. Sale—Payment of Price—Annual Payment—Taxation of Casualties—Relief of Burdens.—In a contract of sale it was arranged that the transaction should take the shape of a feu-contract, one-half of the price to be at once paid, and the other half to be converted into an annual payment at five per cent., but that in all other respects it was to be dealt with as having been really a purchase. *Held* that the feu-contract ought to be framed so as to tax the entry of heirs and singular successors at a nominal sum; but that the purchaser ought to be bound by the feu-contract to relieve the sellers of the feu-duty, and other exactions and prestations exigible from them by their superiors. *Dixon* v. *Muller*, 1858, 20 D. 721; 30 J. 377.

340. Sale—Payment of Price—Nature of Deductions Allowable. — The ground in Edinburgh on which a tenement stood that was destroyed by fire was sold by the magistrates. *Held* that, before consignation of the price, there were to be deducted the expenses incurred for the valuation and sale; that upon the balance of the price the arrears of feu-duty formed a preferable claim; and, in the circumstances, the expense of the purchaser's title, as well as his composition for entry, formed also proper deductions. *Pollock* v. *Mags. of Edinburgh*, 1861, 23 D. 555; 33 J. 282.

341. Sale—Payment of Price—Consignation in Respect of Claim of Relief—Repayment.—Circumstances in which the seller of an estate *held* entitled to repayment of part of the price consigned, under the articles of roup, to await the result of a claim of relief against the superior. *M'Callum* v. *Stewart*, 1870, 8 M. (H. L.) 1; 42 J. 266.

342. Sale — Property in Building on Estate—Schoolhouse Erected by Subscription—Right of Purchaser.—A private schoolhouse was built by heritors, aided by a parish subscription, on the estate of one of their number, who made no objection, and was a subscriber; but no title was got from him, and he afterwards sold his estate. *Held* that the

purchaser was entitled to the property of the house, and to decree of removing against the tenant; and that the heritors could not retain possession until repaid the expense of building the house. *Beattie* v. *Lord Napier*, 1831, 9 S. 639.

343. Sale—Purchase for Specific Object—Undisclosed Lease—Rights of Purchaser.—A party who sold a farm, *assoilzied* from an action of damages at the instance of the purchaser, who alleged that his avowed object in making the purchase was to plant trees on the farm, and that he was obstructed in carrying this into effect by a tenant, who founded on a missive of lease by the seller, said to have been concealed by the seller's agent at the date of the sale. *Reddie* v. *Syme*, 1832, 6 W. & S. 188. Affg. 9 S. 413.

344. Sale—Real Right—Personal Right—Bona fide Purchaser.—An estate was sold to a *bona fide* purchaser by the proprietor, who, although not served heir at the time, was soon after served and infeft in connection with the last feudal investiture descendable to heirs whatsoever. *Held* that the sale was good, although the owner last vest disponed the lands, by a contract of marriage, to his wife in liferent (who was infeft), and the children of the marriage in fee, but which right of fee remained personal. *Calder* v. *Stewart*, 1806, Hume 440. *Campbell* v. *Campbell*, 1811, Hume 444.

345. Sale—Relief of Burdens—Method of Estimating Burdens—Erroneous Statement of Deductions from Rental.—A party bought lands with reference to a rental, and among the deductions there was erroneously stated a sum of converted multures, payable by the tenants in addition to the rental exhibited; and he stipulated that he was to have relief, at the rate of twenty years' purchase, for any excess beyond a certain amount, of public burdens forming a deduction from the rental. *Held* that, in estimating these burdens, the sum of converted multures payable by the tenants in addition to their rents was not to be taken into account. *Gordon* v. *Douglas's Trs.*, 1829, 7 S. 323.

346. Sale—Relief of Burdens—Payment for Use of Sewer—"Reasonable Sum."—A proprietor was required by statute to connect his drains with a main sewer and to pay a "reasonable sum" to be fixed by Commissioners for the use of the sewer. He made the connection, but before the sum was fixed he disponed the property by a feu-disposition, under which he was bound to relieve the purchaser of all public and parochial burdens payable out of the lands preceding the term of entry. *Held* that the seller was bound to relieve the purchaser of payment of "this reasonable sum," it being a burden payable out of the lands prior to the term of entry. *Currie* v. *Macgregors*, 1871, 9 S. L. R. 86.

347. Sale—Relief of Heritable Debts—Transfer of Personal Obligation.—Lands over which the proprietor had granted a bond and disposition in security, were sold by him to a party in consideration of a price paid, "and also in consideration of his freeing and relieving the seller of the heritable debts affecting the same." *Held* that this clause did not transfer to the creditor the personal obligation of the buyer. *Kippen* v. *Stewart*, 1852, 14 D. 533; 24 J. 263; 1 Stuart 495.

348. Sale—Reserved Right to Tenants—Right of Future Tenants.—Part of a barony having been sold, "reserving to the tenants of the whole barony the right of casting peats within D (the part sold), conform to use and wont," and such right having been all along enjoyed by the tenants, *held* that the reservation was available not only to the then but to the future tenants of the barony. *Dinwiddie* v. *Corrie*, 1821, 1 S. 164.

349. Sale—Right of Pre-Emption—Payment for Right—Repetition.—*Held* that a person who had purchased lands, in the titles of which there was a clause intended to give a right of pre-emption to the superior, and who, in order to get an entry, paid the superior a sum of money to pass from that right, was not entitled to repetition from the seller. *Perston* v. *M'Alister*, 1827, 5 S. 274.

350. Sale—Undisclosed Servitude—Right of Purchaser to have it Purged or to Resile.—*Held* that the seller of a piece of land within burgh must purge it within a reasonable time of a servitude against any breweries, foundries, etc., being erected on the premises, not appearing in the titles or on the records, but created by contract on his part, and which had not been made known to the purchaser at the time of purchase, or otherwise the purchaser would be free of the bargain. *Urquhart* v. *Haldane*, 1833, 11 S. 854; and 1835, 13 S. 844; 10 Fac. 619.

351. Sale—Right of Purchaser to Resile—Concealed Reservation in Seller's Title.—Two parties exchanged missives of sale of subjects without referring to any restrictions or conditions; and after an action had been brought by the seller for implement, it appeared that his title was subject to a reservation, in favour of the superior, of mines and minerals, and of power to make roads, etc., and to restrictions as to building. *Held*, on the assumption that the purchaser was ignorant of the reservations and conditions affecting the title at the date of the exchange of the missives, that the contract was not binding on him. *Robertson* v. *Rutherford*, 1841, 4 D. 121.

352. Sale—Right of Purchaser to Resile—Undisclosed Liability for Feu-Duty.—A party who had agreed to become the purchaser of a house at a certain price, and revised the draft of the disposition, afterwards discovered that the feu-duty was double the amount of what it appeared to be from certain accounts which had been rendered to him by the seller. *Held* that he was entitled to resile. *Clason* v. *Stewart*, 1844, 6 D. 1201; 16 J. 521.

353. Sale—Right of Seller to Resile—Completion of Contract.—A party who held an estate subject to a clause of pre-emption in favour of the superior, entered into a contract of sale of the estate by a mutual minute which was delivered to the purchaser, who thereupon paid part of the price. *Held*, in a question with the son of the deceased seller, (1) that the circumstance of the minute being in the possession of the purchaser was not relevant to infer an incomplete contract; and (2) that on the purchaser abandoning all claim of warrandice in the event of eviction by the superior, the son could not availably found on these clauses of pre-emption and warrandice, as indicating an undue advantage obtained by the purchaser. *Scotland* v. *Mercer*, 1813, 1 Dow 229.

354. Sale—Right of Seller to Resile—Acquiescence—Personal Bar.—A party sold a superiority to another, and after some difficulties had been started as to encumbrances, wrote to the purchaser, that if he would not take the titles as they stood, the transaction would be considered as broken off. On no answer being returned, he intimated that he held the bargain at an end; and the purchaser returned no answer to these letters for a considerable period, but ultimately raised an action for implement. *Held* that, by returning no answer, he must be presumed to have acquiesced in the transaction being broken off. *M'Neill* v. *Cameron*, 1830, 8 S. 362; 5 Fac. 305.

355. Sale—Sale by Heritable Creditor—Purchase by Creditor's Trustees.—An heritable creditor, with a power of sale, obtained judicial authority to sell the lands. On his death his trustees exposed and purchased them, and charged the debtor to subscribe a disposition in their favour. *Held* that the debtor was bound to do so, and that as the trustees offered to allow him to take the lands on payment of the price (which was inadequate to the payment of the debt), he could not object that they were both exposers and purchasers. *Maxwell* v. *Drummond's Trs.*, 1823, 2 S. 130.

356. Sale—Sale by Heritable Creditor—Purchase by Creditor.—*Held* that it is illegal for an heritable creditor to become purchaser of subjects sold by him under his bond. *Taylor* v. *Watson*, 1846, 8 D. 400; 18 J. 180.

357. Sale — Sale by Creditor — Absolute Disposition — Back Bond — Redemption.—An absolute disposition was granted to lands, bearing to be sold for a fair and adequate price then advanced. A back bond of same date allowed redemption of the lands within five years, on three months' premonition of the intention to redeem, but declaring specially that, if not redeemed within that period, the lands should be held irredeemably. Premonition was given, but at the end of the three months the price was not tendered, nor was anything done for nine years, when the seller brought a declarator of his right to redeem. *Held* that the lands were held irredeemably. *Boyd* v. *Steel*, 1775, 2 Pat. 368. Affg. M. 7221.

358. Sale—Sale by Creditor—Absolute Disposition.—A party who had granted an heritable bond, afterwards, on a further advance of money, executed a deed which, without prejudice to the bond and in security of the full sum, disponed the property, and also, as the full price of it, disponed it *simpliciter* with absolute warrandice as in a deed of sale. *Held* that it was to be construed as an absolute conveyance. *Hadden* v. *Weavers of Haddington*, 1814, Hume 159.

359. Sale — Sale by Creditor — Ex facie Security—Consent of Assignee of Reversionary Right—Expense of Clearing Title.—Objection to title in sale of heritage on the ground that the granter's title was one *ex facie* of security only, and that the consenter, though assignee of the reverser was not thereby vested in the right of reversion without dispositive words, *repelled*. There is no general rule that a purchaser of heritable subjects who states a plausible objection to the title offered to him is entitled to the expense of clearing the title. *Dundee Calendering Co.* v. *Duff*, 1869, 8 M. 289; 42 J. 125.

360. Sale—Sale by Private Act for Payment of Debts — Completion of Title — Sufficiency of Price.—Where authority is granted by a private Act of Parliament to sell an estate for payment of debts, and, on a sufficient sum being realised for payment of the debts, to grant warrant on a purchaser, the court will not grant it unless there be clear evidence that there is a sufficient fund to pay all the debts. *Gillies* v. *Scott*, 1829, 7 S. 839.

361. Sale — Sequestrated Estate — Purchase by Trustee—Bona fide Singular Successor.—*Held* that a challenge of a singular successor's right to lands, on the ground that they had been unlawfully bought by the trustee on a sequestrated estate of which they formed part, was excluded, in respect that the purchaser bought on the faith of the records, from which he could not discover the delinquency of his author. *Fraser* v. *Hankey & Co.*, 1847, 9 D. 415; 19 J. 164.

362. Sale — Sequestrated Estate — Warrandice—Repetition by Heritable Creditor—Subsidiary Liability of Trustee.—The trustee on a sequestrated estate sold a coal-field under articles of roup, by which he bound himself to exhibit to the purchaser a valid and sufficient progress of writs to the extent of a prescriptive title, and he thereafter granted a disposition, by which he bound himself in warrandice from fact and deed only. The purchase money was paid to an heritable creditor, who signed the disposition as a consenter; and it having been thereafter found that a part of the coal-field was not the property of the sequestrated estate, *held* in an action by the purchaser (1) that he was entitled to repetition of a proportion of the price corresponding to that part, although he could not restore the coal-field as he received it,

having partially wrought the coal in the belief that it was his own; (2) that as the sale had been truly made for the behoof of and the price received by the heritable creditor, he was liable in repetition; and (3) that the trustee was also liable, in so far as such proportion should not be recovered from the heritable creditor. *Bald* v. *Scott*, 1847, 10 D. 289; 20 J. 99.

363. Sale—Subject of Sale—Right of Reversion.—Circumstances in which it was *held* that the right of reversion to certain wadset lands, forming part of an estate sold by Act of Parliament, was not included in the sale. *York Buildings Co.* v. *Ferguson*, 1780, 2 Pat. 541.

364. Sale—Subject of Sale—Error in Extent of Subject—Obligation of Purchaser.—A party sold by auction, "all and haill the lands of North Craigend, consisting of ninety-four acres of land or thereby," and in fact there were only seventy-seven acres; but no fraud was alleged. *Held* that the purchaser must either abandon the subject altogether, or pay the full price. *Gray* v. *Hamilton*, 23 Jan. 1801, F. C.; M. "Sale" App. No. 2.

365. Sale—Subject of Sale—Slump Price—Error in Extent of Subject.—A proprietor advertised his estate for sale as "consisting of about 646 acres," and a party, after inspecting it by a skilled agent, having, without reference to the advertisement, offered a slump price, which was accepted, *held* not relevant, to obtain a deduction from the price, to allege that it consisted only of 605 acres. *Brown* v. *Kyd*, 1813, Hume 700.

366. Sale—Subject of Sale—Subject Burdened by Previous Contract—Knowledge of Purchaser.—A party sold the growing wood on his estate to A, who transferred the right to B. Three years afterwards, the estate, with the wood growing thereon, was sold to C, who knew of the sale of the wood. *Held* that C being in the knowledge of the sale of the wood, must be considered as having purchased subject to the burden of that contract. *Duff* v. *Brown, etc.*, 1817, 6 Pat. 332.

367. Sale—Subject of Sale—Eviction from Part of Subject—Liability of Seller.—A party sold growing wood to another, and thereafter sold the ground to a third person, without making any provision for the cutting of the wood; and the purchaser of the wood was prevented from cutting by an interdict at the instance of the purchaser of the ground. *Held* that the seller was liable in damages to the purchaser of the wood. *Welsh & Stewart* v. *Izat*, 1818, 1 Mur. 397.

368. Sale—Subject of Sale—Discrepancy of Title and Actual Boundary.—A party had right by succession to two contiguous estates, A and B, by separate titles holding of different superiors. 300 acres had, prior to his succession, been cut off from B by a dike, and thrown into A, but no alteration made on the titles. He thereafter sold A to one disponee, declaring the boundary between A and B to be the dike, but not disponing the 300 acres; and thereafter sold B to another disponee, as described in the former titles, and not excluding the 300 acres. *Held* that the 300 acres belonged to the disponee of B. *Livingstone* v. *Clark*, 1821, 1 S. 44.

369. Sale—Subject of Sale—Measurement—Acquiescence by Purchaser.—A property was sold by feu-contract, specifying the quantity and boundaries, and the purchaser bound himself to acquiesce in the measurement, be the same more or less. A demand for deduction of feu-duty, on the allegation that part of a road had by mistake been included within the measurement, *rejected*. *Harley* v. *Campbell*, 1822, 1 S. 238.

370. Sale—Subject of Sale—Slump Price—Eviction.—A purchaser of an estate at a slump price, without reference to rental or warrandice of measurement, and who was to satisfy himself as to the title, and was aware of the nature of the estate, *held* not entitled to repetition of part of the price in respect of eviction of a part of the estate, specified in a printed view, and of other parts not being productive of rent equal to that held forth. *Heddle* v. *Moncrieff*, 1823, 2 S. 350.

371. Sale—Subject of Sale—Right of Property or Servitude.—The proprietor of lands, bounded on one side by a river, disponed them in feu, with absolute warrandice, in lots for building a street, "with a proportional part of the water-side grass opposite the street" corresponding to the steading feued, which was declared to be a common property to the vassals of the street (with warrandice from fact and deed), "and declaring the lands above disponed to be holden in feu-farm, with all and sundry pertinents of the same." Infeftment was to be given in each steading, "with the pertinents," and there was no express reservation, except of such rights as effeired to the superiority of the lands. *Held* that the property of the *solum*, described as "the water-side grass," was conveyed to the feuars, and that their right was not limited to a servitude. *Wright* v. *Logan*, 1831, 5 W. & S. 452. Affg. 1829, 8 S. 247.

372. Sale—Subject of Sale—Superiority.—A piece of ground, of which certain portions had been feued, was sold by an heritable creditor, holding a disposition of the whole subject, under articles of roup which excepted the parts feued. *Held* that the purchaser did not acquire right to the superiority and feu-duties of the ground feued. *Moir* v. *Glen*, 1831, 9 S. 744.

373. Sale—Subject of Sale—Property or Servitude—Conveyance of "Shealings and Grassings."—A conveyance of certain high lands as the "shealings and grassings of A" *held* to be a conveyance of the lands in property. *Beaumont* v. *Lord Glenlyon*, 1843, 5 D. 1337; 15 J. 586.

374. Sale—Extent of Subject not Ascertained—Sale by Railway Company—Lands Clauses Act, 1845, s. 120.—*Question*, whether

a sale by a railway company of superfluous lands was effectual, the extent of the subject not being ascertained before the lapse of the time within which railway companies have power to sell under the Lands Clauses Consolidation Act, 1845, s. 120. *Caledonian Rly. Co.* v. *City of Glasgow Union Rly. Co.*, 1869, 7 M. 959 ; 41 J. 541.

375. Sale—Extent of Subject Sold—Competency of Interdicting Purchaser — Declarator.—*Held* that a proprietor who had sold one of two contiguous estates was entitled to interdict against the purchaser entering upon land alleged by the seller not to be included in the estate sold. *Observed*, that the proper mode of clearing up the dispute was by the purchaser bringing an action of declarator. *Matheson* v. *Stewart*, 1872, 10 M. 704 ; 44 J. 433.

376. Sale — Superiority and Political Interests — Competency — Valuation. — An action for the value of superiorities and the political interests connected with them, is competent, and the value is what they would have sold for at the date of the agreement to transfer them. *Graham* v. *Graham*, 1818, 2 Mur. 54.

377. Sale—Title—Disposition by Commissioners for Trustees. — *Held* to be no objection to a sale of lands, that the original title had been granted by commissioners for trustees who were appointed to sell lands, and for which purpose they were authorised to name commissioners. *Innes* v. *Reid's Trs.*, 1822, 1 S. 518.

378. Sale — Title — Disentailed Lands — Private Act.—An heir of entail in possession, whose right to the estate was challenged, obtained an Act of Parliament for exchanging part of the estate for fee-simple lands, belonging to him, which were to be entailed in place of them, declaring, however, that this should not make his right better, and that the other heirs should have no right to the lands disentailed, but only to those for which they were exchanged. *Held* that a purchaser of the disentailed lands could safely take a title from the heir in possession. *E. of Stair's Trs.* v. *Hamilton*, 1822, 2 S. 37.

379. Sale — Title — Description — Inconsistency. — Lands were purchased to make votes in the county of Stirling, and were described in the Crown charter as lying there, but, in the titles of the vassals, as within the county of Perth, by annexation, which, however, was only for the purpose of infeftment. *Found* that this was no objection to the sale. *Fleming* v. *Buchanan*, 1823, 2 S. 280.

380. Sale—Title—Title by Adjudication of Superiority and Feu-Duties Only.—It is no objection that the title of the seller (being a decreet of sale) adjudged not the lands (which were purchased with a view to making votes), but only the superiority and feu-duties. *Fleming* v. *Buchanan*, 1823, 2 S. 280.

381. Sale — Title — Disposition a non domino — Consent of True Owner. — *Held* that the consent of the true owner to a disposition, along with the disponer, is equivalent to an actual disposition by him. *Mounsay* v. *Maxwell*, 1808, Hume 237.

382. Sale — Title — Disposition a non domino—Consent of True Owner.—A party purchased property, under a declaration that he should not be entitled to withhold the price in respect of any defect in the progress of titles ; and one of the titles was a disposition by a daughter as fiar, while the parent (who was the true fiar) consented as liferentrix, and for all right, title, and interest in the subject ; and the daughter predeceased her. *Held* that as such conveyance would found an action of constitution and an adjudication in implement, the purchaser was not entitled to object. *Sorley's Trs.* v. *Grahame*, 1832, 10 S. 319.

383. Sale—Title—Tender of Title Pending Process. — A party brought an action against her agent who, eight years before, had bought a house for her which was burdened with an heritable debt without getting a title. The conclusion was for repetition of the price paid by her to her agent. *Held*, on the agent's tendering a title, that the pursuer under this form of summons could not insist on getting free from the contract, and that she was bound to take the title. *Brown* v. *Cheyne*, 1833, 11 S. 497.

384. Sale—Title—Liability of Seller for Expenses of Defending.—A party sold land to another, who, before getting a title, entered to possession ; whereupon the superior brought an action against both the seller and purchaser for an alleged violation of the feu-contract, from which they were assoilzied ; but the superior was not subjected in expenses. *Held*, in the special circumstances, that the purchaser was entitled to be relieved by the seller of the expenses incurred by him in the action. *St. Ann's Distillery Co.* v. *Douglas's Trs.*, 1834, 12 S. 407.

385. Sale—Title—Unexecuted Precept—Infeftment.—Under a disposition to trustees and their assignees, containing powers of sale, and an obligation to infeft the trustees or their assignees, and precept making up a feudal title, *held* that a conveyance of the unexecuted precept to a purchaser, who took infeftment under it, formed a good feudal title, and that a party purchasing from him could not object to pay the price. *Cockburn* v. *Cameron*, 1836, 14 S. 889 ; 11 Fac. 734.

386. Sale — Title — Disposition a me —Seller not Bound to Grant Disposition a me vel de me.—*Held* that (in the absence of express stipulation) the seller of an heritable subject is not bound to grant a disposition with a double manner of holding, but only such a disposition as will enable the purchaser to take his place ; and consequently that a purchaser's agent was not liable in damages for taking a disposition with an obligation to infeft only *a se*, and a procuratory of resignation, and no precept of sasine. *Miller* v. *Young*, 1843, 6 D. 149 ; 16 J. 115.

387. Sale—Title—Description—Discrepancy in Name of Lands.—An instrument of disentail described a part of the entailed estate as Achnasellach, whereas, in the entail and subsequent titles, it was called Auchinshelloch. A suspension of a threatened charge by a purchaser, on the ground of the discrepancy, *refused*. *Malcolm* v. *Campbell*, 1849, 11 D. 1261; 21 J. 501.

388. Sale — Title — Restriction in Use Omitted in Title—Bona fide Purchaser.—A piece of ground having been disponed, "for the use of a public school in all time coming," and a title made up omitting these words, *held* that a purchaser, who was aware of the original terms of the title, was not entitled to plead that he was a *bona fide* purchaser. *Mags. of Airdrie* v. *Smith*, 1850, 12 D. 1222; 22 J. 567.

389. Sale — Title — Flaw in Judicial Factor's Title — Right of Purchaser to Refuse Payment.—A judicial factor appointed on a trust-estate having sold part of the heritable estate, the purchaser brought a suspension of a threatened charge for the price, on the ground that in the petition for appointment of the factor, in the act and warrant in his favour, and in a petition by him for authority to make up titles, the date of the trust disposition was incorrectly stated; but as it appeared that the date of recording the disposition was correctly stated, and its provisions were recited in the petition for appointment, the court *held* that it was sufficiently identified, that the error in narrating its date might be corrected, and sisted procedure until the factor presented an incidental application for leave to correct the error; and on that being done, they refused the suspension, but found the purchaser entitled to expenses. *Hope* v. *Hamilton*, 1851, 13 D. 1268; 23 J. 594.

390. Singular Successor — Liability for Author's Personal Obligation — Implied Obligation.—A personal obligation undertaken by the proprietor of an estate in a matter relating to the interest of that estate, *found* effectual against his singular successor, who had come under no personal obligation in that character. *Watson & Stotts* v. *E. of Selkirk*, 20 Feb. 1817, F. C.

391. Singular Successor—Obligation to Grant Personal Bond—Personal Obligations or Real Burdens. — Although there be an obligation in a feu-disposition binding the disponee, his heirs and singular successors, to grant personal bond for performance of all the conditions of the grant within six months after acquiring the subjects, yet *held* that this was not effectual to compel a singular successor to grant bond in relation to obligations merely personal, but only as to those which were real burdens. *Tailors of Aberdeen* v. *Coutts*, 1837, 2 S. & M'L. 609; 1840, 1 Rob. 296. Affg. 1834, 13 S. 226.

392. Title—Barony Title—Specification of Lands—Valid Record of Sasine—Place of Recording.—A charter generally of all the temple lands in Scotland which had belonged to the preceptors of Torphichen, erected into a barony, but without any specification of the names of the lands, *held* to constitute an effectual feudal title. *Question*, whether sasine in a barony consisting of lands in different districts was validly recorded in the particular register in the place where infeftment was delivered, *quoad* lands not within that district. *Hill* v. *D. of Montrose*, 1828, 6 S. 1133.

393. Title—Bounding Title—Right to Servitude of Access Unmentioned.—A party *held* entitled to the benefit of a possessory judgment regarding a servitude of road to a plot of ground, though he had a bounding charter making no reference to such servitude, and containing no clause of parts and pertinents. *Liston* v. *Galloway*, 1835, 14 S. 97; 11 Fac. 75.

394. Title—Bounding Title—Solum of Loch—"Cum lacubus."—A conveyance to certain lands "*cum lacubus*," *held* to be a sufficient title to the *solum* of a loch, one side of which was bounded by the lands. *Baird* v. *Robertson*, 1836, 14 S. 396; 11 Fac. 319.

395. Title—Bounding Title—Property in Erection within Boundary by Statutory Body.—A was proprietor of land, bounded "on the south by the water of Tay." The trustees under an Act of Parliament, who were empowered to perform whatever operations on the banks of the river might be requisite for the maintenance of a bridge, formed an embankment extending into the river *ex adverso* of A's land. *Held* that it belonged to A, subject to the use of the trustees for their operations. *Fisher* v. *D. of Atholl's Trs.*, 1836, 14 S. 880.

396. Title—Bounding Title—Possession of Land outside Boundary—Seashore.—The rule applied that a party holding a bounding title cannot, by possession, acquire adjoining land in the face of his title. *Observed* that, if one of the boundaries in a bounding title be the seashore, a party may (if there be no interjected property) extend his boundary towards the sea. *Suttie* v. *Gordon*, 1837, 15 S. 1037. See *Berry* v. *Holden*, 1840, 3 D. 205. But if lands are described as lying within a parish, the owner cannot by possession acquire land outside the parish. *Gordon* v. *Grant*, 1850, 13 D. 1; 22 J. 171.

397. Title — Bounding Title — Construction—Ambiguity.—A proprietor of ground feued a specific portion of it, which in the feu-charter was described as bounded by a sea-wall dividing it from the sea-beach on the south, reserving liberty of quarrying in the beach "still belonging to me" between the portion feued and the river or estuary; and, on the feuar's death, his heir obtained an entry by precept of *clare*, in which the subjects were described as bounded "by the sea-wall which divides them from the sea-beach on the south," but it did not contain the reservation above mentioned. *Held*, in a

declarator at the instance of a singular successor of the feuar, raised more than forty years after the date of the precept, that he had no right of property in the ground or beach lying between the sea-wall and the estuary, and that if there had been any ambiguity in the precept of *clare*, it was competent to refer to the feu-charter to explain it. *Kerr* v. *Dickson*, 1842, 1 Bell 499. Affg. 3 D. 154; 16 Fac. 92.

398. Title—Bounding Title—Declarator of Servitude—Title to Sue.—*Held* that a bounding charter, without a clause of parts and pertinents, did not exclude the proprietor from pursuing a declarator of servitude over adjoining lands, in respect of alleged prescriptive possession. *Beaumont* v. *Lord Glenlyon*, 1843, 5 D. 1337; 15 J. 586.

399. Title—Bounding Title—Possession beyond Boundary.—A party with a bounding title *held* to have acquired no right to a piece of ground beyond his boundary, by the possession of a building upon it which had been unchallenged for more than forty years. *Mags. of St. Monance* v. *Mackie*, 1845, 7 D. 582; 17 J. 286.

400. Title—Bounding Title—Description—River Bank.—An action was raised against a contractor for rent of and damage done to a piece of ground between a river and a street running parallel thereto. In some of the pursuer's titles his property was described as bounded by "the highway on the shore of the river," but for forty years the terms used had been "the highway on the bank." *Held* that the title was a bounding one, which excluded property on the river side of the street; and action being laid entirely on a title of property, and not on a possessory title, *dismissed*. *Ewing* v. *York*, 1857, 20 D. 351; 30 J. 190.

401. Title—Charter under Great Seal—Omission of Essential Clause—Liability.—*Observed*, in the case of a charter under the Great Seal obtained upon the procuratory in a deed of entail, that a party who, by himself or his agent, takes a blundered charter from Chancery, is answerable, at least in all questions with third parties, for blunders by false translation, etc.; and *multo magis* where it is no case of blundered translation by the Clerk of Chancery, but a plain omission in the charter of an essential clause contained in the original deed. *Sir John A. Cathcart* v. *Maclaine*, 1846, 8 D. 970; 18 J. 491.

402. Title — Competing Titles — Infeftment—Prior Conveyance.—An infeftment does not afford a preferable title to property where the person infeft was aware of a conveyance of the same subject by his author, to another party prior to the disposition to him. *Lang* v. *Dixon*, 29 June 1813, F. C.

403. Title — Competing Titles — Infeftment—Latent Revocation—Conditio si sine liberis.—A party executed a *mortis causa* disposition of certain subjects in favour of a lady, reserving his liferent, and power to alter, sell, or burden the subjects. Thereafter he married her, and had a son by her, after whose birth he executed a second disposition, revoking his former deed, and disponing to her in liferent, and his son in fee. After his death, his widow was infeft on the first deed, the instrument of sasine which was recorded making no mention of the reserved power, and the wife granted heritable securities. The subjects were subsequently brought to a sale by an heritable creditor, and the price was claimed both by the creditor and by the son, who maintained that the fee of the subjects was in him, and that the securities granted by his mother were ineffectual. *Question*, whether the first deed fell by the subsequent birth of the son, as well as by the revocation in the subsequent and latent deed, and the recorded infeftment was unavailing to support the claim of the heritable creditor; or whether the latent deed could compete with the real right derived by the creditor from the widow, as appearing on the records to be absolute fiar. *Galloway* v. *Grant*, 1851, 13 D. 756; 23 J. 332.

404. Title—Competing Titles—Disposition by Heir of Entail Prior to Recording of Entail — Effect of Heritable Bond Granted by Purchaser. — The heir in possession of an estate under an entail which was not recorded, disponed the estate on 6th March 1820 to a purchaser, who was infeft on the 7th, and whose sasine was recorded on the 11th. On the 1st of the same month a substitute had presented a petition for warrant to record the entail, and on the 11th the court granted warrant, and the entail was on that day recorded. Thereafter the purchaser granted an heritable bond over the estate. In an action of reduction (1) of the titles of the purchaser, on the grounds of contravention of the entail, and of a fraudulent conspiracy between him and the seller to defeat the entail, and (2) of the heritable bond, on the ground that it was null, as flowing *a non habente potestatem*, *held* that the creditor having taken the bond from the party *ex facie*, infeft in fee-simple, could not be affected by the alleged fraud of the purchaser. *Williamson* v. *Sharpe*, 1851, 14 D. 127; 24 J. 54; 1 Stuart 105.

405. Title—Competing Titles—Onerous Preferred to Gratuitous Disponee.—The proprietor of a burgage tenement disponed one storey of it to a purchaser in 1792, and in 1793 disponed the whole gratuitously in favour of his wife, without excepting the storey previously disponed to purchaser. Infeftment passed in 1794 in favour of his wife, and in 1837 the heir of the purchaser was infeft. An action of removing having been raised by a singular successor of the wife, duly infeft, against the heir of the purchaser, it was *held* that the title of the heir of the purchaser was preferable as in right of an onerous disponee, while the original disposition by the common author to his wife was gratuitous. *Andersons* v. *Lows*, 1863, 2 M. 100; 36 J. 45.

406. Title — Destination — Erroneous Destination in Charter and Sasine.—By a

marriage-contract an estate was destined to a certain series of heirs. The charter granted, and sasine following thereon, contained a destination to a different series of heirs. *Held* that the charter and sasine were erroneous, as being disconform to the procuratory of resignation contained in the marriage-contract, and signature passed in the Exchequer thereupon; and that therefore the heir had right to make up titles to the estate in the same manner as if the charter and infeftment had not been expede. *Drummond* v. *Drummond*, 1797, 3 Pat. 557. Affg. M. 6936.

407. Title — Destination — Dispositive Clause Inconsistent with Procuratory of Resignation—Intention of Granter.—Where the description of heirs of a disponee was different in the procuratory of resignation from the description in the dispositive clause of a deed, *held* that the one was to be examined and explained by the other, and both taken together so as to collect the intention of the granter. *Halliday* v. *Maxwell*, 1802, 4 Pat. 346.

408. Title—Destination—Destination in Missives and in Minute of Sale—Inconsistency.—A party conveyed to trustees his estate, to be made over to particular heirs, in terms of a relative deed of entail, and also all the estates and effects he might subsequently acquire; and thereafter purchased an estate which, by the letters exchanged at the time, was to be disponed to himself and his heirs generally; but he afterwards took a minute of sale in favour of himself and the heirs of entail. *Held* that the heir of entail, and not the heir-at-law, had right to the new estate. *Ferguson* v. *Munro*, 1823, 1 Shaw's App. 394.

409. Title — Destination — Dispositive Clause Different from Procuratory of Resignation — Dispositive the Controlling Clause.—A clause in a procuratory of resignation "that the eldest son and the descendants of his body shall always succeed preferably to the younger sons and their descendants," *found* not to import an alteration nor qualification of a destination in the dispositive clause to heirs-male of the marriage, whom failing, heirs-male of any other marriage, whom failing, heirs-female of the marriage, so as to let in a daughter of the eldest son (his male issue failing), in preference to that eldest son's next brothers. *Graham* v. *Graham*, 1825, 1 W. & S. 353.

410. Title — Destination — Dispositive Clause Different from Procuratory of Resignation—Dispositive the Controlling Clause.—The destination in the dispositive clause and obligation to infeft in a deed of entail was to the institute and the "heirs-male of his body," whom failing, the "other heirs, etc., after specified"; but in the procuratory (which contained the whole nomination of heirs and provisions of entail, and which was stated to be for effectuating the above infeftment) the destination was to the heirs generally of the institute's body, whom failing, to certain substitutes and their heirs-male. *Held* that the dispositive was the controlling clause, and that an heir-male of a posterior substitute took before an heir-female of the body of the institute. *Young Forrester* v. *Hutchison*, 1826, 4 S. 824; 1 Fac. 765.

411. Title—Destination—Effect of Annulment of Author's Title.—The estates of a party having been forfeited during the reign of James VII., they were by the Crown gifted to a donatary, who reconveyed them to the forfeited party, and titles were made up by the forfeited person. *Held* that the Act Rescissory of 1690, c. 18, annulled not only the title of the donatary, but also the conveyance by him to the forfeited person. *Shaw Stewart* v. *Porterfield*, 1847, 9 D. 1527; 19 J. 679.

412. Title—Disposition—Back Bond—Disponee Uninfeft—Adjudication.—A party who obtained a disposition to lands, granted a back bond to the disponer, binding himself, before selling the property, to offer it to the superior at a specified price, and no infeftment was taken on the disposition. *Held*, in a question between the disponee's adjudging creditors and the disponer, that as the disponee's title was personal only, it was qualified by the back bond, and that the adjudication by the creditors attached his right, subject to the condition in the back bond. *Sir Robert Preston* v. *E. of Dundonald's Crs.*, 6 Mar. 1805, F. C.; M. "Personal and Real" App. No. 2.

413. Title—Disposition and Infeftment—Investiture of Partners.—A disposition and infeftment to A and the other partners of a company, *found* to be a valid investiture to A, so as to make a disposition by him, with concurrence of the other partners, good. *Denniston, M'Nayr, & Co.* v. *M'Farlane*, 16 Feb. 1808, F. C.; M. "Tack" App. No. 15.

414. Title—Gratuitous Disposition for Term of Years.—*Question*, if land be given gratuitously to a person for a term of years without mention of his heirs it transmits to them. *Hamilton* v. *M'Gie*, 1828, 6 S. 932.

415. Title—Disposition—Imperfect Conveyance — Entry in Rental-Books and County Register.—*Held* that a party had no valid right to a tenement which had been imperfectly conveyed to him, notwithstanding an entry of the disposition in the superior's rental-books, and the party having been enrolled as owner at the county registration. *Brown* v. *George*, 1842, 4 D. 746.

416. Title—Dispositive Clause and Inductive Clause Inconsistent—Effect.—An inductive clause of a disposition *held* not to control the dispositive clause, the two being inconsistent. *Chancellor* v. *Mosman*, 1872, 10 M. 995; 44 J. 557.

417. Title — Infeftment by Onerous Singular Successor—Subsequent Reduction of Author's Right.—An onerous singular successor is not affected by a latent and personal ground of challenge to which his author's right is subject.

A party in possession of an entailed estate,

granted to his wife, in implement of his marriage-contract, a liferent infeftment in an annuity. The entail was afterwards reduced as *ultra vires* of the maker. *Held* that the infeftment was nevertheless good, the granter's right being at the date, for anything that could be discovered from the record, subject to no challenge. *Stewart* v. *Heron*, 1749, 1 Pat. 432. Affg. M. 1749; Elc. "Fraud" No. 21.

418. Title—Jus accretionis.—A, who was infeft *a me* but unconfirmed, granted bonds to B and C. Both took sasine. C, whose bond was the later, got confirmation of his title. B then got confirmation of his own and A's title. *Held* this confirmation of A's title accresced to C's bond, and that as it had been first confirmed it was preferable to B's bond. *Henderson* v. *Campbell*, 5 July, 1821, F. C.; 1 S. 103; *Leslie* v. *M'Indoe's Trs.*, 1824, 3 S. 48.

419. Title — Jus accretionis — Bond of Annualrent by Next Heir of Entail—Subsequent Infeftment of Next Heir.—The heir of entail next entitled to succeed to an estate granted a bond of annualrent over the estate, bearing that it was granted with the consent of the heir in possession; but it was not signed by the latter, because (as explained in the testing-clause) he was about to execute a conveyance of his life interest to the next heir. After the creditor in the annualrent had taken infeftment, the conveyance was executed, and the next heir infeft upon it. *Held* that the infeftment of the next heir accresced to the infeftment of the creditor in the annualrent, which was thereby made effectual from its date. *Glassford's Exrs.* v. *Scott*, 1850, 12 D. 893; 22 J. 387.

420. Title—Jus accretionis—Disposition by Heir-Apparent.—*Held* that a disposition granted by an heir-apparent disponing lands "now as then," with authority to the disponee to make up titles, and with all right, title, and interest the disponer then had or might acquire, was validated *accretione* by her subsequent service and feudal investiture. *M'Gibbon* v. *M'Gibbon*, 1852, 14 D. 605; 24 J. 306; 1 Stuart 569.

421. Title — Jus accretionis — Mortis causa Settlement by Owner with Personal Title only—Subsequent Completion of Title by Feudal Tradition.—*Opinions* (1) that a *mortis causa* settlement of an estate, made by its owner while his title is only a personal one, is not extinguished by his afterwards completing his own prior title by feudal tradition; (2) that (the maker having died without revoking it) the *mortis causa* deed remained effectual as a disposition, and not merely as an obligation on the heir. *E. of Fife* v. *Duff*, 1863, 1 M. (H. L.) 19; 35 J. 424; 4 Macq. 469.

422. Title—Jus accretionis—Disposition as Heirs-Portioners by pro indiviso Proprietors without Valid Title—Completion of Title by Heir-at-Law.—A disposition was granted by A and B as heirs-portioners and *pro indiviso* proprietors of certain heritable subjects, in favour of B, whom failing, to her children equally amongst them. A and B were not truly heirs-portioners,—A having a right to two-thirds, as representing her father and an aunt, and B to one-third, as representing her mother, their sister, and neither having made up a valid title. B's eldest son and heir-at-law subsequently obtained from A a disposition of her part of the subjects in his own favour, and after B's death made up titles by serving himself heir to his grandmother (passing over B), and he also served A heir to her father and aunt. *Question*, whether the title made up in B's name accresced to the disponees under the joint disposition by A and B. *Gilmour* v. *Gilmour*, 1864, 2 M. 412; 36 J. 195.

423. Title — Jus accretionis — Impediment.—Where the granter of a disposition has at the time no right to the subject, but acquires a title subsequently, the disposition is validated by accretion. *Swans* v. *Western Bank*, 1866, 4 M. 663; 38 J. 346. But accretion is barred when there is a mid-impediment, *e.g.*, where a security is granted. *Munro* v. *Brodie*, 1844, 6 D. 1249; 16 J. 338.

424. Title—Jus accretionis — Personal Title.—Accretion operates to support a personal as well as a feudal title to lands. *Smith* v. *Wallace*, 1869, 8 M. 204; 42 J. 82.

425. Title—Jus accretionis—Precept by Uninfeft Trustees—Subsequent Infeftment of Assumed Trustees.—The infeftment of assumed trustees does not accresce to and validate precepts granted by the trustees by whom they were assumed, and none of whom were ever infeft. *Martin* v. *Wight*, 1841, 3 D. 485; 16 Fac. 478.

426. Title—Jus accretionis—Procuratory of Resignation by Uninfeft Granter—Subsequent Infeftment.—*Held* that a procuratory of resignation, the granter of which was not infeft, was, with the title made up on it, validated by the subsequent infeftment of the granter. *Innes* v. *Gordon*, 1844, 7 D. 141; 17 J. 64.

Where a superior got decree that he had the only good title to the superiority, *held* that this would draw back to validate a previous writ of *clare constat* granted by him and the vassal's infeftment on it. *Gibson Craig* v. *Cochrane*, 1841, 2 Robin. 446. Affg. 16 S. 1332; 13 Fac. 872.

427. Title — Jus accretionis — Superior and Vassal—Liferent Superior.—An infeftment on an assignation to the precept in a Crown charter conveyed by a trustee to his constituent does not accresce so as to validate a previous feu by a liferent superior consented to by the trustee (the fiar superior uninfeft). *Redfearn* v. *Maxwell*, 17 Mar. 1816, F. C. See also *Norton* v. *Anderson*, 6 July 1813, F. C.

428. Title—Objection by Representative of Granter—Personal Bar.—A party holding an express title to a feu sought to dispossess from a part thereof one who claimed right, and had had long possession under a

title which was inapplicable to the subjects, but had been intended to apply to them, and had been granted by a party who was represented by the pursuer. *Held* that the pursuer was bound to do whatever might be necessary to complete the defender's title; and was therefore not entitled, even assuming the subjects in dispute to be embraced in his title, to dispossess the defenders. *Burke & Carmichael* v. *Mackay*, 1865, 3 M. 799; 37 J. 374.

429. Title — Prescriptive Possession — Declarator—Form of Issue.—In a declarator of property in certain subjects by a party who produced as his title an infeftment on a precept of *clare constat* in 1712, and an infeftment on a precept of *clare constat* in 1828, the issue *adopted* by the court for trying the question of prescriptive possession was, whether the pursuer and his predecessors had, in virtue of the titles in process, for forty years and upwards prior to the commencement of the action, or for time immemorial, enjoyed the exclusive possession. *Christison* v. *Hope*, 1847, 10 D. 119; 20 J. 29.

430. Title — Reduction — Absolute Disposition—Act, 1696, c. 25.—A party disponed certain lands absolutely to his agent, in order, as he stated, to qualify him to vote in county elections, but, according to his agent, in payment *pro tanto* of sums due to him, equal to the value of the estate. No back letter had been granted. In a reduction of the disposition, brought after the disponee had been many years in possession, he pleaded the Act, 1696, c. 25. The reasons of reduction were *repelled*. *Douglas* v. *Dalrymple*, 1770, 2 Pat. 187.

431. Title—Reduction—Common Author.—Where the title of two parties is derived from one author, neither party can object to the right of the common author. *Livingston* v. *Warrock*, 1773, 6 Pat. 790. See *Irving* v. *Hyslop*, 1837, 15 S. 993; 12 Fac. 926.

432. Title—Reduction—Alleged Disposition a non domino — Mora — Failure of Proof.—A deed conveyed lands to a party and the heirs-male of his body, whom failing, to his nearest lawful heirs whatsoever. The property was purchased from an heir-male. In a question raised nearly half a century afterwards by the heir general, who alleged that the seller had been a bastard, *held* that the length of time and failure in the proof made the title unquestionable. *M'Callum* v. *Campbell*, 1798, 4 Pat. App. 32; 15 Nov. 1796.

433. Title — Reduction — Disposition a non domino—Rights of True Owner—Lapse of Time.—A person who was not heir-at-law made up titles as such, in 1764, to ground, and disponed it to a singular successor, who erected houses thereon. *Held*, in an action by the true heir-at-law, in 1795, that although he was entitled to have the titles set aside, and to the value of the area, he could not, owing to the lapse of time and the changes which had taken place on the ground, insist to have the area itself. *M'Nair* v. *Lord Cathcart*, 18 May 1802, F. C.; M. 12832.

434. Title—Reduction — Disposition by Heirs-Portioners — Gratuitous Disposition.—Two heirs-portioners granted a disposition (for a price) to one of them, whom failing, her children. *Held* that these children had right (their mother being dead) to sue a reduction of a gratuitous disposition subsequently granted by the other heir-portioner. *Gilmour* v. *Gilmour*, 1864, 2 M. 412; 36 J. 195.

435. Title — Reduction — Adverse Right Known to Purchaser.—The title of a purchaser infeft *reduced* in so far as adverse to the right of a beneficiary under a marriage-contract, on the ground that the purchaser, being aware of the marriage-contract, was not in *bona fide* in taking the conveyance. *Macgowan* v. *Robb*, 1864, 2 M. 943; 36 J. 472.

436. Title—Title by Private Statute—Reference to Charter for Description — Error in Reference to Date of Charter.—A private statute, declared certain subjects, as bounded and described in a charter dated the 20th day of March 1810, to be vested in trustees, with power to sell. The true date of the charter was 28th March 1810. The subjects having been sold by the trustees, suspension as of a threatened charge for the price, on the ground that the discrepancy between the dates rendered the title invalid, *refused*. *Hay & Others* v. *Laurie & Others*, 1853, 15 D. 554; 25 J. 323.

437. Title — Singular Successor — Contracts of Predecessor with Personal Title.—*Question*, whether a singular successor is bound by the contract of a party in possession on a personal title as to teinds. *Hill* v. *Walker*, 1823, S. (Teinds) 44.

438. Title—Singular Successor—Fraud of Author.—A singular successor infeft cannot be affected by the fraud of his author. *Elliot* v. *Wilson*, 1828, 3 W. & S. 60. Affg. 4 S. 429; 1 Fac. 329.

439. Title — Sufficient Title — Interdict.—A party *found* to have a sufficient title to a property to entitle him to a remit to the jury court to prove possession, in order to interdict another party from building on it. *Banks* v. *Innes*, 1830, 8 S. 489.

440. Title—Sufficient Title—Damage to Mill-Lead.—Title to a mill which *held* sufficient to support a claim for reparation on account of the destruction of the mill-lead, which passed through the property of another party. *Johnstone* v. *Scott*, 1834, 13 S. 717.

441. Title—Unfeudalised Title—Effect of Security Granted by Holder—Substitution of Creditor in Personal Right.—A party holding a personal right to lands in itself absolute, may grant a security which will validly affect that personal right, and may thus competently substitute the creditor for himself in the absolute right to the extent of the qualified or redeemable right held by the creditor.—Lord Fullerton in *Macgregor* v. *Macdonald*, 1843, 5 D. 888; 15 J. 9.

442. Completion of Title—Assignation of Unrecorded Conveyance — Heritable

Securities Act, 1845, s. 1.—*Held* that when a person holding an unrecorded conveyance to an heritable security assigns the same, the right of the assignee cannot be completed by merely recording the assignation in his own favour, the assigner not having had a real right (8 and 9 Vict. c. 31, s. 1). *Johnston* v. *Pettigrew*, 1867, 5 M. 903 ; 39 J. 499.

443. Completion of Title—Infeftment on Trust Disposition for Creditors—Radical Right.—An infeftment on a trust disposition for behoof of creditors does not divest the granter of the radical right, and his heir cannot complete his title by conveyance from the trustee. *Gilmour* v. *Gilmours*, 1873, 11 M. 853 ; 45 J. 521.

444. Completion of Title—Adjudication—Warrant to Infeft under Act 10 and 11 Vict. c. 48, s. 19.—In an adjudication in implement, where the heir to the subjects is unentered, the decree of adjudication may competently contain a warrant to infeft, under 10 and 11 Vict. c. 48, s. 19, but it is granted at the risk of the party asking it. *Liddle* v. *Thomson*, 1855, 18 D. 61 ; 28 J. 15.

445. Completion of Title—Base Infeftment—Effect of Infeftment under Prior Investiture.—A base infeftment was taken on a disposition containing procuratory and precept. *Held* that a title made up by the heir of the disponee under a former investiture was ineffectual to carry the property or mid-superiority. *Harvie* v. *Hamilton*, 29 Jan. 1822, F. C. ; 1 S. 277.

446. Completion of Title—Competition—A me Holding Unconfirmed—Subsequent de me Holding.—A sasine on a disposition containing only a holding *a me*, without confirmation, is unavailing in competition with a subsequent base infeftment. *Rowand* v. *Campbell*, 30 June 1824, F. C. ; 3 S. 196.

447. Completion of Title—Description of Subjects—Insufficient Description.—A party claimed to be enrolled as assignee to a charter of the lands of the earldom of Atholl, on a disposition of certain specified lands as parts of the earldom, and assignation to the open precept in the charter, on which infeftment was taken, as of the lands mentioned in the disposition. *Held* that the party was not entitled to be enrolled, in respect the charter did not contain a description sufficiently specific to certiorate the notary that the lands in which the infeftment was taken were truly those contained in the charter. *Belsches* v. *Stewart*, 21 Jan. 1815, F. C.

448. Completion of Title—Infeftment—Discontiguous Lands—Dispensation Clause.—*Held*, where parts of lands were conveyed by a party whose charter contained a dispensation clause, authorising infeftment to be taken for discontiguous lands on a part for the whole, that the benefit of this dispensation clause is not lost to the parts alienated when the conveyance is merely for life, to revert then to the granter, and that the infeftment in favour of the liferenter taken on part was good for the whole of the lands conveyed to him. *Ogilvie* v. *Skene & Hunter*, 1768, 2 Pat. 141. Revg. M. 8792. *Lyall* v. *Skene*, 1768, 2 Pat. 138.

449. Completion of Title—Infeftment—Dispensation Clause.—Terms of a dispensation clause in a charter which *held* sufficient to authorise infeftment at the place mentioned, for any part of the lands as well as for the whole. *Morehead* v. *Edmonstone*, 1791, 3 Pat. 199.

450. Completion of Title—Infeftment—Dispensation Clause — Barony Lands. — Although lands originally forming part of a barony (the charter of which contained a clause declaring that sasine on any part of the barony lands would be good for the whole) had been disponed in fee, and a charter as to them alone expede, which contained no such clause, yet *held* that a sasine taken on other lands forming part of the barony was good. *Brown* v. *Kyd*, 1813, Hume 717.

451. Completion of Title—Infeftment—Dispensation Clause — Barony Lands.— A clause of dispensation, permitting sasine to be taken *pro integris dict. terris aliisque*, is a sufficient warrant for infeftment upon a part, as well as upon the whole of the barony, and its effect does not cease as to those lands which are not alienated. *Montgomery* v. *Dalrymple*, 2 Mar. 1813, F. C.

452. Completion of Title—Infeftment—Dispensation Clause—Delivery.—A sasine of parts of a barony given at the mansion-house, not situated on the lands disponed, and by delivery of earth and stone stated to be of the lands disponed, *held* warranted by the usual clause of dispensation. *Dennistoun* v. *Campbell*, 7 July 1824, F. C. ; 3 S. 218.

453. Completion of Title—Dispensation Clause — Bond of Annuity. — A Crown charter of resignation to heirs of entail, with a clause of dispensation, for taking infeftment in diverse lands at the manor place, *held* to warrant a bond of annuity with a similar dispensation. *Wood's Trs.* v. *Ferrier*, 1834, 7 W. & S. 147. Affg. 10 S. 773.

454. Completion of Title—Infeftment—Contiguous Lands — Mode of Delivery.— Three parcels of land which were naturally contiguous, having one tenure, one superior, and one vassal, *held* to form one feudal tenement, and that infeftment of the whole might effectually be taken by delivery of earth and stone upon any one of them. *Grant* v. *Carrick & Co.*, 1837, 15 S. 563.

455. Completion of Title—Temple Lands — Evidence Necessary for Infeftment. — *Question* whether, under a charter of temple lands generally, the notary is entitled to give infeftment in particular lands, without evidence being adduced to him to show that these were temple lands, or included in the charter. *Hill* v. *D. of Montrose*, 1828, 6 S. 1133.

456. Completion of Title—Infeftment of Company—Heritable Bond—Feudal Right.

—A sasine in favour of R. M. & Company, on an heritable bond in their favour, *held* not to constitute a feudal right either in the company or in the individual partners, or in R. M. for behoof of the company. *Morison* v. *Miller*, 1818, Hume 720.

457. Completion of Title—Infeftment—Heritable Bond. — Sasine on an heritable bond for an annualrent payable out of lands, and precept to infeft therein, is good though there be no dispositive words in the bond. *Campbell* v. *Macdonald's Trs.*, 1829, 7 S. 826; 4 Fac. 1127.

458. Completion of Title — Heritable Bond — Infeftment in Security.—A party infeft upon a bond and disposition in security, granted by a proprietor who was infeft, but whose sasine was not recorded, executed an assignation of the bond; and the assignee completed his title by taking up an unexecuted precept of sasine for an irredeemable infeftment, contained in a prior disposition, by virtue of the assignation to writs, etc., inserted in successive submissions of the subjects, and infeft himself thereon in security, in terms of the bond and assignation. *Held* that this was a valid title. *Melvin* v. *Daker*, 1843, 5 D. 1217; 15 J. 498.

459. Completion of Title — Method of Completion — Conditional Institute. — *Opinion* as to the method in which a conditional institute should make up his title. *Colquhoun* v. *Colquhoun*, 1828, 7 S. 200; 4 Fac. 234. Remitted, 5 W. & S. 32. Adhered to, 9 S. 911; 6 Fac. 599.

460. Completion of Title—Infeftment—Joint Institutes — Substitution. — A trust disposition was granted to "A and B jointly, whom failing, to C, whom failing, to D." The precept directed sasine to be given "to A, B, C, and D, in the order above mentioned, or either of them who shall accept this trust," and the instrument of sasine was in the same terms. *Held* that the infeftment, "in the order above mentioned," was a good infeftment to those who were named in the first place as joint institutes. *Question*, whether the infeftment was valid so far as conceived in favour of C and D. *Paul* v. *Boyd*, 1833, 11 S. 292.

461. Completion of Title—Infeftment — Resignation or Confirmation — Unconfirmed Sasine.—A sasine was taken in virtue of a precept, proceeding on an obligation to infeft by two manners of holding, and that either by resignation or confirmation, but not *de me*, and the sasine was not confirmed. *Held* not to vest a real right. *Peebles* v. *Watson*, 1825, 4 S. 290; 1 Fac. 110.

462. Completion of Title—Infeftment—Precept by Divested Superior. — A party who had been superior of lands, having inadvertently granted a precept of *clare*, on which infeftment followed, after he was divested of the superiority, and the disponee infeft, *held* that the precept and infeftment thereon were not void. *Dickson* v. *Syme*, 24 Feb. 1801, F. C.; M. "Taillie" App. No. 7.

463. Completion of Title—Infeftment—General Precept — Particular Lands. — Under a precept to infeft in a barony designed by its general name, *held* competent to give infeftment in particular portions thereof, without evidence produced to the notary, and narrated in the instrument, to establish that these were truly parts of the barony. *Hill* v. *D. of Montrose*, 1833, 11 S. 958.

464. Completion of Title — Precept of Sasine — Unrecorded Infeftment.—A precept of sasine is not exhausted by an unrecorded infeftment, and therefore it is competent to take a second infeftment thereon. *Kibbles* v. *Stevenson*, 1830, 9 S. 233; 6 Fac. 157. *Fulton* v. *M'Allister*, 1831, 9 S. 442; 6 Fac. 314.

465. Completion of Title—Warrant to Infeft — Disconform to Sasine. — A party possessing, but not infeft, under an unlimited disposition containing a precept of sasine, executed a deed of entail. The first heir took infeftment under the unexecuted precept, and the fetters of the entail were repeated *verbatim* in the sasine. Objection, that the sasine was disconform to the warrant, *repelled*. *Lord Napier* v. *Livingston*, 1765, 2 Pat. 108. Affg. M. 15418, 15461.

466. Completion of Title—Warrant to Infeft—Crown Charter and Corroborative Disposition—49 Geo. III. c. 42, ss. 15 and 16.—A having disponed and assigned to B his personal right to certain lands under a Crown charter, subsequently granted a corroborative disposition and assignation to C, on the narrative that B had conveyed to a third party, and that after other transmissions the right, which had never been made real, vested in C, who had requested the corroborative deed to be granted in consequence of the loss of some of the writs constituting his progress. *Held* that the Crown charter and the corroborative disposition were a sufficient warrant for C's infeftment. *Observed*, that an extract of a charter from the Register of the Great Seal is a valid warrant for infeftment. *Mackenzie* v. *Munro*, 1869, 7 M. 676; 41 J. 374.

467. Completion of Title — Warrant to Register — Titles to Land Act, 1858 — Schedule.—A warrant to record a disposition to heritable subjects under the provisions of the Titles to Land Act, 1858, must contain the designation of the person on whose behalf the deed is to be registered, and (where not granted by the person himself) must also contain the designation of the party by whom granted. A warrant in the following terms—"Register on behalf of Matthew Pettigrew—William Maclean, agent,"—*held* not to be in compliance with the provisions of the Act, nor according to the form given in the schedule. *Johnston* v. *Pettigrew, etc.*, 1865, 3 M. 954; 37 J. 505.

468. Completion of Title—Infeftment—Second Infeftment on Same Precept.—The court, acting under an Act of Parliament for excambing two entailed estates which required

the titles to be approved by them, *sanctioned* a second infeftment taken on the same precept. *Moncrieff*, 1830, 8 S. 416.

469. Completion of Title—Infeftment—Sasine on Disposition and on Confirmation.—Although a disposition containing procuratory and precept, on which sasine is taken, be confirmed by a charter of confirmation and resignation, yet it is still competent to take sasine on the precept in that charter. *Stewart* v. *E. of Fife*, 1827, 5 S. 383 ; 2 Fac. 368.

470. Completion of Title—Precept by Uninfeft Trustees—Accretion.—A precept of *clare constat* granted by trustees not infeft is inept, and an infeftment in favour of trustees assumed by them and taken after their death, does not accresce to and validate the precept. *Martin* v. *Wight*, 1841, 3 D. 485 ; 16 Fac. 478.

471. Completion of Title—Infeftment—Right to Teinds—Assignation of Writs.—A right to teinds, contained in a disposition with precept, but not followed by infeftment, *found* to be conveyed with lands which were held by separate titles, though not expressly disponed in the disposition thereto, so as to entitle the disponee, in virtue of the general assignation of writs, to take infeftment on the unexecuted precept in the disposition of the teinds. *Mansfield* v. *Robertson*, 1835, 13 S. 832 ; 10 Fac. 595.

472. Completion of Title—Infeftment—Title to Reduce—General Conveyance—Assignation of Writs—Jus ad rem.—*Held* (1) that in order to reduce a prior infeftment by a person having an *ex facie* feudal title, the pursuer must libel a real right to the subjects, feudal or personal ; (2) that, without an assignation of writs, a general conveyance by one party in a marriage-contract does not carry a right to infeftment on a general conveyance to trustees under which that party is a beneficiary ; and (3) that such a conveyance in a marriage-contract only conveys a *jus ad rem*, and not a real right. *Smith* v. *Wallace*, 1869, 8 M. 204 ; 42 J. 82.

473. Warrandice — Action of Relief—Prior to Eviction.—Circumstances in which *held* that a purchaser was not bound to wait the result of an action against him as proprietor of the subjects sold, but was entitled at once to proceed with an action of relief against the seller, who did not admit his claim of relief. *Lord Melville* v. *Wemyss*, 1842, 4 D. 385.

474. Warrandice — Compulsory Sale — Assignation by Bondholder — Extent of Warrandice.—The fiar of an estate, with consent of the liferenters, granted two heritable securities. The first bondholder entered into possession under a decree of maills and duties directed against both the fiar and the liferenters. The second bondholder brought the estate to sale by public roup. *Held* that the first bondholder, on getting payment, was not bound to assign with any higher warrandice than that the amount of the bond was advanced by him at the date of the security, and that at the date of the assignation the same remained unpaid to the extent of the principal sum or interest assigned. *Russell & Others* v. *Mudie*, 1857, 20 D. 125 ; 30 J. 77.

475. Warrandice—Construction — Effect of Warrandice by Party not Disponing.—Construction of a clause of warrandice contained in a disposition of land (embracing a glebe eventually evicted), in a question with a party binding himself in that clause, but not being a disponer of the lands. *Ramsay* v. *Cunynghame*, 1830, 8 S. 399 ; 5 Fac. 328.

476. Warrandice—Disposition by Wife—Effect of Absolute Warrandice.—*Question* as to the effect of a clause of absolute warrandice inserted by a wife in a disposition of her property with consent of her husband. *Buchan* v. *Risk*, 1834, 12 S. 511 ; 9 Fac. 297.

477. Warrandice — Disposition — Assignation of Writs.—A party who held lands with the teinds (which had been conveyed to him with a warrandice right over other lands in case of augmentation of stipend) granted a disposition with the usual assignation of writs. *Held* that this assignation did not carry any right to the warrandice. *Hamilton* v. *Montgomery*, 1834, 12 S. 349 ; 9 Fac. 210.

478. Warrandice—Action for Peaceable Enjoyment or Damages—Proof of Eviction Necessary.—Where a summons concludes for peaceable enjoyment of lands sold under a warranty or damages in case of eviction the action is substantially on the warrandice, and, to succeed in the action, the pursuer must show that he has suffered eviction. *Gordon* v. *Hughes*, 1819, 1 Bligh 287. Revg. 15 June 1815, F. C.

479. Warrandice — Eviction Prior to Sale—Knowledge and Consent of Authors — Personal Bar. — Commissioners for the formation of a public street were by statute vested in property and authorised to divide it among themselves, whereupon a lot of land was conveyed to two of them with absolute warrandice. Prior to this the street had been formed and opened, and part of the lot had been cut off by a deviation in the line of the street. They sold the lot to a third party, and made over to him the clause of warrandice. In an action at his instance upon the warrandice, for the damage suffered in respect of the part cut off by the deviation, *held* that—as his authors would have been barred from suing such a claim, in respect that they were commissioners, and in the knowledge of the whole circumstances connected with the formation of the street, that the deviation was a matter of public notoriety, and that it was laid down in a plan referred to and made part of the conveyance—he was in no better position than his authors. *Richmond* v. *Graham*, 1850, 12 D. 1163 ; 22 J. 517.

480. Warrandice — Eviction — Date of Valuation for Purchaser's Claim.—*Question*, whether when the purchaser of an heritable subject is evicted therefrom, and its value at the date of eviction is less than at the date

of the sale, the purchaser's claim against the seller under the clause of warrandice is to be measured by the value at the date of eviction, or by the price which was paid. Special circumstances in which *held* that the purchaser was entitled to repetition of the price paid on accounting for the rents drawn by him during his possession. *Cairns* v. *Howden*, 1870, 9 M. 284; 43 J. 134.

481. Warrandice — Gratuitous mortis causa Deed—Absolute Warrandice Expressed.—Observations on the effect of absolute warrandice in a gratuitous *mortis causa* deed with reference to the disburdening of an estate of debts secured on it. *Coventry* v. *Coventry*, 1834, 12 S. 895; 9 Fac. 475.

482. Warrandice — Gratuitous Deed—Absolute Warrandice Expressed.—An express clause of absolute warrandice must be construed literally, and receive full effect, even in a gratuitous deed. *Macalister* v. *Macalister's Exrs.*, 1866, 4 M. 495; 38 J. 231.

483. Warrandice—Liability to Implement or Repay Price.—A seller *found* liable either to implement an obligation of warrandice and pay rents, or repay the price. *Crichton* v. *Gilbertson*, 1822, 1 S. 340.

484. Warrandice—Extent of Liability—Privilege of Taking Water in any Direction — Effect of Interdict. — A party who obtained from another the privilege of taking water in any direction he pleased, having been interdicted from carrying it in a particular line, *held* not entitled, under the warrandice, to damages. *Reid* v. *Shaw*, 1822, 1 S. 334.

485. Warrandice—Extent of Liability—Increase of Salary.—Warrandice against increase of schoolmaster's salary, contained in a contract in 1648, *held* to be limited to the amount of salary then allowed by law. *Dame Mary Elliot* v. *M. of Lothian*, 1824, 3 S. 348.

486. Warrandice—Extent of Liability—Glebe.—Lands having been evicted as glebe, *found* that the party warranting was liable for the value both of the land and of the trees. *Ramsay* v. *Cuninghame's Trs.*, 1832, 10 S. 745.

487. Warrandice — Over Feu-Duties.—*Question*, whether the seller of land is understood to warrant against feu-duties payable to an overlord. *Paton* v. *Stuart*, 1825, 3 S. 653.

488. Warrandice—Principal Obligation Ineffectual —Subsidiary Obligation.—The principal obligation in a deed being ineffectual, a subsidiary obligation, undertaken by another party in the same deed, to warrant implement of the principal obligation is ineffectual. *Hamilton* v. *Boswell*, 1720, Robert. 346.

489. Warrandice—Sale of Trust-Estate—Extent of Warrandice.—Trustees selling a trust-estate required to bind the truster in absolute warrandice, and themselves in warrandice from fact and deed. *Forbes's Trs.* v. *M'Intosh*, 1822, 1 S. 497.

490. Warrandice—Sale by Trustees for Creditors — Entailed Estate — Right of Recourse.—A party purchased part of an entailed estate sold under an Act of Parliament for payment of debts; and, in terms of an allocation, paid part of the price to trustees for creditors, who thereupon granted a discharge, binding the creditors in absolute warrandice, and obliging themselves (without specifying any particular time) to procure for them a ratification. The purchaser paid (also in terms of an allocation) the rest of the price to assignees of the heir in possession, an alleged creditor, acting partly for their own and partly for his behoof, who thereupon granted a discharge, with a clause of absolute warrandice by them personally. The trustees for the creditors did not give to the purchaser, till after the lapse of thirty-two years, a deed of ratification, and the lands were ultimately evicted from the purchaser. *Held*, in an action of relief under the warrandice, that the purchaser had no recourse against the trustees for creditors, but that the assignees of the heir of entail were liable in relief. *Blair* v. *E. of Galloway*, 1827, 6 S. 51; 3 Fac. 37.

491. Warrandice—Sale of Trust-Estate—Extent of Warrandice.—The private trustee of a party who was rendered bankrupt within sixty days of the trust conveyance, made a *bona fide* sale of trust heritage which was free of burden; but it was alleged that all the creditors did not concur in the trust, and the purchaser was offered warrandice against the truster absolutely, against the trustee from fact and deed, and against the creditors to the extent of the portions of the price drawn by them respectively. *Held* entitled to no other warrandice. *Read* v. *Storie*, 1831, 9 S. 925.

492. Warrandice — Trust-Estate — Eviction—Claim against Trust Funds.—A party conveyed lands by an irrevocable trust deed, creating interests distinct from his own, in favour of his wife and children. The trustees sold the lands, binding themselves in warrandice from fact and deed, and the truster in absolute warrandice. The lands were afterwards evicted from the purchasers, while the trustees held funds or property arising from the price of the lands. *Held* that the warrandice in the transaction gave the purchasers a claim against the trust funds remaining extant and unappropriated in the hands of the trustees. *Agnew's Trs.* v. *Macneill*, 1833, 11 S. 447.

PUBLIC AUTHORITIES PROTECTION

1. Excise Officer.—The Acts 23 Geo. III. c. 37 and 28 Geo. III. c. 37 (as to actions against excise officers) apply to Scotland, and protect officers in the execution of their duty from actions of damages; but do not apply to actions for the repetition of money illegally extorted. *Anderson & Co.* v. *Campbell*, 28 Feb. 1811, F. C.

2. Poor Law Amendment Act—Contract.—The limitation of actions on account of things done in the execution of the Poor Law Act *held* not to apply to cases on contract. *MacKay* v. *Beattie*, 1860, 22 D. 1486; 32 J. 677.

3. Poor Law Amendment Act—Irregular Procedure.—A firm was entered in the assessment roll for poor's rates. The sum was not paid and the collector erroneously disregarding the roll got a warrant for the incarceration of the partners. A partner having sued the collector for damages for illegal arrest, *held* that under the Poor Law Amendment Act (8 and 9 Vict. c. 83), s. 86, notice to the defender must be given one month before the action was raised (although the proceedings by the collector were irregular) and the action *dismissed* as notice had not been given. *Ferguson* v. *M'Ewan*, 1852, 14 D. 457; 24 J. 225; 1 Stuart 422. See *Russell* v. *Lang* (notice required under 1 and 2 Will. IV. c. 68), 1845, 7 D. 919; 17 J. 476. *Melvin* v. *Wilson* (Glasgow Police Act, 6 and 7 Vict. c. 99), 9 D. 1129; 19 J. 477.

4. Poor Law Amendment Act—Slander.—*Held* that an action of damages, libelling malice and want of probable cause against a committee of a parochial board for alleged slander contained in a report by them, was excluded by s. 86 of the Poor Law Amendment Act (8 and 9 Vict. c. 83), which enacts that "all actions on account of anything done in the execution of this Act" shall be commenced within three months, and that notice in writing shall be given to the defenders. *MacKay* v. *Chalmers*, 1859, 21 D. 443; 31 J. 243.

5. Road Surveyor — General Turnpike Act, 1831.—An action was brought against a road surveyor for damage received more than six months previously, due to his leaving stones unguarded on a road. He pleaded the statutory limitation of such actions. *Held* that the General Turnpike Act applied to faults of omission as well as of commission. *Held*, also, that a correspondence with reference to an agreement to refer the claim did not bar the defender from pleading the statutory limitation. *Dudgeon* v. *Robertson*, 1859, 21 D. 351; 31 J. 193.

6. Road Trustees. — Although a road statute provided that all actions for penalties and forfeitures, "or for any wrong done or injury suffered in any matter relative thereto," should be commenced within a year, *held* that this provision did not apply to an action for the value of ground illegally taken possession of by the road trustees. *Orr* v. *Hill*, 1841, 3 D. 1235; 16 Fac. 1308.

7. Road Trustees — General Statute Labour Road Act — Joint and Several Liability.—A summons, concluding against fifteen statute labour road trustees, as jointly and severally liable to the pursuer in damages for an injury caused through their negligence, was signeted, and was served on nine of the defenders, within six months of the occurrence of the injury, but was not served on the other defenders until the day after the six months had expired. *Held* that as the summons concluded against the defenders conjunctly and severally, and was laid upon a joint wrong, the action had been "commenced" within the six months as against all the defenders, and that none of them were entitled to have it dismissed in respect of the provision in the General Statute Labour Road Act, 8 and 9 Vict. c. 41, that any action for damages shall be commenced within six months after the injury suffered. *Swan* v. *Mackintosh*, 1867, 5 M. 599; 39 J. 299.

8. Road Trustees — General Turnpike Act, 1831.—*Held* that an action against road trustees, though purporting to be for the value of land, and damages for compulsory purchase and severance, was really for reparation and damages, and that consequently it was incompetent after the lapse of the six months specified in the General Turnpike Act, 1831 (1 and 2 Will. IV. c. 43), s. 118. *Stewart* v. *Banff County Road Trs.*, 1871, 8 S. L. R. 387. But see *Somerville* v. *Gordon*, 1842, 5 D. 383; 15 J. 171.

9. Summary Procedure Act—Irregular Procedure.—A complaint under the Summary Procedure Act (27 and 28 Vict. c. 53, s. 35) charged a contravention of the Day Trespass Act (2 and 3 Will. IV. c. 68), s. 11. On a deposition on oath by one witness to the truth of the charge a justice of peace, before the complaint was served, issued a warrant under which the accused were apprehended. In an action by the accused against the complainer's law agent and two of the police for damages for wrongous apprehension, *held* that though the proceedings were irregular there had not been such deviation from the statute as to deprive the defenders of the protection of s. 35 of the Summary Procedure Act, which requires that all actions arising out of proceedings under it shall be brought within two months, and the action *dismissed* as that period had elapsed. *Murray* v. *Allan*, 1872, 11 M. 147; 45 J. 88.

PUBLIC HEALTH

NUISANCE, see that title.

1. Drainage—Owners of Flatted Tenements—Local Act.—The provisions in s. 97 of the Edinburgh Police Act, 3 Geo. IV. c. 78, forbidding the proprietor of a flat to use, for the purposes of a water-closet, any drain leading into the common sewer under the ground-floor of a common tenement, without the consent of the proprietor of the ground-floor, remain in force, notwithstanding the Act, 2 Will. IV. c. 87. *Barclay* v. *Sharpe*, 1836, 14 S. 893; 11 Fac. 737.

2. Drainage—Powers of Police Commissioners—Decision not Reviewable in Court of Session. — *Held* that the Court of Session has no jurisdiction to judge of the necessity of drainage and other works undertaken by commissioners of police under the Police Improvement Act, 1862, 25 and 26 Vict. c. 101, by s. 397 of which an appeal to the

sheriff is allowed at the instance of the aggrieved party. The powers of the commissioners of police under the Act are not exhausted by their having given notice of their intention to execute certain works, and these being approved of. They may afterwards, on giving other notices, change the line of works, as may seem expedient. *Smeaton* v. *Commrs. of Police of St. Andrews*, 1865, 3 M. 816; 37 J. 422.

3. Drainage — Seller and Purchaser — Local Act.—Where the commissioners under the Edinburgh and Leith Sewerage Act, 1864, made a connection between their main drain and certain subjects which had been sold, but to which the purchaser had not entered, *held* that the cost thereof fell on the seller. *Currie* v. *M'Gregors*, 1871, 44 J. 68.

4. Drainage — Cost of New Sewers — Local Act.—The Edinburgh and Leith Sewerage Act of 1864 authorises the commissioners to levy an assessment in respect of the use of their sewers upon subjects built subsequently to the construction of these sewers. *Held* that it was reasonable to assess the owners of new buildings for the use of the sewers at the same rate as had been levied from owners for their construction. *Macknight* v. *Macgregors*, 1871, 10 M. 289; 44 J. 167.

5. Drainage—Interdict of Scheme.—A local authority under the Public Health Act having resolved to carry out a scheme of drainage, certain feuars petitioned the sheriff for interdict on the ground that the proposed plan of drainage would cause a nuisance and injuriously affect their property. *Held* that as the application was really an attempt to bring the resolution of the local authority under the review of the sheriff it had been rightly dismissed. *Question*, whether the court would interfere if it were relevantly alleged that the operations of the local authority would necessarily cause a nuisance. *Steel, etc.* v. *Commrs. of Police of Gourock*, 1872, 10 M. 954; 44 J. 526.

6. Drainage—Powers of Board of Supervision—Petition to Compel Local Authority.—*Held* that whenever a local authority "shall refuse or neglect" to construct the necessary system of drainage, the Board of Supervision has a right to present a petition to have them compelled to do so. On a petition and complaint by the Board of Supervision the court *sisted* procedure to allow a local authority reasonable time to discover the most suitable system of drainage and to have it executed. *Board of Supervision* v. *Local Authority of Montrose*, 1872, 11 M. 170; 45 J. 108.

7. Health, Board of—Liability.—During the prevalence of cholera, a quantity of rags were prevented by a board of health (but without authority of a magistrate) from being received into a paper mill within their parish, and were deposited by them in a field, and the owner refused to remove them. *Held* that the board were not liable in damages for the loss arising by exposure. *Davidson* v. *Glenny*, 1835; 13 S. 624.

8. Nuisances Removal Act, 1856—Concurrence of Procurator-Fiscal — Unwholesome Meat.—*Held* (1) that the concurrence of the procurator-fiscal is not necessary in a complaint under the Nuisances Removal Act, 1856; and (2) that the penalties of the Nuisances Removal Act are directed not only against the exposure for sale of meat unfit for human food, but also against keeping the same with the intent that it should be used for food. *Kennedy* v. *Cadenhead*, 1867, 6 M. 179 (J.); 40 J. 104; 5 Irv. 539.

9. Noxious Trade — Grinding Bones—Powers of Police Court.—The police act of a burgh authorised the police court to prohibit the "collecting, keeping, grinding, or using in any way" of bones, wherever it should be established before that court that such collecting, etc., was prejudicial to the health or comfort of the neighbourhood. A complaint was presented by the procurator-fiscal to the police court, under this statute, against the proprietor of a large chemical manufactory, who used bones in some of his operations. A note of suspension and interdict presented by him *passed* to try the question, whether the Act applied to an establishment like the one complained of, or only, as alleged, to dealers in bones. *Anderson & Co.* v. *Burnet*, 1849, 12 D. 131; 22 J. 5.

10. Overcrowding—Public Health Act, 1867—Landlord's Liabibity.—A landlord having let with a farm, *inter alia*, a cottage suitable for the occupation of six persons, into which his tenant put a hind whose family consisted of nine persons, the sheriff, upon a petition under s. 16, subsection (f) of the Public Health Act, 1867, at the instance of the local authority of the parish, convicted both the landlord and the tenant of overcrowding said cottage, and found them liable in the penalties provided. *Held*, in an appeal by the landlord, that the cottage being under the control of the tenant, the landlord was not the author of the nuisance, and could not as such be held responsible for the fault of his tenant. *Home* v. *Local Authority of Kelso*, 1876, 3 Coup. 239.

11. Removal of Offensive Matter—Powers of Commissioners.—*Held* that the powers given to commissioners of police to regulate the removal of offensive matter within burghs under the 145th section of the Police Act, 1862, apply only to removals from premises within, and not to the conveying of offensive matter through burghs. *Vert* v. *Richardson*, 1869, 7 M. 552; 41 J. 292; 1 Coup. 199.

12. Slaughter-Houses—Control of Magistrates—Outside Burgh.—*Held* that, under the Police Act, 3 and 4 Will. IV. c. 46, s. 112, the magistrates of a burgh were not entitled to prevent the erection of slaughter-houses beyond the statutory limits of the burgh. *Bowie* v. *Douglas*, 1845, 2 Broun 377.

13. Water Supply—General Police and Improvement Act, 1862 — Waterworks Clauses Act, 1847—Title to Sue.—An action was brought by inhabitants of a burgh against police commissioners, founded on allegations of insufficient water supply for domestic purposes, *dismissed* on the proof. *Opinions* as to their title to sue. *Murray* v. *Peterhead Police Commrs.*, 1867, 5 S. L. R. 104.

RAILWAY

See titles *Carriage, Compulsory Powers, Negligence, and Retention.*

1. Construction—Completion—Retention by Contractor—Unpaid Claims.—Contractors are not entitled to retain possession of a line certified to be ready for public traffic, or to prevent the opening of it, although certain operations under the contract were still unexecuted, and claims by them still unpaid. *Castle-Douglas & Dumfries Rly. Co.* v. *Lee & Co.*, 1859, 22 D. 18 ; 32 J. 12.

2. Construction — Siding — Level-Crossing — Private Level-Crossing Given by Agreement—Interference with.—*Held* that a railway company having by agreement given a level-crossing, along with a sum of money, to a proprietor whose lands were intersected by a branch line, were entitled to make a siding near the level-crossing, it being held proved, on the evidence, and after a remit to a man of skill, that the siding did not render the level-crossing either unsafe or materially inconvenient. *Bell's Trs.* v. *Edinburgh & Glasgow Rly. Co.*, 1867, 4 S. L. R. 13.

3. Fencing—Statutory Obligation—Title to Enforce—Reparation for Damage Caused by Failure—Title to Sue.—A Railway Act (5 and 6 Will. IV. c. 55) imposed upon the company an obligation to erect fences. *Held* (1) that these provisions are in favour only of the owners and occupiers of the lands intersected by the railway ; (2) a railway company is not liable in damages for the loss of the cattle straying upon the railway from a farm not immediately adjoining to it, but separated therefrom by other lands ; (3) that an enactment relative to fences upon railways, contained in an Act for the better regulation of railways, and "passed for the safety of the public," 5 and 6 Vict. c. 55, applies to the public travelling on the railways, and not to the public generally. *Monkland Rly. Co.* v. *Waddell*, 1861, 23 D. 1167 ; 33 J. 586.

4. Process—Agreement to Lease—Failure to Implement—Appointment of Judicial Factor—Competency.—A railway company executed a lease and deed of assignment of their line in favour of another company, and the lessees having refused to take possession, the court *refused* an application of the lessors for a judicial factor to manage their line, which continued in their own possession. *Barrhead Rly. Co.* v. *Caledonian Rly. Co.*, 1850, 12 D. 1014 ; 22 J. 419.

5. Process — Interdict — Construction — Contractor—Failure to Complete.—Circumstances in which the court *granted* warrant to inventory the materials, plant, etc., of a railway contractor, and to take possession and use them in completing the works ; and interdict against the contractor molesting or hindering the company in so doing. *Wilson* v. *Caledonian Rly. Co.*, 1860, 22 D. 697 ; 32 J. 268.

6. Process — Title to Sue — Projected Railway Company.—Where note of suspension and interdict had been presented in name of (among others) a projected railway company, which was not incorporated by Act of Parliament, and which had besides been dissolved, the court appointed the note to be amended by withdrawing the instance of the railway company. *Edinburgh & Perth Rly. Co.* v. *N. B. Rly. Co.*, 1846, 9 D. 307 ; 19 J. 104.

7. Process—Undue Preference—Summary Petition—Railway Clauses Consolidation (Scotland) Act, 1845—Railway and Canal Traffic Act, 1854.—Competency of petition against undue preference alleged to be in contravention of the Railway Clauses Consolidation (Scotland) Act, 1845, 8 and 9 Vict. c. 33, and the Railway and Canal Traffic Act, 1854 (17 and 18 Vict. c. 31). *Hosie* v. *Edinburgh & Glasgow Rly. Co.*, 1856, 19 D. 65 ; 29 J. 22.

8. Station — Joint Station — Agreement with Third Railway Company—Agreement for Use of Joint Station.—A terminal station was jointly possessed by two railway companies. One of them entered into an agreement with a third company, having a terminal station of its own, by which it was proposed to introduce its passenger traffic into the joint station, and with that view a junction of the two lines of railway was proceeded with. In an application for interdict at the instance of the company co-proprietor of the joint station against this agreement being carried into effect, *held* that this introduction at the threshold of the joint station of the traffic of a third railway, although for a short distance it passed along the line of one of the co-proprietors of that station, could not be considered as the introduction of traffic fairly communicated to that line, but was a colourable attempt to give the third company the use and benefit of the joint station, which a co-proprietor had a right to resist ; therefore interim interdict *granted*, and note *passed*. *Edinburgh & Glasgow Rly. Co., etc.* v. *N. B. Rly. Co.*, 1853, 16 D. 250 ; 26 J. 99.

9. Statute — Interpretation — Amalgamation with Canal Company—Right to Supply Water at or near—Right to Waste Water. — By the Act amalgamating the Edinburgh and Glasgow Railway Company and the Union Canal Company, the railway company were empowered to supply parties "at or near" the canal with water on certain conditions ; on the other hand, the Edinburgh Water Company had right to all the waste water which should flow over a certain weir. *Held*, on a construction of the statute, that the water company had a title to see that the provisions of the statute were exercised *bona*

fide, but that the railway company were entitled to supply a distillery situated at a distance of 700 yards from the canal with water. *Edinburgh Water Co.* v. *Edinburgh & Glasgow Rly. Co.*, 1859, 21 D. 1028 ; 31 J. 588.

10. Statute—Interpretation—Agreement by Railway Company for Lease of Line.—Note of suspension and interdict *passed* against the proceedings of a railway company who had agreed to lease their line to another railway company, and to allow the latter to work it, but who, on the alleged ground of illegality of this agreement, were proceeding to repudiate it, and to enter into a new agreement with a third company, who offered them higher terms. *London & N.-W. Rly. Co.* v. *Scottish Central Rly. Co.*, 1847, 10 D. 215 ; 20 J. 58.

11. Statute — Interpretation — Lease by One Company of Another's Line—Percentage on Amount Expended in Construction —Expenditure in Excess of Share Capital and Borrowing Power.—One railway company was bound by Act of Parliament to take on lease another line, paying as rent a percentage on the amount which should be fixed by their own engineer as having been actually expended on it. The sum he fixed exceeded the aggregate of the share capital and sums authorised by the lessors' Act to be borrowed. Objection by the lessees, that they were not bound to pay the percentage on the sum fixed, so far as in excess of that aggregate, *repelled*. *Stirling & Dunfermline Rly. Co.* v. *Edinburgh & Glasgow Rly. Co.*, 1857, 19 D. 598 ; 29 J. 277.

12. Statute—Interpretation—Power to Lease—Agreement Prior to Statute.—A railway company made an agreement with the promoters of a projected line, regarding the leasing of the line when completed by the promoters to the company. The promoters obtained an Act of Parliament which contained provisions as to the leasing of the line. *Held* (1) that a provision in the agreement between the parties, which was not incorporated in the Act, could not be founded on in an action to enforce the statutory obligation as to leasing ; and (2) that in terms of the Act the lease commenced whenever a portion of the line capable of being worked was completed. *Stirling & Dunfermline Rly. Co.* v. *Edinburgh & Glasgow Rly. Co.*, 1853, 15 D. (H. L.) 48 ; 25 J. 508 ; 2 Stuart 91.

13. Statute — Interpretation — Lease — Cost to be Ascertained by Remit—Statutory Referee.—In a Railway Leasing Act, it was provided that one company should take a lease of the works of the other, paying a percentage on the cost, "as the said amount shall be ascertained and fixed by A B." The one company, in an action to compel the other to take up the lease, was found entitled to decree, and the court remitted to A B to ascertain the cost. Objections having been stated to his report, *held* that he was not a mere reporter under the authority of the court, but a statutory referee, and that his report was final, and could not be examined. *Question*, whether the report of a statutory referee could be opened up, even if he went beyond his powers. *Stirling & Dunfermline Rly. Co.* v. *Edinburgh & Glasgow Rly. Co.*, 1856, 18 D. 1230 ; 28 J. 619.

14. Statute — Interpretation — Sale of Line to Company—Payment of Annuity—Possession without Conveyance—Obligation to Pay Annuity.—A statute authorised the sale of the Garnkirk Railway to the Caledonian Railway Company, and provided that, on the execution of the deed of conveyance, the latter should pay to the Garnkirk Company an annuity of 8 per cent., to enforce payment of which power was given to apply for the appointment of a judicial factor. The Caledonian having taking possession, and the annuity having fallen into arrear, the Garnkirk Company applied for a judicial factor. It was objected that this was incompetent, in respect that no deed of conveyance had been executed. The court *held* that the possession by the Caledonian Company was possession under the statute, and appointed the conveyance to be executed ; and in case of the arrears remaining unpaid, appointed a judicial factor. *Garnkirk Rly. Co.* v. *Caledonian Rly. Co.*, 1850, 12 D. 989 ; 22 J. 437.

15. Statute — Interpretation — Power to Borrow and Assign Property—Power to Sell.—Under a railway statute, power was given to borrow money and "to assign the property of the said company, and the rates arising, or to arise, by virtue of this Act, as a security for any such sum," and by the form of the deed "to assign unto" the lender "the said undertaking and all and singular the rates," etc., but there was no power to sell. *Held* that a creditor could not sell the railway or the rates, or the works and property connected with it. *Dundee Union Bank* v. *Dundee & Newtyle Rly. Co.*, 1844, 6 D. 521 ; 16 J. 237.

16. Statute—Interpretation—Protection of Owner of Ground Entered upon—Rights of Third Parties.—Terms of a private Railway Act, regulating the right of temporarily occupying ground for the purposes of the Act, which held to impose special restrictions for the protection of the owner and occupier of the ground entered upon, and to leave the common law rights of third parties untouched, either in point of enlargement or diminution. *Donald* v. *Humphrey*, 1839, 1 D. 1184 ; 14 Fac. 1206.

17. Statute—Power to Make Railway—Right of Third Party to Enforce—Dissolution—Application to Parliament—Interdict.—A railway company cannot be interdicted from applying to Parliament to dissolve the company ; nor can a party not a shareholder, whose lands would have been intersected by the proposed line, obtain an interdict against the repayment of calls, or insist that the private statute incorporating the company, and enabling them to make their railway, is to be taken as a contract between them and him, of which he is entitled to enforce implement by compelling them to construct the projected

line. *Sir Wyndham Anstruther* v. *East of Fife Rly. Co.*, 1852, 24 J. 419; 1 Stuart 691; 1 Macq. 98. Affg. 12 D. 127; 22 J. 3.

18. Statute — Interpretation — Tonnage Duty.—Under a Railway Act a party was entitled, as part of the compensation for passing through his lands, to "the sum of one halfpenny per ton upon all goods or articles upon which a tonnage duty is chargeable, or charged in virtue of this Act." *Held* that this applied to tonnage duty chargeable on carriages conveying passengers. *Wauchope* v. *Edinburgh & Dalkeith Rly. Co.*, 1842, 1 Bell 252. Affg. 16 S. 227.

19. Statutory Powers—Lease Contracted under Statutory Powers—Statutory Force.—A railway lease entered into under powers in an Act of Parliament has not statutory force. *Finnie* v. *Glasgow & S.-W. Rly. Co.*, 1857, 20 D. (H. L.) 2; 3 Macq. 75; 29 J. 537.

RECOMPENSE

Arbiter's Fee, see title *Arbitration* (*Remuneration*).

Commission of Mercantile Agent, see title *Agency*, Part II. (*Commission*).

Factor's Fee, see title *Agency*, Part II. (*Factor*).

Meliorations, 2–12; and see titles *Landlord and Tenant* and *Bona Fides*.

Quantum Meruit, 13–27.

Remuneration of Law Agent, see title *Agency*, Part I. (*Remuneration*).

Remuneration of Partner, see title *Partnership*.

1. Advances—Common Object—Relief.—*Observed*, that when parties are engaged mutually in promoting an object of common interest, and the expenses entailed in furthering that object are thrown on one of the parties, then, when that expenditure fails of obtaining the end aimed at, the party-disburser must be recompensed, as being the disburser for a common object. *Dobie* v. *Lauder's Trs.*, 1873, 11 M. 749; 45 J. 455.

2. Meliorations — Commonty—Division.—In a division of commonty, a proprietor who has encroached on a common by cultivating in various parts thereof, is not entitled to compensation, though it is reasonable that where land so improved falls within the portion allotted to him in a division, he should get it at its unimproved value. *Innes* v. *Hepburn*, 1859, 21 D. 832; 31 J. 463.

3. Meliorations—Person lucratus—Payment of Heritable Debts—Invalid Title.—A bank, on the faith of the validity of a title to an estate, obtained from the disponee a conveyance of it. It paid heritable debts, and relieved the disponee of other debts contracted by the granter. The title of the disponee was set aside on the incapacity of the granter, whereby the conveyance to the bank fell. *Held* that the bank was entitled, in an accounting with the pursuer, to take credit for the above debts. *Anderson* v. *Blair*, 1841, 3 D. 968.

4. Meliorations—Person lucratus—Possession bona fide by Purchaser under Sale afterwards Reduced — Building and Planting — Completion of Title. — The common agent in a ranking and sale purchased the estate at the judicial sale, made up a title, and possessed for thirteen years, in the course of which he expended considerable sums in planting, and in building a mansion-house. The purchase having been reduced, *held* that, before reconveying, the common agent was entitled to reclaim the purchase money, the expense of making up his title, and of the planting and mansion-house—these items of expenditure having been beneficial for the estate. *York Buildings Co.* v. *Mackenzie*, 1795, 3 Pat. 378; 1797, 3 Pat. 579. See also 1 Macq. 481, note. See also *Beattie* v. *Lord Napier*, 1831, 9 S. 639.

5. Meliorations—Person lucratus—Possession without Title—Acquiescence—Resumption by Proprietor.—Settlers in a village had, with the acquiescence of the proprietor, been in the practice of selling, conveying, and granting securities on the houses erected by them, without having any written titles. *Held* that the proprietor, having taken possession of several of the houses, was liable to pay the value of them. *Clark* v. *Brodie*, and *Mackay* v. *Brodie*, 1801, Hume 548, 549.

6. Meliorations — Person lucratus — Obligation Fulfilled in Unnecessarily Expensive Way — Acquiescence.—A tenant became bound to construct an embankment in a sufficient manner, at least equal to one previously on the farm. He erected one of a much more costly, and, he alleged, more substantial description. During the progress of the work he applied to the landlord for assistance, who replied that he did not object to the principle on which aid was asked, but refused to condescend upon a precise sum until the work was completed. In an action concluding for the difference between the cost of the original embankment and of the new one, *held* (1) that the letter of the landlord constituted no obligation to relieve the tenant of any part of his outlay; (2) that in such circumstances there was no claim for recompense at the instance of the tenant. *Grant* v. *Macleod*, 1856, 19 D. 127; 29 J. 61.

7. Meliorations—Person lucratus — Expenditure on Property by Parent Living in Family with Proprietor.—A mother had expended funds of her own in improving heritable property belonging to her son, a pupil without tutors, residing in family with her, and occupying the property. In an accounting for the rents of the heritable subjects at the instance of the son against the representatives of his mother's second husband, who had continued the management of the son's property, *held* that these representatives were

entitled to credit for the improvements to the extent to which the son was *lucratus* thereby. *Paterson* v. *Greig*, 1862, 24 D. 1370; 34 J. 692.

8. Meliorations—Person lucratus—Illegal Purchase by Trustee under Error—Heir.—A trustee, in the *bona fide* belief that he was entitled to alter the directions of the truster, purchased with the trust funds (taking the title in his own name) a landed estate of a different description from that directed by the trust deed to be purchased and entailed on himself and a series of heirs. The trustee then laid out a large sum of his own private money in improving the property. After his death it was held that he had no power to alter the trust directions, and a separation of the estates was ordered. The then heir of entail under the trust claimed the estate so purchased, without giving credit to the representatives of the trustee for the money expended on improvements. *Held* that he was not entitled to demand from the trustee's representatives a conveyance, except on condition of giving credit for the whole purchase money and cost of improvements; but that as the purchase was not in accordance with the directions of the truster, he was entitled, if he chose, to the purchase money, with interest. *Douglas* v. *Douglas's Trs.*, 1864, 2 M. 1380; 36 J. 697.

9. Meliorations — Person lucratus—Expenditure Induced by Fraud of Proprietor's Agent.—A was induced by the representations of C to enter into a partnership with B, believing him to be the proprietor of certain works. D, for whom C was general agent, was in reality the proprietor of the subjects. *Held* that A, who had *in bona fide* expended certain sums upon the property, was entitled to recover them from D to the extent to which he was *lucratus* thereby. *Duff, Ross, & Co.* v. *Kippen*, 1871, 8 S. L. R. 299.

10. Meliorations—Person lucratus—Repairs to House by Previous Owner—Heir.—A woman, imbecile from old age and paralysis, lived in a house belonging to herself, with her daughter, who managed her affairs. The daughter employed tradesmen to execute extensive but necessary repairs upon the house. In an action brought after the mother's death by the tradesmen for payment of the accounts against the mother's heir-at-law, *held* that the heir was liable in so far as he had been *lucratus* by the repairs. *Fernie* v. *Robertson*, 1871, 9 M. 437; 43 J. 210.

11. Meliorations — Possession mala fide —No Recompense.—Where a party has held possession of a property *mala fide*, he is not entitled to recompense for meliorations from the true owner evicting the subject from him. *Barbour* v. *Halliday*, 1840, 2 D. 1279; 15 Fac. 1394.

12. Meliorations — Possession mala fide —Right to Remove Improvements.—*Question*, whether a *mala fide* possessor, not being entitled to be recompensed for the value of a house built on the property of another, be entitled to remove the house. *Barbour* v. *Halliday*, 1840, 2 D. 1279; 15 Fac. 1394.

13. Quantum meruit—Circumstances.—A sum of money found due to a party who had come from America to this country to manage a business, in which he was occupied for a considerable time. *Sharp* v. *Pollock's Trs.*, 1822, 1 S. 339.

14. Quantum meruit—Contract—Departure from Terms of Contract.—Although there was a written contract limiting the recompense to £148, circumstances in which, the stipulations of the contract having been departed from, the jury found the pursuer entitled to £250 for work and labour done. *Smaill* v. *Potts*, 1847, 9 D. 1043; 19 J. 670.

15. Quantum meruit — Contract not Fixing Remuneration—Horse Appraiser.—Circumstances in which a horse appraiser, who had made no stipulation as to his remuneration, was *found* entitled to a commission of 2 per cent. besides travelling charges, on the aggregate value of horses appraised by him. *Laing* v. *Johnstone*, 1839, M'F. 263.

16. Quantum meruit—Contract not Fixing Remuneration—Issue.—Form of issue in an action by a person who had given tuition to children under an arrangement by which the terms of remuneration alone were left not fixed. *Hardinge* v. *Clark*, 1856, 18 D. 612; 28 J. 257.

17. Quantum meruit—Contract not Fixing Remuneration — Mineral Searcher — Outlays.—A party sued an ironmaster for salary, or remuneration for services rendered as a mineral searcher, at the rate of £75 per annum, and £25 per annum for travelling expenses. *Held* (1) that there being no evidence of any agreement as to the rate of payment, the services must be remunerated on the principle of *quantum meruit*, and, in the circumstances, payment at the rate of £50 per annum held sufficient; (2) that the principle of *quantum meruit* could not be applied to expenses, which must be paid for according to the amount actually disbursed. *Pinkerton* v. *Addie*, 1864, 2 M. 1271; 36 J. 635.

18. Quantum meruit—Implied Contract —Employment—Division of Commonty—Joint and Several Liability.—A land surveyor who was, on application of parties in a process of division of a commonty, employed to survey, make plans, and lay off the ground, *held* entitled to payment of his account from any of the parties applying for his appointment *in solidum*, and that decree might be pronounced in the process. *Wilson*, 10 July 1813, F. C.

19. Quantum meruit—Extra Services—Fixed Remuneration — Factor. — A factor, acting under factories renewed from time to time, received an annual salary, which was converted into a bond of annuity for life for £100, whether the factor remained in the service or not. Annual accounts were given in, including the salary, and discharges

mutually granted, without any other claim being made. *Held* that the factor could not claim remuneration for extra services. *Rose* v. *E. of Fife*, 1803, 1806, 5 Pat. 115.

20. Quantum meruit—Extra Services—Circumstances.—Circumstances in which it was *held* that there was not sufficient evidence of a claim made against the trustees of a defunct for recompense on account of labour, over and above wages, paid during the life of the deceased. *Arrol* v. *Spaden*, 1821, 1 Shaw's App. 164.

21. Quantum meruit—Extra Services—Work not Ordered.—In an action by an accountant for his account against a law agent, who admitted employment to a limited extent, *held* that the accountant had gone beyond his duty in preparing states which he was not asked to prepare, that he had failed to instruct employment to the extent and effect libelled, and therefore was entitled to recompense only for the admitted work. *Scott* v. *Marshall*, 1847, 10 D. 226; 20 J. 65.

22. Quantum meruit — Services Given under Erroneous Belief.—Circumstances in which one of four joint-lessees of a farm, who took the entire management of it, *held* entitled, in the absence of stipulation, to remuneration for his trouble—the principal specialty being that he erroneously, but in *bona fide*, believed that he had made an arrangement with the others by which the farm was to be his alone. *Anderson* v. *Anderson*, 1869, 8 M. 157; 42 J. 70.

23. Quantum meruit—Service whether Gratuitous or not — Architect. — Circumstances where it was *held* that an architect had not agreed to act gratuitously in superintending the building of houses, and a *quantum meruit* awarded. *Donaldson* v. *Ewing*, 1821, 2 Mur. 406.

24. Quantum meruit—Service whether Gratuitous or not—Clerk to Militia Association.—A person acted for eight years as clerk to a militia association, the duties of which he performed at his bye hours, without any stipulation as to salary, or any demand therefor; and his predecessor had, in like manner, drawn no salary, but received a "donation" on quitting the office. *Held* that the service was gratuitous, and no salary was due. *Carmichael* v. *Millar*, 1830, 8 S. 783.

25. Quantum meruit—Service whether Gratuitous or not—Secretary to Investigation Committee—Outlays.—A committee of a joint stock company was appointed to make an investigation for behoof of the company, and one of their number, a writer to the signet, acted as their clerk, but did not stipulate for remuneration. *Held* not entitled to make a charge for his time and trouble, but entitled to reimbursement of his outlay, besides a charge for making copies, in his own chambers, of the proceedings of the committee for their behoof. *Duncan* v. *Union Canal Co.*, 1831, 9 S. 398.

26. Quantum meruit—Service whether Gratuitous or not—Relative with whom Children Lived.—Circumstances where remuneration awarded to an aunt, with whom children had lived when attending school. *Smellie* v. *Gillespie*, 1835, 13 S. 700.

27. Quantum meruit—Use of Articles.—A party who erected hustings to be used at the nomination of a member to serve in Parliament, raised an action for the expense against the agents of the sole candidate, known at the time they were erected as his employer, and against the mover and seconder of a candidate who, without his consent, was proposed by them on the hustings, as having used and taken the benefit of them. *Held* that the agent, as employer, was liable for the full amount, reserving any relief competent against the other parties; but these parties assoilzied. *Ellis* v. *Fraser*, 1840, 3 D. 264; 16 Fac. 271.

RELIEF

Bill of Exchange, see that title.
Cautioners, see title *Caution*.
Heir and Executor, Incidence of Debt, see title *Succession*.
Teinds, see title *Church*.
Trustees, see title *Trust*.

1. Aliment—Bastard—Sums Expended in Maintenance by Maternal Grandmother—Relief against Father.—A man, on the birth of a natural child, went to Jamaica, where he died after the lapse of twelve years. The child had in the meantime resided with and been supported by its maternal grandmother for eleven years. *Held* that she was entitled to payment from the father's executors of £10 annually for the eleven years. *Macdowall* v. *M'Lurg*, 19 Feb. 1807, F. C.; M. "Prescription" App. No. 6.

2. Arbitration—Payment by one Party of Sum to Arbiter as Fee—Relief against other Party.—At the close of a reference, one of the parties paid a fee to the arbiter, which was reasonable in amount, and was said to have been paid in circumstances which implied acquiescence by the other party in the payment. *Held* that the first party was entitled to relief, to the extent of one-half of the fee, from the second. *Edinburgh Oil-Gas Light Co.* v. *Clyne's Trs.*, 1835, 13 S. 414. See 2 S. & M'L. 243.

3. Arbitration — Reference — Fee to Referees and Clerk — Payment by one Party — Relief against the Other. — A landlord and tenant agreed to refer to two engineers the adjustment of the terms of a lease of coal. The engineers pronounced a decree-arbitral adjusting the terms of the lease. The clerk to the reference refused to give up the decree until an account was paid, which included a reasonable remuneration to the referees and himself; and one of the parties paid it. *Held* that the party paying

was entitled to relief against the other, to the extent of one-half of the total sum paid under deduction of the expense applicable to proceedings on the part of the referees on the application of the first party, which proceedings were irregular and premature. *Jolly* v. *Young*, 1834, 13 S. 188; 10 Fac. 130. See also *Henderson* v. *Paul*, 1867, 5 M. 628; 39 J. 307.

4. Bank — Credit of Sums Lodged by Tutor to Private Account — Payment to Ward—Relief against Tutor's Representatives.—A tutor to certain children transmitted sums of money to a banker to be deposited in name of the children. The banker, however, placed them to the credit of the tutor's private account. The banker having been compelled to pay the sums to the children, *held* entitled to relief against the representatives of the tutor. *M'Kenzie* v. *M'Leod*, 1821, 1 S. 193.

5. Bankruptcy—Business Carried on by Creditors — Loss — Advance by Trustee—Relief against other Creditors.—Creditors on the sequestrated estate of a coalmaster continued to work the pits, and loss was sustained. The trustee (who was also a creditor) made advances to the estate. *Held* that he was entitled to relief from the other creditors *minus* the proportion of the loss corresponding to the sum for which he was ranked. *Wilson* v. *Mags. of Dunfermline*, 1822, 1 S. 417.

6. Bond of Relief—To One of Two Co-Obligants who had Granted Letter of Relief to the Other—Liability of Granter of Bond who was Ignorant of Letter.—A and B were jointly and severally liable under a bond. A granted a letter of relief to B. C, who was unaware of the letter granted by A to B, granted a letter to A, binding himself to relieve him of one-half of his obligation. A thereafter paid up the sum due under the bond. *Held* that A was entitled to relief against C as if B had remained liable, *i.e.* to one-fourth of the whole sum due. *Wingate* v. *Martin*, 1829, 8 S. 185.

7. Bond of Relief—Bill of Exchange—Joint Acceptors—Bond by one Acceptor in Favour of the Other—Sexennial Prescription.—A joint acceptor of a bill holding a letter of relief from two co-acceptors, retired it in part, and received two other bills from them for the amount so paid by him. *Held*, in an action at his instance, founded both on the letter of relief and these bills, that his claim was not barred by the sexennial prescription, or the vitiation of one of these bills. *Souter's Reps.* v. *Souter*, 1827, 5 S. 876; 2 Fac. 579.

8. Bond of Relief — Co-Obligants—Exchequer Bond.—Two of three joint obligants in a bond to Exchequer granted a letter to the third, binding themselves to pay up the bond at the stipulated terms, and bearing that it was for the accommodation of one of them; and this one became bankrupt. Decree of relief given against the other. *Morrison* v. *Balfour*, 1822, 1 S. 525.

9. Bond of Relief by one Co-Cautioner to Another — Composition-Contract — Construction.—A, a cautioner in a cash-credit bond for behoof of his brother granted an obligation of relief to B, a co-cautioner. The principal debtor also assigned certain subjects in security to all the cautioners, and then became bankrupt. He offered a composition, and A granted an obligation to pay the difference between the composition and twenty shillings in the pound. This offer was accepted by the creditors including B, under reservation "of all other separate securities held by us for our respective debts." *Held* that A was liable to B in the above difference on the latter's whole obligation to the bank and not on that obligation under deduction of the security. *Graham* v. *Dunlop*, 1838, 1 D. 167.

10. Bond of Relief—To One of Two Co-Obligants — Liability to the Other— Jus quæsitum tertio.—Two cautioners, A and B, joined with the principal party as joint obligants in a cash-credit bond; and a third party granted to A a letter, proceeding on the narrative of both cautioners having bound themselves with the principal in the cash-credit bond, and binding himself "not only to become bound in the third share of the responsibility of the said bond, but also to free and relieve you (A) of whatever loss you may sustain by your subscription of the said bond"; and A and B were obliged to pay each one-half of the bond. *Held* that the letter imported no obligation in favour of B so as to entitle him to have a third part of the loss thrown on the granter thereof. *Coventry* v. *Hutchison*, 1830, 8 S. 924.

11. Bond of Relief—Principal Obligation Prescribed—Renewal Granted after Prescription in Erroneous Belief of its Subsistence—Liability under Bond of Relief.—A cautionary obligation came to an end under the Act, 1695, c. 5, on the 29th July 1773 The cautioner believing it to subsist till 11th November 1773 granted, in October, an obligation that the bond of caution should continue effectual after that date. On the 13th November a third party granted a letter to the cautioner, engaging to relieve him of every consequence of his cautionary obligation, and referring to the original bond, but not to the renewal. The cautioner was compelled to pay the debt in an action, which was duly intimated to the granter of the letter of relief, but in which the plea that the bond had already prescribed at the date of renewal was not maintained. The cautioner afterwards failed in an action of repetition on this ground. *Held* that the granter of the letter of relief was liable to the cautioner. *Henderson* v. *Ramsay*, 1806, 5 Pat. 155.

12. Bond of Relief—Cautioner for Rent—Sequestration of Tenant by Landlord — Failure to Intimate to Granter of Bond.—A cautioner for payment of rent, holding a letter of relief, is entitled to enforce it, although he has not intimated that the effects of the tenant have been sequestrated for part of the rent. *Boog* v. *Jamieson*, 25 June 1825, F. C.; 4 S. 117.

13. Co-Obligants — Partners — Excise Penalties — Relief to Innocent Partner

against Copartners.—One of the partners of a distillery company having been found liable in excise penalties, in consequence of the other partners and the manager having, without his knowledge, engaged in illicit distillation, verdict in an action of relief *found* against them. *Campbell* v. *Campbell*, 1834, 12 S. 573. See M'L. & R. 387; 1 Robin. 4.

14. Co-Obligants—Defenders in Action of Damages—Settlement by Payment to Pursuer—Negligence not Proved against Either.—Two parties were called conjunctly and severally as defenders in an action of damages for personal injuries. The action was thereafter settled by a payment of money and expenses to the pursuer, under the reservation of all questions of relief between the defenders. One of the defenders paid the sum due to the pursuer under such agreement. *Held* that he was entitled to relief to the extent of one-half from the other defender, notwithstanding a verdict of a jury that the injury was not attributable to the fault of either party. *Union Canal Co.* v. *Johnston*, 1835, 1 S. & M'L. 117; 1834, 12 S. 304.

15. Co-Obligants—Cash-Credit—Payment by Obligant for whose Behoof Drafts had been Applied—Relief against Co-Obligant.—*Held* that a co-obligant in a bond of cash-credit, who had paid up the balance, was not entitled to relief from a partner of the firm in whose name the cash-credit was kept, in respect that the drafts creating the balance had been applied for his own behoof. *Henderson* v. *Cormack*, 1842, 4 D. 1478; 14 J. 564.

16. Co-Obligants—Payment by and Assignation to Third Party—Rights inter se.—A bond granted by six co-obligants was retired by a stranger to it, who offered a discharge to each co-obligant on paying one-sixth of the sum paid by him, but refused to assign the bond to three co-obligants who tendered full payment of the bond. *Held* that these co-obligants were bound to pay their proportion under deduction of such sums as had been paid by them to the original creditor in the bond. *Gilmour* v. *Finnie*, 1831, 9 S. 907.

17. Co-Obligants—Discharge of Some by Creditors—Liberation of Others in so far as Relief Cut off.—Six co-obligants were jointly and severally bound in a bond for £10,000 to a bank. Three of them paid £1500. A stranger to the bond paid the balance, took an assignation to the bond, and refused to accept full payment of that balance from the three parties who had paid the £1500, and to grant them an assignation of the bond. *Held* (1) that he was not entitled to discharge the other co-obligants on receiving payment from them of their rateable proportions of the balance paid by himself to the bank; and (2) that having granted such a discharge to two co-obligants after interpellation, he was barred from claiming against the first three obligants, in so far as he had thereby cut off their right of relief. *Gilmour* v. *Finnie*, 1832, 11 S. 193.

18. Co-Obligants—Discharge of One by Creditor—Bill of Exchange—Co-Acceptors — Bankruptcy of One — Trust Deed — Accession by Holder of Bill. — Trustees along with the heir of the truster jointly and severally accepted a bill drawn on them by A. The heir afterwards granted a trust deed for creditors, which provided that acceding creditors should be bound by a discharge granted by three-fourths of their number, and A acceded. *Held* that A having by his accession deprived the trustees of their relief against the heir could not sue them on the bill. *Gibson* v. *M'Donald*, 1824, 3 S. 374.

19. Co-Obligants — Trustees — Erroneous Payment by One — Liability to Relieve Trustee Subsequently Assumed.—A testamentary trustee made an erroneous payment of part of the trust funds, and afterwards assumed a co-trustee. In an action by the party to whom the payment should have been made against both the trustees, the assumed trustee was ordered, after the death of the original trustee, to consign the amount. *Held*, in an action of relief by the assumed trustee against the representatives of the other trustee, that they were bound to relieve him of the consignation. *Ogilvy* v. *Boswell*, 1850, 12 D. 940; 22 J. 412.

20. Co-Obligants—Total Relief of One against the Others — Proof of. — Circumstances in which *held* that a co-obligant under a bond had failed to prove that he had a right of total relief against the other obligants. *Carswell* v. *Irvin*, 1850, 12 D. 462; 22 J. 132.

21. Damages—Agent—Liability for Erroneous Procedure.—A law agent was employed by a manufacturer to prepare and present petitions to the justices of Renfrew, against two apprentices for having deserted their work, and other misconduct. The agent founded on the third section instead of the first of the Act 4 Geo. iv. c. 34, which related to apprentices in the situation of those complained of. The apprentices were convicted and imprisoned, but were subsequently liberated by the Court of Justiciary, as the wrong section had been founded on; whereupon they sued the manufacturer for damages and expenses. *Held* in an action of relief by the manufacturer against the agent, that, as the terms of the Act were clear, he was liable, although there was no established practice under the statute, and the sheriff-substitute considered the petitions to have been correctly libelled. *Frame* v. *Campbell*, 1839, 1 Robin. 595. Affg. 14 S. 914; 11 Fac. 749.

22. Damages—Building Contract—Reparation for Personal Injury Sustained through Fault of Builder—Relief of Proprietor against Builder.—The proprietor of a house which was in the course of building having been found liable in damages for an injury suffered by a woman in consequence of an insufficient fence, *held* entitled to relief from the builder, in terms of a contract. *Binnie* v. *Parlane*, 1825, 4 S. 122.

23. Damages—Building Contract—Repair of House—Damage Caused to Neighbouring Buildings—Reparation by Owner of House — Relief against Builder. — A builder was employed to excavate the foundation, and underfoot the walls of a house, under the supervision of an architect. In consequence of want of skill and recklessness in the execution of the work, some neighbouring houses were injured. The builder's employer settled with the proprietors of the injured property for the damage. *Held* that the builder was liable to him in relief. *Pollock* v. *Wilkie*, 1856, 18 D. 1311 ; 28 J. 659.

24. Damages—Expenses — Quarry — Use by Permission of Proprietor—Interference with Neighbouring Mine—Litigation with Lessee—Relief against Proprietor of Quarry. —By an agreement between a railway contractor and a landed proprietor, the former was allowed to take building stone for a viaduct from any part of certain lands, at a certain rate per superficial yard, the contractor being bound to make good all surface damages, and fill up the quarry when his contract was completed. The contractor opened a quarry near the bank of a river, and in consequence of his operations water flowed into the quarry and thence into an old coal-waste which communicated with going coal-mines on the estate of the same proprietor. The lessee of the minerals brought a process of suspension and interdict, in which the contractor was ordered to execute certain works, and was found liable in the expenses of process. In an action of relief brought by the contractor against the proprietor, *held* that the agreement was not a lease, and the pursuer was not entitled to be relieved by the proprietor either of the sums which he had been obliged to expend for the protection of the coal-mines, or of the expenses of the former process. *Brand & Son* v. *Bell's Trs.*, 1872, 11 M. 42 ; 45 J. 34.

25. Damages—Landlord and Tenant—Relief against Railway Company—Different Grounds of Liability.—A tenant recovered damages from his landlord for failure to restore, in terms of his lease, a certain railway which had been interfered with by a railway company, and which, in terms of the Railways' Clauses Act, the company ought to have restored. The landlord brought an action of relief against the company, claiming the sums of damages and expenses for which he had been found liable. *Held* that the landlord's liability to his tenant having arisen *ex contractu*, while any claim he had against the company arose *ex delicto*, the action should have been dismissed as incompetent. *Colt* v. *Caledonian Rly. Co.*, 1860, 22 D. (H. L.) 13 ; 3 Macq. 833 ; 32 J. 707.

26. Damages — Master and Servant — Defective Machinery—Liability of Party Supplying to Relieve—Different Grounds of Liability.—A master extrajudicially settled a claim of damages by the representatives of a servant who had been killed by the breaking of a chain. *Held* that he was not entitled to relief, on the ground of the insufficiency of the chain, against the party who had supplied it. *Opinion* that an action of relief is not the appropriate remedy where the two claims are not commensurate and not founded on the same kind of liability. *Ovington & Others* v. *M'Vicar*, 1864, 2 M. 1066 ; 36 J. 553.

27. Damages — Personal Injuries — Obstruction on Road—Relief against Party Responsible for Obstruction.—Road trustees *found* entitled to relief of damages from a party who had laid stones on a road by which a coach was overturned and a passenger injured. *Sharp* v. *Waddell*, 1820, 2 Mur. 211.

28. Damages — Property — Servitude — Right to Discharge Water—Diversion by Servient Owner—Damage to Neighbouring Property—Relief against Dominant Owner. —The proprietor of a tenement who had a servitude over a property in a town, of receiving and carrying off in a sewer the ordinary waste water, erected a distillery on his premises, and discharged on the servient tenement a large quantity of water introduced artificially for the supply of his distillery. The proprietor of the servient tenement, at his own hand, turned this additional water in a new direction, whereby it flooded an adjoining house and injured it. *Held* that he was not entitled to recover from the proprietor of the dominant tenement the consequential damages thus arising, nor the expenses incurred in disputing it. *Scouller* v. *Robertson*, 1829, 7 S. 344.

29. Damages—Wrongous Use of Diligence —Bill of Exchange—Liability of Bank to Relieve Holder of Damages for Wrongous Use of Diligence.—The holder of a bill about to fall due sent it to a bank at a distance to present it and obtain payment. The bank having presented it after the usual business hours, protested it for non-payment, and sent it back to the holder, who thereupon did diligence against the effects of the acceptor. *Held* that the holder was entitled to relief from the bank of the sum in name of damages in which he had been found liable to the acceptor. *Houldsworth* v. *British Linen Co.*, 1850, 13 D. 376 ; 23 J. 162.

30. Damages—Sale of Heritage—Price Payable by Instalments—Failure—Heritable Creditor—Notice by Debtor—Failure to Pay.—A trustee for creditors sold an estate to a party who became bound to pay the price by instalments at certain terms ; whereupon the trustee gave the requisite six months' notice to a heritable creditor that his debt would be paid on a stipulated term. The buyer having failed to make payment as agreed on, the trustee was thus unable to fulfil his engagement to the creditor, who raised action against the trustee for the loss thereby sustained. *Held* that the buyer was liable to the trustee in relief thereof. *Mansfield* v. *Campbell*, 1836, 14 S. 585 ; 11 Fac. 510.

31. Expenses—Private Bill—Obligation of Relief of Expenses of Opposition—Recovery

from Opponent.—An arrangement was entered into between a landed proprietor, A, and a railway company, to unite in opposing the bill of a projected railway, by which the company agreed to pay the expenses of the opposition until they should intimate their intention of withdrawing from it. After the opposition had gone on for some time, the company withdrew, and A, having continued the opposition alone, succeeded in effecting a favourable compromise, including a sum for the expenses of the opposition. In an action by A against the company, for payment or relief of the expenses, *held* that the company were not entitled to insist that he should impute the sum he had received under the compromise, towards the expenses which they had agreed to pay. *Graham* v. *Glasgow & Garnkirk Rly. Co.*, 1847, 9 D. 1508; 19 J. 613.

32. Expenses—Agent—Employment to do Diligence on Bill—Action for Irregularities in Diligence—Relief of Expenses of Successful Defence.—A, the holder of a bill, indorsed it to a law agent in trust in order that the diligence might proceed in the name of the agent, and granted a letter binding himself for the agent's transactions in so far as he acted legally. An action of damages subsequently raised against the agent in respect of alleged irregularities in the use of the diligence was dismissed as irrelevant. *Held* that A was liable to the agent in relief of the expenses incurred by him in defending the action. *Laing & Others* (*Alison's Reps.*) v. *Smarts*, 1840, 12 J. 377.

33. Expenses—Decree—Charge—Suspension—Agent for Suspender—No Mandate—Liability to Relieve Charger.—A was found entitled to expenses in an inferior court. A charge on this decree was suspended by his opponents on the ground that the agent who had appeared in their name had no authority from them. A served on the agent a requisition and protest, calling on him to sist himself in the suspension or to produce his mandate. The agent did neither, and refused all information as to his authority to appear. *Held* that A was entitled to relief against the agent of the expenses in the original action and in the suspension. *Philip* v. *Gordon*, 1848, 11 D. 175; 21 J. 39.

34. Expenses—Diligence—Suspension on Ground of Irregularity by Messenger—Refusal with Expenses—Liability of Messenger to Relieve Creditor.—A messenger-at-arms instructed to execute a warrant for imprisonment of a debtor, omitted the name of one of the parties at whose instance the debtor was incarcerated from a memorandum which he indorsed on the warrant. A suspension and liberation presented by the debtor on this ground was refused with expenses. The creditor, having failed to recover these expenses from the debtor, raised an action against the messenger on the ground that his mistake had occasioned the expense. *Held* that the messenger was not liable. *Potter* v. *Muirhead & Others*, 1847, 9 D. 519; 19 J. 213.

35. Expenses—Co-Defenders—Action by Superior against Purchaser and Seller of Heritage — Absolvitor — No Expenses — Relief.—A party sold land to another, who, before getting a title, entered into possession; whereupon the superior brought an action against both the seller and purchaser for an alleged violation of the feu-contract, from which they were assoilzied, but the superior was not subjected in expenses. *Held*, in the special circumstances, that the purchaser was entitled to be relieved by the seller of the expenses incurred by him in the action. *St. Ann's Distillery Co.* v. *Douglas's Trs.*, 1834, 12 S. 407.

36. Expenses—Heritors—Action by One — Relief against Co-Heritors.—A heritor *found* liable in expenses, in a litigation carried on by himself, has no relief against the other heritors. *Dingwall* v. *Gardiner*, 1825, 4 S. 246.

37. Expenses — Procurator-Fiscal — Action against—Relief against Magistrates of Expenses of Defence.—*Held* that the procurator-fiscal of a burgh was not entitled to relief out of the funds of the burgh of expenses incurred by him in defending himself against an action of damages which had been directed against him for an act done in his official character, and which had been dismissed with expenses, although he was unable to recover them from the pursuer. *M'Culloch* v. *Mags. of Airdrie*, 1845, 8 D. 321; 18 J. 143.

38. Master and Servant—Deduction from Servant's Wages of Sum Paid in Error to Customer of Master—Relief against Customer.—Circumstances in which a party whose employers deducted from his wages a sum paid by him to a third party on behalf of the employers under the mistaken belief that it was due, *held* entitled to relief from that third party. *Anderson* v. *Burness*, 1851, 1 Stuart 42.

39. Obligation—Construction—Relief of Feu-Duties—Grant of by Crown to Creditor in Obligation.—By marriage-contract a widow's locality lands were granted to her blench, but on condition that she relieved her husband and his heirs of the feu-duties thereof due to the Crown. The Crown made a grant to her husband of the feu-duties of his estate. *Held* that as the widow was bound only to relieve her husband she was not bound to pay the duties to her husband when none were exigible from him. *Duke of Roxburghe's Trs.* v. *Duchess of Roxburghe*, 1824, 3 S. 121.

40. Obligation — Bill of Exchange—Assignation of Landlord's Hypothec on Condition of Relief of Bill. — F granted a bill for the rent of certain property and took an assignation to the landlord's hypothec. He thereafter permitted H, a creditor of the tenant, to sell off the effects on condition of relieving him (F) of his obligation. H got a third party to take up the bill to whom F paid it. *Held* that F was entitled to relief from H. *Hamilton* v. *Fergusson*, 1823, 2 S. 423.

41. Obligation — Extent — Damages — Expenses of Defence — Advocation. — A, who had been found liable in an action of damages in the Sheriff Court, raised an action of relief against B and intimated to B that he did not intend to advocate unless B intimated a desire that it should be done. B made no such intimation, but A, nevertheless, advocated the cause, and being unsuccessful was subjected in expenses. *Held* that A's right of relief against B, which had been established, did not cover the expenses of the advocation. *Mack* v. *Dixon*, 1836, 15 S. 272.

42. Obligation — Lease — Assignation in Security—Obligation of Assignee to Pay Rent—Relief against Assignee.—A creditor who held an assignation to a lease in security of her debt, under an obligation to pay the rents, and was in possession of the subjects, consented to an assignation to a purchaser on 14th March 1825. The purchaser paid the rent due at Whitsunday 1825. *Held* that he was not entitled to relief from the creditor of the rent due for the period from Martinmas 1824 to 14th March 1825. *Potter* v. *Houldsworth*, 1829, 7 S. 581 ; 4 Fac. 830.

43. Obligation — Marriage-Contract — Provision for Children — Condition that Child Succeeding to Estate to Charge Provision on Estate—Relief against Personal Representative of Child Succeeding to Estate.—In the marriage-contract of his son W, G undertook to provide £5000 to the children of the intended marriage on their majorities or marriages ; but if W or his heir should succeed to the estate of X, then he or the heir in possession was taken bound to charge it with the said sum. W's grandson succeeded to X after W's death and after the £5000 had been paid by money raised on G's estate. In an action of relief by G's heir against the heir in possession of X, *held* (1) that G's obligation was superseded when W or his heir succeeded to X ; (2) that there was a personal obligation on W, and therefore his heir was bound to relieve G's heir although the terms of the entail of X forbade his charging it with the sum ; and (3) that W's obligation was not limited to the case of the succession of X opening in his lifetime. *E. of Galloway* v. *Stewart*, 1865, 3 M. (H. L.) 73 ; 37 J. 484.

44. Obligation — Trust — Obligation to Denude when Debts Paid—Relief against Trustees and Representative of Prior Heir. —An entailed estate was held in trust under the condition that the trustees should denude in favour of the heir, only on extinction of the whole debts affecting the estate. The trustees denuded while certain debts remained unpaid, to meet which they stated that they had retained funds. *Held* that when these debts were demanded from a succeeding heir, he was entitled to relief not only against the trustees but also against the representative of the heir in whose favour they had denuded. *Fraser* v. *Fraser*, 1826, 5 S. 104.

45. Obligation — Obligation to Find Expenses of Prosecution — Relief to Procurator-Fiscal. — Certain parties agreed to defray the expenses of a prosecution at the instance of a procurator-fiscal. The procurator-fiscal was subjected in expenses and damages on account of the prosecution. *Held* that he was entitled to relief from them. *Kerr* v. *Cooper & Co.*, 1823, 2 S. 419 ; 1 W. & S. 232.

46. Obligation — Security for—Death of Partner—Representative's Relief against Remaining Partners.—The representative of a deceased partner of a company is not entitled to demand from the remaining partners, who are in good credit, security to relieve him of the obligation for future rents under certain leases held for behoof of the company, in which the individual partners, with their respective heirs and successors, have been taken bound to the landlord. *Murray* v. *Hogarth & Co.*, 1835, 13 S. 453 ; 10 Fac. 263.

47. Proof of—Co-Obligants.—The trustees of a dissenting congregation granted a heritable bond over the chapel, and one of the obligants having died, his executor paid up the loan upon an assignation to himself individually, and thereafter charged the other obligants. *Held* that the executor had failed to prove that there was an obligation of relief. *Carswell* v. *Irvin*, 1850, 12 D. 462 ; 22 J. 132.

48. Railway Stock—Calls — Registered Owner—Latent Trust—Pledge — Liability of Pledgee to Relieve Registered Owner.— A purchased railway stock, the certificates of which he took in name of B. A deposited the certificates with a bank, in security of advances made to him. Calls were thereafter made on B, who certified the bank that A was the real owner, and called on them either to relieve him of the calls or deliver up the certificates to him for sale. The bank refused. *Held* that they were liable to relieve B of the calls in which he was liable. *Barrow* v. *National Bank of Scotland*, 1852, 14 D. 565 ; 24 J. 278 ; 1 Stuart 505.

49. Ship—Freight—Charter by Consignee as Agent of Consignor—Relief of Freight against Consignor.—A distiller who had contracted to sell and ship spirits to a merchant at Kirkcudbright, was requested by another also to send him a small quantity by the same vessel. The latter, at the request of the distiller, freighted a vessel. *Held* that the distiller was liable to relieve him of the freight, reserving relief against the first merchant. *Haig* v. *Hannay*, 1813, 1 Dow 259 ; 5 Pat. 703.

50. Ship—Freight—Wreck of Vessel—Payment by Consignor of Freight pro rata —Relief against Consignee. — Dutch merchants sold and shipped goods from Rotterdam to a Leith merchant. The vessel was wrecked and the goods taken back to Rotterdam. The sellers paid the freight *pro rata itineris* and sent them on to Leith. *Held* the Leith merchant was bound to relieve the sellers of the freight so paid. *Havellaar & Van Dulken* v. *Hodge*, 1821, 1 S. 128.

REPARATION

AGENT'S LIABILITY, see title *Agency.*
ASSAULT, see that title.
ASYLUM, DETENTION IN, see title *Lunacy.*
BREACH OF CONTRACT, see title *Contract.*
CARRIER'S LIABILITY, see title *Carriage.*
DAMAGES, MEASURE of, see title *Damages.*
DILIGENCE, DAMAGES FOR WRONGOUS, see title *Abuse of Process.*
FRAUD, see title *Fraud and Misrepresentation.*
IMPRISONMENT, WRONGOUS, see title *Arrest.*
JUDGE'S LIABILITY, see title *Administration of Justice.*
MAGISTRATE'S LIABILITY, see titles *Administration of Justice* and *Burgh.*
MASTER AND SERVANT, see that title.
MESSENGER-AT-ARMS, see titles *Negligence* and *Abuse of Process.*
NEGLIGENCE, see that title.
POLICE, LIABILITY OF, see title *Arrest.*
PRINCIPAL'S LIABILITY, see title *Agency.*
PROPERTY, DANGEROUS CONDITION, see title *Negligence.*
PROSECUTION, WRONGOUS, see titles *Abuse of Process* and *Arrest.*
RUNNING DOWN, see title *Negligence.*
SLANDER, see that title.
STATUTORY TRUSTEES, see title *Trust.*

1. Assythment.—*Opinions*, that an action of assythment will not lie unless the act upon which it is founded is punishable as a crime. *Eisten* v. *N. B. Rly. Co.*, 1870, 8 M. 980; 42 J. 575.

2. Auctioneer—Error of.—A party who had the charge of a sale by public auction of the furniture of a house allowed to be sold along with it a few articles which were part of the furniture of another house belonging to the tenant of that house and which had been sequestrated by his landlord for rent. Having received the money, he paid it in ignorance of the sequestration to the tenant. *Held* that he was not liable in repetition to the landlord. *Laing* v. *Robertson*, 1829, 7 S. 335; 4 Fac. 440.

3. Bank—Failure—Consigned Money.—Where a defender consigned a sum sued for in a bank which was selected by both parties, to await the orders of the court, and the pursuer ultimately obtained decree in terms of his libel, but the bankers had failed in the interim, *held*, in the special circumstances, that the loss arising from the failure of the bankers should be mutually borne by the pursuer and defender. *Scott* v. *Selbie*, 1836, 14 S. 574; 11 Fac. 500.

4. Breach of Confidentiality—Medical Practitioner.—An elder of a church consulted a doctor whether a child must from the date of its birth have been begotten before marriage. An action of damages for breach of confidentiality against the doctor on the ground that he had communicated a copy of his opinion to a member of the kirk-session *held* relevant. *Whyte* v. *Smith*, 1851, 14 D. 177; 24 J. 77; 1 Stuart 156.

5. Breach of Engagement—Retention of Servant under Engagement to Another—Liability of Master.—Damages *found* due by a party who retained a collier in his service after he knew that the collier was under a previous engagement with another. *Dickson* v. *Taylor*, 1816, 1 Mur. 141.

6. Breach of Interdict.—Circumstances *held* not to justify an award of damages against a party who had exercised the trade of a tailor in violation of the exclusive privileges of a corporation, and in contravention of an interdict. *Murison* v. *Tailors of Dundee*, 1836, 15 S. 179; 12 Fac. 178.

7. Breach of Promise.—Circumstances in which damages were found due to a woman on account of breach of promise of marriage made to her. *Tucker* v. *Aitchison*, 1846, 9 D. 21.

8. Breach of Promise—Award.—Damages *awarded* for breach of promise of marriage. *Rose* v. *Gollan*, 1816, 1 Mur. 82.

9. Breach of Promise—Implied Promise.—Damages are due for breach of promise of marriage, even where the promise is not direct, but is inferred from the terms of a correspondence. *Hogg* v. *Gow*, 27 May 1812, F. C.

10. Breach of Promise—Implied Promise.—Circumstances in which *held* that a man who had been for years carrying on a courtship had made an implied promise of marriage, and was liable in damages for breach thereof. *Scott* v. *Stewart*, 1870, 8 S. L. R. 44.

11. Breach of Promise—Offer to Marry.—An action of damages at the instance of a woman, for breach of promise of marriage, sent to a jury, notwithstanding that the defender, in the letter founded on by the pursuer as containing the breach of promise, while avowing that he entertained no love for the pursuer, left it to her to say whether the marriage should take place or not. *Cattanach* v. *Robertson*, 1864, 2 M. 839; 36 J. 416.

12. Breach of Promise—Refusal of Pursuer to Marry.—Damages *awarded* for breach of promise of marriage, although the pursuer of the action had, after three or four years' courtship, refused to marry the defender, his conduct justifying her refusal. *Turnbull* v. *Dodds*, 1869, 6 S. L. R. 353.

13. Breach of Promise — Refusal of Pursuer to Marry — Conduct of Man.—*Held*, on a proof, that the conduct of a man to a woman to whom he was engaged to be married, though rough and unmannerly, was not designed to frighten her into giving up the marriage, and that while it might justify her in refusing to marry him, it did not render him liable in damages for breach of promise of marriage. *Stoole* v. *M'Leish*, 1870, 8 M. 613; 42 J. 296.

14. Breach of Promise—Seduction.—In an action of damages by a woman for breach of promise and seduction, the pursuer averred that the defender had promised to marry her, and that he had thereafter seduced her. The defender pleaded that the action was not relevant, in respect that the pursuer's averments amounted to an averment of marriage by promise *subsequente copula*. *Held* that the action was relevant, and that the pursuer was entitled to issues of (1) breach of promise of marriage, and (2) of seduction. *Forbes* v. *Wilson*, 1868, 6 M. 770 ; 40 J. 396.

15. Bribery.—Damages awarded against a party for bribing the clerk of the pursuer's law agent to disclose matters relative to the party's title. *Kerr* v. *D. of Roxburgh*, 1822, 3 Mur. 126. [See No. 70.]

16. Challenge — Sending Challenge — Delivery of Challenge — Admissibility of Evidence.—In an action of damages for sending a challenge, the pursuer is not entitled to prove that a challenge was delivered to him, unless he undertake to prove that it was sent by the defender. *Hislop* v. *Miller*, 1816, 1 Mur. 45.

17. Commonty—Excess of Possession by one Proprietor.—A claim of damages for alleged excess in the possession of a common by one of the common proprietors, prior to a decree of division, *refused* to be sustained. *Houston* v. *Dempster*, 1835, 13 S. 492.

18. Detention—Stoppage of Carriage.—Damages awarded for having wrongfully stopped a coach conveying a company to a funeral. *Crawford* v. *Mill*, 1830, 5 Mur. 215.

19. Disease — Communication of. — A party raised an action against a hirer of grass parks, for the value of three horses, averring that one of the horses had been infected with glanders by a pony which the defender, knowing him to be diseased, had put into the field in which the pursuer had hired grazing for his horse ; and that the horse so infected having been taken home by the pursuer, in ignorance of the disease, and put into his own stable, had there communicated the disease to two other horses. *Held* that these averments were relevant to infer liability against the defender for the loss not only of the horse which had caught the infection from the pony, but also of the horses to which the disease had been communicated ; and direction given to the jury, that it was not necessary to adduce direct evidence of the defender's knowledge of the diseased state of his pony. *Robertson* v. *Connolly*, 1851, 13 D. 779 ; 23 J. 348 ; 14 D. 315.

20. Error in Charter—False Translation—Liability.—*Observed*, that a party who, by himself or his agent, takes a blundered charter under the Great Seal, obtained upon the procuratory in a deed of entail from Chancery, is answerable, at least in all questions with third parties, for blunders by false translation, etc. ; and *multo magis* where it was no case of blundered translation by the Clerk of Chancery, but a plain omission of an essential clause contained in the original deed. *Cathcart* v. *Maclaine*, 1846, 8 D. 970 ; 18 J. 491.

21. Fire—Colliery.—A fire having broken out in a colliery, caused by calcined ironstone having fallen from the surface through sists or fissures in the strata, the party engaged in calcining the ironstone *found* liable in the expense incurred in extinguishing the fire. *Rankin* v. *Dixon & Co.*, 1847, 9 D. 1048. See *Nisbett* v. *Dixon & Co.*, 1851, 13 D. 776 ; 23 J. 340.

22. Hypothec—Failure to Grant Assignation of—Liability of Landlord.—Circumstances in which a landlord found not liable in damages for failure to grant an assignation of the hypothec to a poinding creditor, who paid the rent. *Bannatyne* v. *Finlayson*, 1824, 2 S. 751.

23. Lease—Failure to Grant—Entailed Estate.—An heir of entail in possession granted a lease, with absolute warrandice, to commence at a future term, and, before the arrival of that term, he forfeited his right to the estate. The next heir, having obtained possession, refused to implement the lease. *Held* that the granter was liable in damages to the tenant. *Downie* v. *Campbell*, 31 Jan. 1815, F. C.

24. Liability—Act Done by Order of Another.—A person may be liable for damage caused by his act, although done by order or authority of another. *Mackenzie* v. *Goldie*, 1866, 4 M. 277 ; 38 J. 145.

25. Liability—Joint—Damages—Fire.—Four students who were convicted of breaking street lamps, having, besides damages to the contractor, been found liable, jointly and severally, for a fine to the procurator-fiscal, *held* that, while they were liable, jointly and severally, for the damages, each was liable only for the fine. *Smith* v. *O'Reilly*, 1800, Hume 605.

26. Liability—Joint—Illegal Fishing—Damage to Superior Heritor.—Parties guilty of illegal fishing by stake-nets opposite their respective properties, *held* not liable *singuli in solidum* to a superior heritor for the damages thence arising. *D. of Atholl* v. *Dalgleish*, 20 June 1822, F. C. ; 1 S. 511.

27. Liability of Representatives—Action of Damages against Superior.—A, after he had sold a superiority, granted a precept of *clare constat* to the heir of the vassal, and got payment of feu and entry duties. Having died, *held* in a question between A's heir and the creditors of the heir of the vassal (who by the error could not attach the property) that no claim of reparation existed as penal actions do not transmit. *Syme* v. *Erskine*, 22 July 1805, 12 F. C. 537, note ; 4 Pat. 510. Affg. 16 June 1801, F. C. ; M. "Superior and Vassal" App. No. 3.

28. Liability of Representatives. — A party inflicted an injury on an individual by firing a pistol at him, and, on the death of the former, the latter sued his heir for reparation of his actual patrimonial loss. *Held* that he

was entitled to do so. *Macnaughton* v. *Robertson*, 17 Feb. 1809, F. C.

29. Liability of Representatives. — Actions *ex delicto* pass against heirs, if they are for damages, not punishment; and therefore an action raised against a messenger for damages, in respect of wrongously failing to execute diligence, and during which he died, *sustained* against his heirs. *Morrison* v. *Cameron*, 25 May 1809, F. C.

30. Liability of Representatives—Actio personalis moritur cum persona. — The maxim *Actio personalis moritur cum persona* does not hold always, if at all, in Scotland. So where a deceased party has by fraud occasioned pecuniary loss to another party also deceased, the representatives of the wrongdoer must, *in quantum lucratus*, make compensation to the representatives of the injured party. *Tulloch* v. *Davidson*, 1860, 22 D. (H. L.) 7; 3 Macq. 783; 32 J. 363.

31. Nautae caupones, etc.—Innkeeper—Fire—Damnum fatale.—An innkeeper *held* not liable for the value of horses put up in his stables and lost in a fire which burned down the stables, this being held to be a *damnum fatale* although there was reason to believe that the fire had originated owing to the ostler's carelessness. *Observations* on what constitutes a *damnum fatale*. *M'Donell* v. *Ettles*, 15 Dec. 1809, F. C.

32. Nautae caupones, etc.—Innkeeper—Loss of Parcel Containing Money.—A parcel containing money was delivered to an innkeeper for the purpose of being given to a carrier, whose quarters were at the inn. It was put on the cart, and afterwards taken off and placed in a cellar where goods for him were deposited; and it was lost. *Held* that although no intimation was made that it contained money, the innkeeper was liable for the value. *Williamson* v. *White*, 21 June 1810, F. C.

33. Nautae caupones, etc.—Innkeeper—Parcel Containing Money.—An innkeeper *held* not liable for money contained in a parcel addressed to his care, where the person to whom it was addressed was not a guest in his house, and no notice was given that the parcel was to be sent, and it was not marked as of particular value. *Meikle* v. *Skelly*, 16 Feb. 1813, F. C.

34. Nautae caupones, etc.—Innkeeper—Theft of Money by Servant.—A traveller arrived at an inn, and immediately gave his greatcoat, in the breast pocket of which was a pocket-book containing bank-notes, in charge to a waiter, who, placing it in the lobby, requested him to go in to dinner, which was then on the table, and which he did. While there, he inquired if his coat was safe, to which the waiter answered it was. The money was stolen by a servant employed in the inn. *Held* that although the traveller had not mentioned that there was money in the pocket, he was entitled to recover from the innkeeper under the edict. *Observed*, that the innkeeper was liable also at common law. *M'Pherson* v. *Christie*, 1841, 3 D. 930; 16 Fac. 959.

35. Nautae caupones, etc. — Lodging-house-Keeper.—*Held* that the edict applies to lodginghouse-keepers. *Scott* v. *Yates*, 1800, Hume 207.

36. Nautae caupones, etc. — Lodging-house-Keeper — Housebreaking. — *Question*, whether the keeper of a lodginghouse falls under the edict. Housebreaking *held* to be *vis major* so as to protect him from liability for articles stolen. *Watling* v. *M'Dowall*, 10 June 1825, F. C.; 4 S. 83

37. Nautae caupones, etc. — Stables — Injury to Horse.—*Held* that a stabler who had received a young horse for the purpose of being trained, into a stable, under which he was aware that a railway company were forming a tunnel by blasting rock, and who had not communicated that circumstance to the owner of the horse, was liable for injury done it in consequence of a fright occasioned by an explosion in the tunnel. *Laing* v. *Darling*, 1850, 12 D. 1279; 22 J. 593.

38. Nautae caupones, etc. — Stables — Death of Horse.—The keeper of a livery stable *held* liable for the value of a horse which died while under his charge. *Hagart* v. *Inglis*, 1832, 10 S. 506.

39. Nautae caupones, etc.—Stables—Horse-Breaker.—A stabler and horse-breaker *held* liable for the value of a mare which was killed while under his care. *Hay* v. *Wordsworth*, 13 Feb. 1801, F. C.; M. "Nautae Caupones" App. No. 1.

40. Nuisance.—A proprietor of estates on the banks of the Clyde, within the limits of the Clyde Navigation Trust, raised an action against the trustees, concluding (1) for declarator that the trustees were bound to fill up the foreshore to the level of the pursuer's lands, or above the level of the high-water mark of spring tides, so as to afford to the pursuer at all times access to the river, or at least to such a level as would prevent the nuisance; (2) for declarator that the trustees were bound to repair the damage done to the pursuer's lands and banks, by restoring and making up such portions of the land as had been washed away, and "to uphold and protect the lands and banks by performing such operations on the lands and banks as shall be necessary in order to prevent such injury"; (3) in the event of the pursuer failing to obtain decree under these and relative conclusions *ad factum præstandum*, for declarator that the pursuer was entitled to such compensation for the damage as should either be fixed by the court in this action, or in the manner provided by the Navigation Acts. *Held* (1) that as the Clyde Navigation Acts did not impose upon the trustees the burden of heightening the foreshore, or of preventing the nuisance which was the necessary result of the operations authorised by the statute, and as the whole trust funds were appropriated by statute to other uses, the trustees were not at common

law under any such obligation; (2) that though the Clyde Navigation Act of 1758, s. 3, did impose an obligation on the trustees, when they raised the level of the water, to defend the banks, there was no obligation to restore the banks or repair the damage, and that there was no relevant conclusion for implement of the specific obligation imposed by this section. *Lord Blantyre* v. *Clyde Navigation Trs.*, 1871, 9 M. (H. L.) 6; 43 J. 250.

41. Partnership—Refusal to Fulfil Contract of Partnership—Specific Implement—Damages.—A summons narrating that the defender, after verbal communings as to entering into a partnership with the pursuer, and orders given for preparing a draft of the contract, had refused to execute it, whereby the pursuer had sustained and might sustain damage, and concluding for implement, or, on failure to implement, for damages as a *solatium* for such failure, *dismissed* as irrelevant. *Finlayson* v. *Fisher*, 1828, 6 S. 419.

42. Patentee—Injury to Business.—The shareholders of a joint stock company resolved to wind up a few months after its formation and before it commenced business. A patentee raised an action of damages against them on the ground that "upon the representation and assurance of the company that they would without delay commence business and would continue to carry it on during all the years of the latter's patent, or during such part of the time as might be necessary for fairly testing by experience whether the business could be profitably worked, he had been induced to permit them to publish a statement that they had acquired the privilege of his patent"; that his invention had been brought into disrepute and his professional character had suffered. *Held* that the action was irrelevant. *Scott* v. *Money Order Co. of Great Britain*, 1870, 42 J. 212.

43. Property—Animal—Destruction of—Killing Dogs.—In an action of damages for wilfully killing dogs belonging to the pursuer, *held* incompetent to prove the practice of killing them in a different district of the country. Damages *awarded*. *Grant* v. *Barclay*, 1830, 5 Mur. 130.

44. Property—Animal—Injury to—Driving away Stallion.—A stallion having broken out of a field, and entered, in pursuit of some mares, the farm-close of a neighbouring farm, *held* that a servant on the farm, who beat him with a stake in order to drive him away, was not liable for his value in consequence of his having died from a wound alleged to have been inflicted by a nail in the stake, it not being proved that he had used more than ordinary and reasonable compulsion to drive him away, or that he was in the knowledge that there was a nail in the stake. *Cumming* v. *Turnbull*, 1840, 2 D. 519.

45. Property—Animal—Injury to—Driving Horses out of Field.—Several horses from a neighbouring farm having broken into a farmer's wheat-field, his servant chased them out by driving them across a fence, and one of them, in leaping, fell on a stake and was killed. *Held* that the servant was not liable in reparation, the injury being accidental. *Herriot* v. *Unthank*, 1827, 6 S. 211.

46. Property—Animal—Injury to.—Circumstances *held* sufficient, in a civil action of reparation, to establish that parties, who had been previously acquitted by a jury when tried criminally, had inflicted a wound on a mare which caused death. *Wilsons* v. *M'Knight*, 1830, 8 S. 398.

47. Property—Destruction of—Cutting Down Hedge—Offer to Erect Temporary Fence.—One of two neighbouring tenants under the same landlord cut down part of a thorn hedge between the same farms, but not in a way which was alleged to be prejudicial, or unnecessary for the ultimate improvement of the hedge, and he offered to put up a temporary fence at mutual expense, which the other tenant refused. *Held* that the latter was not entitled to reparation for damage suffered in consequence of the want of a fence. *Thomson* v. *Purves*, 1829, 7 S. 730.

48. Property—Destruction of—Time—Breaking Down Dam-Dyke.—Damages *found* due by the tacksman of coal-pits on the side of a river for breaking down a dam-dyke, by means of which the proprietor of a mill was in possession of part of the water of the river. *Britton* v. *Lang*, 1826, 4 Mur. 44.

49. Property—Destruction of—Riot—Act 3 Geo. IV. c. 33.—*Held* that a house had been burnt and property had been injured by the acts of an unlawful and riotous assembly of persons, or of persons making part of such unlawful or riotous assembly, so that the sufferer was entitled to redress under the Act 3 Geo. IV. c. 33. *Johnston* v. *Kerr*, 1837, 16 S. 104.

50. Property—Destruction of—Setting Fire to Heath.—A party *held* liable in damages for setting fire to the heath over which he possessed a servitude of grazing, in prejudice of another proprietor's right of deer hunting and shooting. *Robertson, etc.* v. *D. of Atholl*, 1815, 6 Pat. 135.

51. Property—Destruction of—Stake-Nets.—Damages *awarded* for destroying stake-nets. *Grubb* v. *Mackenzie*, 1818, 2 Mur. 1.

52. Property—Injury to Mill-Lead.—Under a summons concluding for restoration of a mill-lead, or, on failure, for warrant to restore it at the expense of the defender, and also for damages, *held* competent to award as damages the expense of this operation. *Johnstone* v. *Scott*, 1834, 13 S. 717.

53. Property—Injury to—Taking Roof off Servant's House.—Damages *awarded* against a proprietor for taking the roof off a servant's house without his consent, although it was alleged that the servant was bound to have removed. *Scougall* v. *Lady M. L. Crawfurd*, 1819, 2 Mur. 110.

54. Property—Loss of—Admissibility of Evidence.—In an action of damages for not securing to the pursuer the chips made by him in quarrying stones, it is competent to ask the tenant of the quarry whether these chips belonged to him. *Inglis* v. *Cunningham*, 1826, 4 Mur. 79.

55. Property — Loss of Water — Claim against Superior Tenant for not Sending Down Water.—A claim of damages by an inferior tenant on a stream against a superior tenant, for not sending down water agreeably to what was ultimately determined by the court to be the true construction of the obligations in his lease, *held* relevant, although the inferior tenant had at one time put the same construction on the lease as that on which the superior tenant acted. *Tassie & Co.* v. *Miller*, 1826, 4 S. 571.

56. Representations Leading to Dismissal.—*Question*, whether an action is relevant for damages on account of representations made, on probable grounds, against a public officer to his superiors in office, and in consequence of which he was dismissed. *Young & Co.* v. *Leven*, 1822, 1 Shaw's App. 179.

57. Retention — Machinery — Deterioration.—Damages *awarded* for the wrongous retention of certain premises and machinery; and also for their deterioration, beyond ordinary tear and wear, while so retained. *Stead* v. *Cox*, 1835, 13 S. 1133.

58. Sale—Sale of Wood—Interdict by Party who Purchased Ground—Liability of Seller to Purchaser of Wood.—A party sold wood to another, and thereafter sold the ground to a third person, without making any provision for cutting the wood. The purchaser of the wood was prevented from cutting by an interdict at the instance of the purchaser of the ground. Damages *awarded* against the seller. *Welsh* v. *Stewart*, 1818, 1 Mur. 397.

59. Sale—Sale by Curator after Death of Ward—Personal Bar.—A curator, after the death of his ward, a lunatic, sold subjects contained in a bond and disposition in security, granted to the curator on behalf of the lunatic. *Held* that although the sale was invalid, the party whose property had been sold was not entitled to damages from the curator, seeing that, by letters written by him, he had consented or acquiesced in the proceedings which the curator had adopted. *Duff* v. *Gorrie*, 1849, 11 D. 1054; 21 J. 401.

60. Seduction.—In an action of damages for seduction, a verdict was returned in favour of the pursuer. *Kay* v. *Wilson's Trs.*, 1850, 12 D. 845; 22 J. 363, 413.

61. Seduction — Inducing Belief that Married Legally.—Damages *found* not due by a party to a lady, whom he had led to believe he had legally married, and brought from her own country as his wife, it appearing she did not so regard herself. *Sassen* v. *Sir J. Campbell*, 1826, 2 W. & S. 309. Revg. 3 S. 159.

62. Seduction — Inducing Belief that Marriage Intended.—Circumstances under which a person, who by his conduct had created a belief that he was intending marriage, and seduced the woman, was *found* liable in damages. *M'Candy* v. *Turpy*, 1826, 4 S. 520.

63. Seduction — Married Woman — Adultery.—Although a husband has not instituted an action of divorce against his wife for adultery, he is entitled to insist in an action of damages against her seducer. *Paterson* v. *Bone*, 10 Dec. 1803, F. C.

64. Seduction — Married Woman — Adultery.—Damages *awarded* to a husband for seduction of his wife. *Kirk* v. *Guthrie*, 1817, 1 Mur. 271.

65. Seduction — Married Woman — Adultery—Admissibility of Evidence.—In an action of damages by a husband for adultery, the pursuer may ask in general how his wife and the defender behaved to each other, but it is irregular to put special questions as to particular facts. *Baillie* v. *Bryson*, 1818, 1 Mur. 323.

66. Seduction — Married Woman — Adultery—Character of Husband—Admissibility of Evidence.—A question in an action of damages for adultery, whether the witness had been employed to find a lodging for a pursuer and a young woman, *held* competent as to the employment to find a lodging, but not whether it was for the pursuer and a young woman. *Baillie* v. *Bryson*, 1818, 1 Mur. 331.

67. Seduction — Married Woman — Adultery—Cohabitation after Adultery—Personal Bar.—A party has no claim to damages for adultery, who continues to cohabit with his wife after he has proof of her guilt. *Aitkin* v. *Macree*, 6 Feb. 1810, F. C.

68. Seduction — Married Woman — Adultery—Character of Husband—Admissibility of Evidence.—In an action of damages for adultery, it is not competent to prove the husband's loose character during a former marriage, nor that he was divorced from his former wife. *Baillie* v. *Bryson*, 1818, 1 Mur. 330.

69. Seduction—Specific Acts—Relevancy.—In an action of declarator of marriage, with an alternative conclusion for damages as for seduction, *observed* that, to support such latter conclusion, the summons ought to contain a particular statement as to the seductive arts having been used. *Stewart* v. *Menzies*, 1841, 2 Robin. 547. Affg. 15 S. 1198; 12 Fac. 1097.

70. Seduction of Workman—Relevancy—Specification.—In an action of damages by a leather japanner against another for seducing a workman from his employment, and bribing or inducing the workman to reveal secrets connected with his employer's trade, the pursuer must specify in his condescendence the nature of the secret which he charged the defender with thus obtaining, otherwise he is not en-

titled to an issue as to the allegation of the defender having unlawfully got possession of such secret. *Rutherfoord* v. *Boak*, 1836, 14 S. 732; 11 Fac. 32. [See No. 15.]

71. Seizure of Goods—Act 28 Geo. III. c. 17.—A seizure before trial of articles alleged to be manufactured contrary to a statutory regulation, cannot take place unless specially authorised by the statute; and therefore *found* that as the Act 28 Geo. III. c. 17, which makes certain regulations with regard to the manufacture of thread under the sanction of forfeiture, does not expressly give a power of seizure before trial, damages were due for such seizure having been made. *Mitchell & Co.* v. *Meek*, 1819, 6 Pat. 420. Affg. 29 May 1818, F. C.

72. Servant—Injury to—Loss of Services—Action by Master.—An action at the instance of a master for damages alleged to have been sustained by loss of his servant's services, in consequence of the servant having been injured by the fault of the defender, *dismissed* as irrelevant, there being no averment of any continued contract of service, nor of special damage from the loss of service. *Question*, whether such an action is competent by the law of Scotland. *Allan* v. *Barclay*, 1864, 2 M. 873; 36 J. 436.

73. Spuilzie—Capture of Whales.—A party of the inhabitants of one of the Shetland Isles discovered a shoal of small whales off the island, and succeeded in driving them into a bay, where they were joined by another party, who assisted in killing and taking them, and thereby, according to usage, became entitled to a share of the blubber. This second party attended at the flinching to receive their share, but were prevented and ordered off by the factor of the proprietor of the ground, who was entitled to one-half of the fish. *Held* that he had, as guilty of a spuilzie, become liable to them for the loss thereby suffered. *Stove* v. *Colvin*, 1831, 9 S. 633.

74. Statutory Powers—Lowering Pavement—Liability to Proprietor of Shop.—A local Act of Parliament authorised certain improvements in the city of Edinburgh, and *inter alia* to level a street, by an operation on which the pavement was lowered in front of one of the shops. *Held* that a claim for damages by the proprietor of the shop was competent against the commissioners, although there was no provision for compensation in such a case. *Strachan* v. *Edinburgh Improvement Commrs.*, 1837, 15 S. 637; 12 Fac. 602.

75. Tercer — Mislabouring of Terce Lands.—*Held* incompetent to demand damages or compensation against a tercer during her possession, on account of alleged mislabouring her terce lands, or to proceed against her, except in terms of the statutes 1491 and 1535. *Bell* v. *Bell*, 1827, 6 S. 221.

76. Title to Sue—Collaterals—Solatium.—A workman having been killed through the alleged fault or negligence of his employers, or of those for whom they were responsible, *held* that his brothers were not entitled, without alleging patrimonial or pecuniary loss, to sue the employers for damages, by way of *solatium* to their feelings for his death. *Greenhorn* v. *Addie*, 1855, 17 D. 860; 27 J. 440.

77. Title to Sue—Collaterals.—A wife may sue for damages for her husband's death, a husband for his wife's death, a parent for his child's death, and a child for his parent's death where the death has been caused by negligence or delict although the party suing can qualify no pecuniary loss arising from the death; and the party may sue both for solatium and for pecuniary loss, where such loss has been incurred. But collaterals have no title to sue. Accordingly an action by two sisters for damages in respect of their brother's death *dismissed* although the brother was their sole support. *Eisten* v. *N. B. Rly. Co.*, 1870, 8 M. 980; 42 J. 575.

78. Title to Sue — Executors — Actio personalis moritur cum persona. — The pursuer in an action for injury sustained in the service of an employer, died during the dependence of the action from the effects of the accident. *Held* that the right to recover damages transmitted to the executors of the deceased, and that they were entitled to carry on the action. *Neilson* v. *Rodger*, 1853, 16 D. 325; 26 J. 156.

79. Title to Sue—Executor-Creditor.—The pursuer of an action of damages died while it was pending. His widow was confirmed executrix, the claim for damages being included in the inventory. She also died pending the action. *Held* her executor-creditor might take up the claim and sist himself as pursuer in the action. *Mein* v. *M'Call*, 1844, 6 D. 1112; 16 J. 486.

80. Title to Sue—Husband—Death of Wife.—*Held* that a party had a title to sue for solatium and damages owing to the death of his wife caused by the defender's negligence. *Dow* v. *Brown & Co.*, 1844, 6 D. 534; 16 J. 248.

81. Title to Sue — Mother — Death of Illegitimate Child.—*Held* that the mother of an illegitimate child has a title to sue an action of damages and *solatium* for the death of her child. *Renton* v. *N. B. Rly. Co.*, 1869, 6 S. L. R. 255.

82. Title to Sue—Purchaser—Deterioration by Third Party of Material Purchased.—The police commissioners of a city sold to a contractor the whole dung and sweepings of the city, as the same should be laid down in their depôt. A gas company opened up several streets to lay pipes, and the sand and rubbish raised by them being mixed with the police sweepings, considerably diminished their value—*held* that the contractor had a title to sue the gas company for damages on account of the deterioration caused by their operations, notwithstanding the injury was done before the sweepings were brought to the depôt. *Fisken* v. *Glasgow City Gas Co.*, 1850, 12 D. 757; 22 J. 262.

83. Trust—Mismanagement—Action by Trustee against Co-Trustees for Injury to Health. — A trustee, alleging that he had been so irritated by the improper conduct of co-trustees in the management of the trust that his health was injured, and he was unable to attend to his business, which he lost in consequence, brought an action of damages against them. Action *dismissed* as irrelevant. *Pridie* v. *Dick*, 1857, 19 D. 287; 29 J. 142.

RES JUDICATA

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1. Absolvitor from Action as Laid — Different Allegations.—*Held* that an interlocutor "assoilzieing the defenders from the action as laid" could not be effectively pleaded as *res judicata* in bar of another action with the same conclusions, but supported by different allegations. *Gillespie* v. *Russel*, 1859, 21 D. (H. L.) 13; 3 Macq. 757; 31 J. 641.

2. Actio popularis—Decree of Commissioners of Supply—Declarator of Public Right-of-Way.—A decree of commissioners of supply shutting up a public footpath, under powers in a statute "to shut up superfluous or useless roads," *held*, on a construction of the word "roads" as used in the statute, not to bar a declarator of public right-of-way or footpath. *Pollock* v. *Thomson*, 1858, 21 D. 173; 31 J. 101.

3. Actio popularis — Ferry — Decree of Declarator of Right. — *Held* that the proprietors of a ferry were entitled to plead *res judicata* in respect of decrees declaring their right, obtained in previous processes, to which the pursuer, who sued as one of the public, had not been a party. *Greig* v. *Mags. of Kirkcaldy*, 1851, 13 D. 975; 23 J. 442.

4. Actio popularis — Public Right-of-Way—Absolvitor.—*Observed* that a judgment of absolvitor in a declarator of public right-of-way will not support a plea of *res judicata* against the public, when the subject-matter has not been adjudicated on. *Anderson* v. *E. of Morton's Trs.*, 1859, 21 D. 1055. *Hay* v. *E. of Morton*, 1861, 24 D. 116. *Hay, etc.* v. *E. of Morton*, 1862, 24 D. 1054. *White* v. *Lord Morton's Trs.*, 1866, 4 M. (H. L.) 53.

5. Actio popularis — Public Right-of-Way — Compromise. — In an action of declarator of public right-of-way, a verdict obtained by the pursuers was set aside by the court as against evidence, and a new trial was granted. Thereafter the pursuers consented to the defenders obtaining decree of absolvitor, on the defenders agreeing to take a certain sum in full of expenses. In a second action raised by other pursuers against the same defenders, concluding for declarator of the same right of way, *held* that the decree of absolvitor in the former action having been the result of a compromise, could not be considered a *judicium*, and could not support a plea of *res judicata*. *Question*, whether any individual may constitute himself the representative of the public in an action of declarator of a public right-of-way, so as to preclude an action by any other person, and to make the plea of *res judicata* a bar to such action. *Jenkins* v. *Robertson & Others*, 1867, 5 M. (H. L.) 27; 39 J. 384.

6. Actio popularis — Public Road — Members of Public.—*Observed*, that if an *actio popularis*, having for its object the removal of obstructions from an alleged public road, is properly carried to a decision by pursuers entitled to sue as members of the public, that decision will be *res judicata* against all other members of the public. *Potter* v. *Hamilton*, 1870, 8 M. 1064; 42 J. 625.

7. Action Allowed to Sleep — Final Interlocutor.—Circumstances in which *held* that an interlocutor pronounced in an action which had been allowed to sleep for a great many years was a final interlocutor, and amounted to *res judicata* as regarded the matters embraced in it. *Ross* v. *Mackenzie*, 1776, 3 Pat. 676.

8. Appearance in Cause — Tutors Appearing in Cause without being Sisted — Final Decree. — In an action against a pupil and his tutors and curators service was accepted by an agent for behoof of the pupil and his tutors and curators. The pupil had no tutors, but defences were lodged for the pupil "and his tutor *ad litem*." Additional defences were afterwards lodged for the pupil "and his tutors dative"; but there was no

evidence either that a tutor *ad litem* had been appointed to the pupil, or that his tutors dative were sisted, and their names did not appear in the proceedings at all. Judgment was finally pronounced in the case by the Inner House. *Held* that the intervention of the tutors dative, and their continued pleading in the cause, validated the proceedings in that action, whatever objections might have existed to the citation and service, and therefore that the judgment pronounced therein formed *res judicata*. *Carmichael* v. *Anstruther*, 1866, 4 M. 842; 38 J. 440.

9. Bailie Court Decree — Breach of Promise — Absolvitor — Damages for Seduction before Commissaries. — *Question*, whether absolvitor from an action of damages before the bailies for breach of promise of marriage, forms *res judicata*, so as to bar an action of damages for seduction before the commissaries. *Sellers* v. *Lindsay*, 1825, 4 S. 8.

10. "Competent and Omitted"—Absolvitor.—A mother made a deed of settlement in favour of her son, reserving power to burden him with debts and legacies to the extent of £500, and thereafter she transferred £500 to a daughter. On the mother's death the son raised an action to have it found that the settlement was onerous (as to which he got decree), and to reduce the transference of the £500 (on the ground that it truly formed part of the mother's funds), and for payment of it to him, but he did not aver that she had contracted any debts. An issue having been sent to a jury whether the £500 had been wrongously transferred to the daughter, the judge refused to allow the son to prove the existence of debts, and the jury found for the daughter, who at the same time lodged a minute admitting that the £500 was the money of her mother, but reserving all defences as to the effect of that admission, and she was assoilzied subject thereto. Before the absolvitor a supplementary action was raised by the son, in which he averred that debts existed exceeding £500, whereby the reserved right to dispose of that sum was exhausted. *Held* that the absolvitor formed *res judicata*, and that the allegation as to the existence of debts was competent, but omitted. *Stewart* v. *Stewart*, 1838, 16 S. 632.

11. "Competent and Omitted" — Accountant's Report. — *Held* that after an accountant's report had been approved of, finding a specific sum due by a defender by a judgment of the Court of Session, affirmed by the House of Lords, it was not competent for the pursuer to allege that the accountant had fallen into an error as to the application of indefinite payments, which, if corrected, would enlarge the sum due by the defender. *Robarts* v. *Cuthbert*, 1840, 15 Fac. 1488.

12. "Competent and Omitted"—Bill of Exchange.—The acceptor of a bill of exchange presented a bill of suspension of a charge for payment, on the ground that the charger was not a *bona fide* onerous indorsee, and referred to the charger's oath, who deponed negative, whereupon the bill of suspension was refused; and it was subsequently discovered that the bill was written on a wrong stamp. *Held* competent and omitted, and therefore the refusal of the bill *res judicata*. *Barbour* v. *Grierson*, 1828, 6 S. 860; 3 Fac. 920.

13. "Competent and Omitted"—Bill of Exchange.—An acceptor presented a suspension of a charge upon a bill, on the ground that no debt was due, and referred to the oath of the charger, who deponed that he gave the amount in the bill to the acceptor, on the footing that he was to repay it in such sums as he could, and that if not paid when it fell due, the bill was to be renewed. The court having held the oath negative of the reference, and the suspender having been incarcerated, he presented a note of suspension and liberation, in which he admitted the debt to be due, but stated that the money had been advanced to him on the above understanding, and again referred to the oath of the charger. The court, before answer, and without giving any opinion as to a plea of competent and omitted, *sustained* a reference to the charger's oath that the money had been advanced on the conditions alleged by the suspender. *Grant* v. *Ramsay & Co.*, 1851, 13 D. 500; 23 J. 209.

14. "Competent and Omitted"—Decree for Expenses—Reduction.—A reduction of a decree alleged to have been for a random sum of expenses, *held* barred by the decree having been pronounced in a suspension of a charge for payment of such expenses, finding the letters orderly proceeded, and in which the plea was to be regarded as either proponed and repelled or competent and omitted. *Campbell* v. *Aiken*, 1837, 15 S. 1049.

15. "Competent and Omitted"—Decree in Absence—Medium concludendi.—*Held* that a plea of competent and omitted did not apply where the decree challenged passed in absence; and that although a former summons of reduction had been dismissed, the pursuer had raised a summons upon a new *medium concludendi*. *Macdonald* v. *Macdonald*, 1840, 2 D. 889; 15 Fac. 916.

16. "Competent and Omitted"—Decree in Absence—Reduction.—In a reduction of a decree in absence, the defender pleaded that as the decree had been produced in an action of count and reckoning at the pursuer's instance against the defender, and there sustained as a good claim of debt by a decree *in foro*, the pursuer was barred from insisting in the reduction on any of the grounds libelled, which were either competent and omitted, or proponed and repelled in the count and reckoning. The Lord Ordinary sustained the defender's plea, but the court recalled his interlocutor *hoc statu*, and remitted the case to him. *Kincaid* v. *Stainton*, 1852, 2 Stuart 116.

17. "Competent and Omitted"—Decree in Name of Law Agent for Expenses.—A party who allowed the agent of his opponent

to obtain decree in the jury court for expenses in his own name, *found* barred, by the exception of competent and omitted, from suspending a charge, on the allegation that the agent had no licence. *Ewing* v. *Wallace*, 1831, 6 W. & S. 222. Affg. 9 S. 385; 6 Fac. 281.

18. "Competent and Omitted"—Decree in Suspension of Charge.—In a suspension of a charge on three bills, decree was pronounced and extracted in favour of the charger; but thereafter, a new suspension having been brought on the ground of the invalidity of the protest, which it was said to be *pars judicis* to notice, *held* competent and omitted, and therefore the decree *res judicata*. *Napier* v. *Carson*, 1828, 6 S. 500; 3 Fac. 509. See *Merchant & Anr.* v. *Tay Ferries Trs.*, 1824, 2 S. 622.

19. "Competent and Omitted"—Identity of Parties. — The unintentional omission of a competent plea by an heir of entail in possession does not prevent a decree in the cause operating as *res judicata* against subsequent heirs. *Carmichael* v. *Anstruther*, 1866, 4 M. 842; 38 J. 440.

20. "Competent and Omitted"—Lease—Acquiescence in Refusal of Bill of Suspension.—A tenant of a piece of ground in natural pasture at entry, the term of removal from which was stipulated to be Whitsunday, acquiesced in the refusal of a bill of suspension of a decree of removing as at Whitsunday. *Held* that the refusal of the bill formed *res judicata* as to his claim, so far as founded on the lease, and that he could not support this claim by a decree-arbitral, on which he had omitted to found in his bill of suspension. *Blair* v. *Lyall*, 1826, 4 S. 365.

21. "Competent and Omitted"—Poor's Roll.—An objection that an applicant for the poor's roll was a married woman and had not her husband's concurrence, stated after the lawyers had reported a *probabilis causa*, *held* to be competent and omitted *quoad hoc*, but that it would be open to the objector to plead it *in causa*. *A.* v. *B.*, 1833, 12 S. 197.

22. "Competent and Omitted"—Reduction—Media concludendi.—The plea of competent and omitted has no place against the pursuer of a reduction on *media concludendi* different from those on which the original action was founded. *Macdonald* v. *Lord Macdonald*, 1842, 1 Bell 819.

23. "Competent and Omitted"—Sequestration—Decree of Approval and Discharge—Reduction of Decree.—An offer of composition under a sequestration was entertained at one meeting, agreed to at another, and followed by decree of approval and discharge, after the usual intimations, without opposition. In a reduction of the decree it was alleged that there were only nine creditors ranked; that of these, only eight assented, one of whom was not entitled to be counted, his debt being under £20; that another had, prior to the decree, withdrawn; that at a meeting subsequent to those at which the composition was entertained and agreed to, the creditors had directed the trustee to wind up the estate, as the composition had not been acceded to by the proper number; and that no mention was made in the petition by the trustee and bankrupt of this latter meeting, nor was the state of the concurrence distinctly brought under the review of the court. *Held* that these allegations were irrelevant as being competent and omitted. *Buchanan* v. *Dunlop*, 1829, 8 S. 201; 5 Fac. 168.

24. "Competent and Omitted"—Sequestration—Lease—Compensation.—In a conjoined process of sequestration by a landlord, and poinding by the tenant's creditors, the landlord omitted to state a good plea against claims of compensation by the tenant, and he allowed the fund *in medio* to be uplifted and distributed among the creditors. *Held* not entitled afterwards to reduce the decree, on the ground of the plea omitted to be stated. *Campbell* v. *Brown*, 1831, 9 S. 258.

25. Construction of Decree—Declarator.—*Held* that it was competent to try a question as to the construction of a final decree, in an action of declarator. *Barstow* (*Park's Curator*) v. *Black*, 1870, 8 M. 671; 42 J. 332.

26. Construction of Decree — Final Interlocutor.—An interlocutor having found a decree to be *res judicata*, and a party, in terms of it, entitled to fish "from the march at Breakenord down to the sea," "but in respect parties are not agreed as to the march between the lands of Balblair and Breakenord," appointed a condescendence on that subject; and the interlocutor having become final, *held* that it was still competent to inquire in what sense the words "the march at Breakenord" were used in the decree. *Mackenzie* v. *Mags. of Dingwall*, 1834, 7 W. & S. 306. Affg. 9 S. 761.

27. Criminal—Acquittal—Civil Action.—Parties, although acquitted under a criminal charge, found in a civil action liable in reparation for an injury inflicted on a mare. *Wilsons* v. *M'Knight*, 1830, 8 S. 398.

28. Criminal—Assault—Justice of the Peace—Justiciary Court.—A plea of *res judicata* against an indictment for assault, founded on proceedings before a single justice of the peace, *repelled*. *M'Lellan*, 1824, S. (Just.) 126.

29. Criminal — Civil Action. — Circumstances in which a party who had been prosecuted by a private individual, with concurrence of the Lord Advocate, before the Court of Justiciary on a criminal charge, concluding likewise for damages and expenses, and acquitted, *found* to be still subject to a civil action. *Gordon* v. *Gordon*, 1731, 1 Pat. 60.

30. Criminal—Foreign Court Conviction—Civil Action.—A Scots vessel was seized by the Dutch East India Company, and, on a charge of contraband trade, was condemned by the courts of Malacca and Batavia. The owner afterwards arrested property of the company *jurisdictionis fundandæ causa*, and brought an action of damages for illegal seizure

and confiscation. *Held* that the action was competent, but that the foreign sentence formed a defence *exceptione rei judicatæ*. *Hamilton* v. *Dutch East India Co.*, 1732, 1 Pat. 69. Affg. M. 4548.

31. Criminal—Justice of Peace Court—Different Pursuer.—A seaman presented a complaint to the justices of peace, founded on the Merchant Seamen Act, 1845, ss. 11 and 12, alleging that his effects had been detained, contrary to the statute, by the defender, and praying for delivery of them, and a penalty in terms of the statute. The justices having dismissed the complaint, another was presented by an informer (who had been examined as a witness in the former one) against the same defender, setting forth the same facts, and founded on the Merchant Seamen Act, 1844, ss. 10 and 62, and also on the Merchant Seamen Act, 1845 (but latterly restricted to the offence under the former statute), and praying for the statutory penalty and delivery to the seaman of his effects. The defender objected that the matter was *res judicata* in the complaint at the instance of the seaman. The justices overruled the objection, and convicted him. Note of suspension of the conviction *passed*. *Macdonald* v. *Fildes*, 1848, 10 D. 860; 20 J. 301.

32. Criminal—Justice of Peace Court—Sheriff.—A person who had been acquitted in a justice of peace court of a charge under the Prevention of Poaching Act, 1862, ss. 2, was afterwards charged before the sheriff with contravention of the Preservation of Game Act, 13 Geo. III. c. 54, s. 3. The two complaints were at the instance of different prosecutors, but the facts founded on in each were substantially the same. In bar of trial upon the second complaint, the accused pleaded *res judicata*, and this plea was sustained by the sheriff. *Held*, on appeal to the Circuit Court of Justiciary, that the plea of *res judicata* was not well founded, in respect that the offence with which the man was charged before the sheriff was different from that of which he had been acquitted by the justices. *Galloway* v. *Somerville*, 1863, 4 Irv. 444; 36 J. 185.

33. Criminal—Police Court—Assault—High Court—Murder.—A panel was tried in a police court for assault. The person assaulted having thereafter died, he was charged with murder. Plea of *res judicata repelled*. *James Stewart*, 1866, 5 Irv. 310.

34. Criminal—Police Court—Assault—High Court—Murder.—A panel who had been acquitted by a police court on a charge of assault, having, in consequence of the death of the injured party, been afterwards indicted for murder, *held*, after the court had been equally divided, that a plea of *res judicata*, founded on the former trial, was not well founded. *Cobb*, 1836, 1 Swin. 354.

35. Criminal — Police Court — Same Offence.—A sentence of a police court for assault, on a complaint by the private party, with concourse of the procurator-fiscal, affords a plea of *res judicata* against an indictment for the same offence. *Watt*, 1824, S. (Just.) 113.

36. Criminal—Relevancy.—The relevancy of a libel in the sheriff court must be considered at the first diet; and therefore, where an interlocutor sustaining the relevancy has been pronounced at the first diet, it is incompetent to state objections to the relevancy at the second diet. *Smith* v. *Lothian*, 1862, 4 Irv. 170; 34 J. 467.

37. Criminal — Same Charge — Baron Bailie — Justiciary Court. — Three panels having been convicted of an assault before a baron bailie, and punished by fine, a plea of *res judicata*, founded on this conviction, *sustained* as a defence against a subsequent trial for the same offence before the Justiciary Court. *Hosie*, 1837, 1 Swin. 507.

38. Criminal—Same Charge—Relevancy—Sheriff Court—Justiciary Court.—A panel was charged before a sheriff court with culpable homicide. The sheriff-substitute ordered certain words to be deleted as irrelevant, whereupon the procurator-fiscal deserted the diet *pro loco et tempore*. The panel was indicted to the Justiciary Court on the same charge. Plea, that it was *res judicata* that the words which the sheriff had ordered to be deleted from the libel as irrelevant, should be deleted from the indictment, *repelled*. *Fleming*, 1866, 5 Irv. 289; 39 J. 1.

39. Criminal — Same Charge — Sheriff-Substitute—Sheriff.—It is incompetent to try an accused person before the sheriff, on a libel charging the same crime and drawn in the same terms as one on which he had previously been indicted before the sheriff-substitute, and which had been dismissed as irrelevant. *Longmuir* v. *Baxter*, 1858, 3 Irv. 287; 31 J. 33.

40. Criminal—Sentence of Magistrates of Royal Burgh Awarding Assythment, etc.—Justiciary Court—Culpable Homicide.—A plea of *res judicata* founded on a sentence of the magistrates of a royal burgh, on a complaint at the instance of the private party, with concourse of the procurator-fiscal, awarding assythment, and ordering him to keep the peace under a penalty, failing which to be imprisoned, against an indictment for culpable homicide, *repelled*. *M'Niel*, 1826, S. (Just.) 162.

41. Criminal—Summary Conviction—Subsequent Action of Damages.—Action of damages *dismissed* as incompetent, where the ground of action was, that the defender had assaulted the pursuer, and thereafter had him tried and convicted before a police magistrate, the sentence not having been brought under review of the superior criminal court, and being unreduced, and no irregularity alleged. *Gilchrist* v. *Anderson*, 1838, 1 D. 37.

42. Criminal — Suspension and Liberation — Action of Damages for Wrongous

Imprisonment.—In an action of damages for wrongous imprisonment, on the ground of the alleged illegality of certain proceedings under the Combination of Workmen Act, 1825, which had been previously the subject of a bill of suspension and liberation at the instance of the pursuer before the Court of Justiciary, *held* that the decision of the Court of Justiciary granting liberation imported no *res judicata* in this action. *Macleod* v. *Buchanan*, 1837, 15 S. 1113.

43. Declarator of Marriage — Decree Binding on all Persons.—A decree of declarator of marriage is a judgment *in rem*, and is therefore binding on all persons whomsoever. *Longworth* v. *Yelverton*, 1867, 5 M. (H. L.) 144; 39 J. 635.

44. Decree.—A defender, after lodging defences, was assoilzied, and, on a representation by the pursuer, decree was given against the defender in consequence of failure to lodge answers arising from poverty. *Held* that the decree was in absence, and not *in foro*. *Leith* v. *Leith*, 1822, 1 S. 468.

45. Decree.—*Held* that a decree of the Court of Session pronounced, upon full discussion of the merits of the cause, constituted *res judicata* to the effect of excluding all consideration of the questions which were decided by it. *Maule* v. *Maule*, 1833, 6 W. & S. 586. Affg. 9 S. 876.

46. Decree—Abandonment—New Action.—After a record was closed, but before any interlocutor was pronounced necessarily inferring absolvitor, the pursuer, for the purpose of bringing a new action, intimated his intention to abandon the case, and the court, in respect thereof, assoilzied the defenders, and found them entitled to expenses. *Held* that a new action was competent, although there was no special reservation of it. *Shirreff* v. *Shirreff's Trs.*, 1836, 14 S. 825.

47. Decree — Competition of Brieves — Reduction of Service. — In a competition of brieves, the agent of one of the parties intimated to the agent of the other that he was instructed not to proceed further, and allowed his client's brief to be dismissed in absence, and the other party was served. *Held*, in a reduction of this service by the other party whose brief had been dismissed, that there was no room for the plea of *res judicata*, and that it was unnecessary to reduce the interlocutor dismissing his brief. *Barclay* v. *Sir R. Barclay*, 1842, 5 D. 394; 15 J. 175.

48. Decree—Dismissal of Action.—*Held* that an interlocutor, whereby the judge, in respect of a minute by the pursuer stating that he did not insist in certain conclusions "dismisses the action and decerns," did not preclude the pursuer from raising another action containing the same conclusions. *Stewart, etc.* v. *Greenock Harbour Commrs., etc.*, 1868, 6 M. 954; 40 J. 550.

49. Decree — Extracted Decree. — *Held* that a party could not open up an extracted decree by a Lord Ordinary, in a previous process, pronounced *in foro*, although it affected his legitimacy, and he alleged that, through poverty, he had been unable to bring it under review before it was extracted. *Kerr* v. *Martin*, 1836, 14 S. 1104.

50. Decree—Judgment upon Question not Material.—A judgment upon a question not material or necessary for the decision of the point at issue, does not form *res judicata*. *Lord Blantyre* v. *E. of Wemyss*, 1844, 3 Bell 34.

51. Decree—Reduction of Decree.—*Held* that a party founding on an unstamped and improbative document of debt alleged to have been obtained by fraud, and who had been called in a process of multiplepoinding, was entitled to pursue a reduction of a decree of preference in his absence, and that such decree did not form *res judicata*. *Mackay* v. *Murray*, 1826, 5 S. 34.

52. Decree—Right to Estate and Titles.—In a reduction of a decree *in foro* relative to the right to an estate and the titles thereof, the defender may produce the decree, and thereupon found on it as *res judicata*, and refuse to produce the titles till the decree is set aside. *Maule* v. *Maule*, 1827, 5 S. 256.

53. Foreign Decree — Bill. — A party brought an action of damages against the agent for a bank and the bank, setting forth that the agent had guaranteed to the pursuer the delivery of certain locomotive engines, on receiving his accepted bill for £1000 of the price; that the pursuer accepted the bill, which was indorsed by the agent to the bank; that the agent failed to implement his guarantee; and that the bank obtained judgment upon the bill in England against the pursuer, which they executed against him. *Held* that the proceedings in England formed *res judicata* to the effect of barring the pursuer from claiming damages on account of the judgment and execution. *Chanter* v. *Borthwick*, 1848, 10 D. 1544; 20 J. 659.

54. Foreign Decree — Condemnator — Authority.—A foreign decree *condemnator* is not of the same authority as a decree of the court of this country, and can only be considered as affording *prima facie* evidence of the truth and justice of the claim of the pursuer seeking to enforce it here. *Southgate* v. *Montgomerie*, 1837, 15 S. 507; 12 Fac. 473.

55. Foreign Decree—Consistorial Cause.—An Englishwoman, resident in England, was sued in the English ecclesiastical courts by her husband, a domiciled Scotsman, for restitution of conjugal rights, and defended herself by a "responsive allegation," praying for divorce *a mensa et toro*, on the ground of cruelty and adultery committed in Scotland. She obtained sentence of divorce, and afterwards raised an action of divorce in the Scottish courts. *Held* that she was not barred from insisting in that action. *Geils* v. *Geils*, 1851, 23 J. 435; 1 Macq. 36. Affg. 13 D. 321; 23 J. 137.

56. Foreign Decree—Executor.—A report by a Master in the Chancery Court of Jamaica as to an accounting there between creditors of a defunct, and the defender as executor, *held* not binding on the next-of-kin, the defunct pursuer of an action of count and reckoning in the Court of Session, as to whom the report was *ex parte*. *Bain* v. *Shand*, 1839, 1 D. 439.

57. Foreign Decree — Executor — Decree of Exoneration.—A party who was appointed an executor, and had intromissions in Jamaica, obtained, after the estate was thrown into the Court of Chancery in Jamaica, a power of attorney from a residuary legatee. In a process of accounting in that court as to his intromissions, he caused appearance to be made for the residuary legatee, and obtained decree of exoneration; and on his return to Scotland, the legatee raised an action of count and reckoning against him. *Held* that as the executor was not entitled to use his power of attorney, to the effect of making the legatee a party to these proceedings (seeing that their interests were directly opposed), the legatee was not barred by the decree from calling him to account, nor bound to sue him in the Jamaica courts. *Anderson* v. *Shand*, 1833, 11 S. 688.

58. Foreign Decree—Hostile Kingdom.—*Held* that a decree of the French court, against a Scotsman as it had been pronounced *sine causa cognita*, and in the court of a hostile kingdom, where the Scotsman could not safely appear to defend himself, was not *res judicata* against his representatives. *Lippmann* v. *Don*, 1837, 2 S. & M'L. 682. Revg. 14 S. 241; 11 Fac. 175.

59. Foreign Decree—Prize Court.—*Question*, how far the facts stated in the decree of a foreign prize court were to be held as *probatio probata* in the courts of this country. *Henderson, Riddell, & Co.* v. *Lothian*, 1803, 4 Pat. 484. Affg. 27 June, 1800, F. C., and 434 note; M. "Insurance" App. No. 4.

60. Foreign Decree—Succession.—Judgment having been pronounced by an American court, finding the fee of certain sums to belong to the pursuer under a settlement of her brother, executed in America, decree pronounced conformably in her favour. *Brown* v. *Brown's Trs.*, 1830, 4 W. & S. 28. Affg. 4 S. 42.

61. Foreign Decree — Succession. — The owner of an estate in Jamaica died intestate, when his succession fell to his only daughter, subject to the dower of the widow. The daughter died under fifteen years of age, a short time after the Act was passed abolishing slavery, and providing compensation to the owners; but prior to its coming into operation, she, by her will, conveyed her estate to her mother, who, as registered owner, obtained payment in Jamaica, without opposition on the part of the heir-at-law, from the commissioners. In an action by the heir-at-law of the daughter, *held* that the proceedings in Jamaica by the widow did not form *res judicata*. *Robertson* v. *Landell*, 1843, 6 D. 170; 16 J. 125.

62. Foreign Decree—Succession.—Representatives in Scotland of a party who died in America, received under a judgment of an American court a share of the residue of the deceased's estate, on the footing that a certain legacy was void. No party had been called in the American courts as claiming right to the legacy. A party claiming to be entitled to the legacy sued the Scots beneficiaries in the Court of Session. Plea of *res judicata repelled*. *Boe* v. *Anderson*, 1857, 20 D. 11; 30 J. 12.

63. Holding as Confessed.—*Opinion* expressed, that a holding as confessed is not a sufficient foundation for the plea of *res judicata*. *A.* v. *B.*, 19 May 1815, F. C.

64. Identity of Parties.—The Judge Ordinary regulated the state of possession of a vacant piece of ground used as a dunghill for a neighbouring tenement, in a question with the fiar, who, jointly with the liferentrix, his mother, occupied the premises. *Held* conclusive as to the regulation of the possession in a process subsequently raised by the liferentrix. *Denovan* v. *Johnstone*, 1832, 10 S. 206.

65. Identity of Parties—Absolvitor.—An action was raised by a trustee, adjudging on a trust bond for behoof of a party setting himself forth as apparent heir to an estate under a fee-simple destination, with a view to reduce the service and titles of the heir in possession, on an allegation of illegitimacy; and decree of absolvitor was pronounced. *Held* to form *res judicata* against a grandson of such heir (now deceased), who claimed the same character, insisting in a reduction of the same titles, and on the same grounds, though not having incurred a representation to his grandfather. *Rutherfurd* v. *Nisbet's Trs.*, 1832, 11 S. 123.

66. Identity of Parties—Absolvitor—Next Heir-Apparent.—An apparent heiress having made up titles in the person of a trustee by an adjudication on a trust bond, in order to challenge her predecessor's deed, and decree of absolvitor having passed against her, *held* that this was *res judicata* against the next heir-apparent challenging. *Gordon* v. *Ogilvie*, 1762, 2 Pat. 61.

67. Identity of Parties — Bankruptcy — Absolvitor. — A bankrupt under sequestration raised an action against certain defenders. The trustee declined to sist himself, and intimated, that if the creditors adopted any proceedings, it would be in a different shape; and the defenders were assoilzied, in respect the bankrupt failed to find caution for expenses. *Held* that this did not bar the trustee from afterwards bringing a multiplepoinding in name of the defenders in relation to the same question. *Shepperd* v. *Munro*, 1829, 7 S. 680.

68. Identity of Parties—Bankruptcy—Action by Agent to whom Expenses Incurred. — Although creditors had been

assoilzied from an action at the instance of a trustee under a disposition *omnium bonorum* for expenses, yet *held* that this did not bar an action against them by the agent to whom the expenses were incurred, and who was not a party to the former action. *Laidlaw* v. *Blackwood*, 1843, 15 J. 484.

69. Identity of Parties—Bankruptcy—Decree against Trustee Personally—Cautioner.—Decree was pronounced in an action against a trustee on a sequestrated estate personally, and in a suspension, in which he found caution, the reasons were repelled. *Held res judicata* in a question with the cautioner. *Jeffrey* v. *Brown*, 1824, 2 Shaw 349. Affg. 1 S. 102.

70. Identity of Parties—Bankruptcy—Judgment against Trustee. — A judgment against a trustee, as such, does not constitute *res judicata* in an action, as to the same matter, against the individual creditors on the estate, for subjecting them to personal responsibility. *Kirkland* v. *Cadell*, 1838, 16 S. 860 ; 13 Fac. 649.

71. Identity of Parties—Bankruptcy—Trustee Subsequently Appointed.—A decree sustaining the validity of an entail in an action at the instance of an individual creditor of a bankrupt and deceased heir of entail to constitute his debt *held* not to be *res judicata* as against a trustee subsequently appointed on the bankrupt's estate. *Howden* v. *Rocheid*, 1868, 6 M. 300 ; 40 J. 166.

72. Identity of Parties—Defender Pursuer in Former Action. — Circumstances in which it was *held* that the validity and import of an agreement, founded on by a pursuer, was *res judicata* under the decision in a previous process between the defender, then claiming against the bankrupt estate of the pursuer, and a creditor of the pursuer's opposing the claim. *Megget* v. *Scoular*, 1833, 11 S. 661.

73. Identity of Parties—Entail.—In a previous litigation between an institute and the next heir of entail (the pursuer and defender in this case), the court *found* that the institute was bound to execute a deed of entail, containing a clause declaring the entailer's personal debts a burden on the entailed estate. The institute was also the entailer's executor. *Held* that although the institute did not appear in that litigation in his character of executor, the decision in that case formed *res judicata* as to the liability of the heirs of entail for the entailer's personal debts. *Fraser* v. *Lord Lovat*, 1854, 16 D. 645 ; 26 J. 302.

74. Identity of Parties — Entail — Declarator—Subsequent Heir of Entail.—An heir of entail in possession brought an action to have it found that he had sole right to a forest, subject to various servitudes, and to a personal privilege of shooting in favour of the proprietor of B, and got a judgment generally to the effect he sought, containing a finding that the proprietor of B had a right of shooting, and procedure followed with a view of fixing the extent of that right. The next heir in possession of the entailed lands now brought a declarator against a singular successor in possession of B, seeking to have his right of forest declared absolute. Plea of *res judicata* stated in defence *sustained*, overruling the pursuer's contentions (1) that the plea did not apply, for, under the original action as laid, his ancestor could not have obtained a decree affirmative of the right now sought to be established ; and (2) that the previous judgment proceeded on a judicial admission made by an heir of entail, which was not binding on succeeding heirs. *Observed*, that an admission in a litigation by an heir of entail, no *mala fides* being alleged, is binding as against third parties, whatever it may be *inter hæredes*. *M. of Huntly* v. *Nicol*, 1858, 20 D. 374 ; 30 J. 211.

75. Identity of Parties — Entail — Heir in Possession—Succeeding Heir.—A judgment dismissing a claim for ameliorations, in a question with an heir of entail in possession, held to form *res judicata*, in a question with a succeeding heir. *Innes* v. *D. of Gordon*, 1831, 9 S. 632.

76. Identity of Parties — Entail — Reduction.—A husband, by marriage-contract, bound himself to secure certain lands to himself and the heirs-male of the marriage. He thereafter entailed the lands on his son and his heirs-male, whom failing, on his daughter. His son brought a reduction (calling his sister as defender) of the entail, as a contravention of the marriage-contract, and settled the estate on himself and the heirs-male of his marriage, whom failing, on the heirs-female of his marriage. Decree of absolvitor was pronounced in the reduction. The son died, survived by daughters, who brought a new reduction of the entail on the same grounds as their father had done. *Held* that the decree in the action at their father's instance was *res judicata*. *Craik* v. *Craik*, 1753, 1 Pat. 542.

77. Identity of Parties—Entail—Subsequent Heir of Entail. — Circumstances in which a decree *in foro*, pronounced in 1782 in a question with an heir of entail, was *held res judicata* as to part of the subject-matter thereof in a question with a subsequent heir of entail. *Maule* v. *Maule*, 1833, 6 W. & S. 586. Revg. 9 S. 876.

78. Identity of Parties — Entail — Substitute Heirs.—*Opinion* intimated that, in a process with an heir of entail in possession (or entitled to possession), the decree obtained *in foro*, if without collusion, is good against all substitute heirs, though not parties to the process. *Maule* v. *Maule*, 1833, 6 W. & S. 586. Affg. 9 S. 876.

79. Identity of Parties—Entail—Title to Entailed Lands—Subsequent Heir of Entail.—Circumstances in which it was *held* that the refusal of a bill of suspension presented by a purchaser, relative to the validity of a title to entailed lands sold under a process of sale, afforded a plea of *res judicata* in a question with a subsequent heir of entail.

Dickson v. *Cuninghame*, 1831, 5 W. & S. 657. Affg. 7 S. 503 ; 4 Fac. 653.

80. Identity of Parties — Executor — Cautioner in a Confirmation.—Where decree has been obtained against an executor *foro contentioso*, and the cautioner in the confirmation is afterwards sued for the sum decerned for, he is not entitled to have the proceedings opened up to the effect of pleading a defence which was proponed for the executor and repelled, without bringing a reduction of the decree against the executor. *Ross & Another* v. *Mackenzie & Another*, 1840, 12 J. 570.

81. Identity of Parties—Foreign Decree.—In an action in England the defender was found liable in a sum. Thereafter being unable to pay he prevailed on the pursuer to discharge his bail, and the defender in writing agreed that this should not release or discharge the judgment. *Held* that this writing did not homologate the judgment and bar the defender from stating pleas in a subsequent Scots action against him by the same pursuer. *Goddard* v. *Swinton*, 1715, Robert. 162.

82. Identity of Parties — Lease. — A transaction by which a substitute heir sold his eventual interest under a lease to the tenant, but which the tenant afterwards renounced, *held* no bar to the heir after his succession pleading *res judicata*. *Innes* v. *D. of Gordon*, 1831, 9 S. 632.

83. Identity of Parties — Members of same Association.—In an action at the instance of a member and manager of a widows' fund association, to have it declared illegal to apply the funds towards payment of expenses incurred "in prosecuting or carrying out the said proposal to dissolve, and appropriate the funds among the parties interested, or in litigation in support thereof," and concluding for reduction of certain resolutions relative to these proceedings, a plea of *res judicata*, in respect of judgments of absolvitor previously pronounced in two actions having similar objects, at the instance of another member of the same association, *sustained* *Gray* v. *M'Hardy, etc.*, 1862, 24 D. 1043 ; 34 J. 521.

84. Identity of Parties—Partnership—Latent Partner. — A decree against the partners of a company is not such *res judicata* against a latent partner who had not been called, as to exclude him from objecting to it. *Edinburgh & Leith Shipping Co.* v. *Gillon*, 1832, 10 S. 404.

85. Identity of Parties — Reduction — Declarator. — By marriage-contract the husband and his father became bound to entail an estate in favour of the eldest son and other sons of the marriage, etc., and the husband and his father afterwards conveyed the estate to a trustee for behoof of their creditors. The marriage-contract trustees raised an action, concluding for declarator that the estate was entailed and for reduction of the trust deed. They obtained decree of reduction. After his succession, the eldest son brought an action against the succeeding heirs of entail, for declarator that the entail was ineffectual, and that he was entitled to hold in fee-simple, the same grounds being urged for holding the entail invalid as were urged by the defenders in the former action. Plea of *res judicata sustained*. *E. of Leven* v. *Cartwright*, 1861, 23 D. 1038 ; 33 J. 521.

86. Identity of Parties — Reduction of Deed.—A sister threatened to bring a reduction, on the ground of facility and circumvention, of a disposition to a stranger of the family estate of which she was heir ; but, in consideration of a sum of money, with consent of her husband, renounced her right to challenge the deed. After her husband's death, she revoked this renunciation as impetrated, and brought a reduction of the disposition, in which decree of absolvitor was pronounced. After her death, her son brought a reduction both of the disposition and of the renunciation by his parents. *Held* that he was barred by the renunciation of his parents from bringing the action, and that the decree of absolvitor was *res judicata*. *Gordon* v. *Ogilvie*, 1762, 2 Pat. 61. Affg. M. 14070.

87. Identity of Parties—Reduction of Deed.—In a reduction of a deed, as on deathbed, at the instance of parties served heirs to the deceased, they adduced a witness who, on his examination *in initialibus*, declared that he considered himself a nearer heir than the pursuers, though he had not yet been able to make out his propinquity, but that he did not renounce his claim. *Observed*, by a majority of the court, that a verdict or judgment obtained by the pursuers could not be used for the witness, should he subsequently make out his propinquity and reduce the pursuer's service, but that thereupon the proceedings would fall, as at the instance of a party not entitled to have carried them on ; and that a verdict and judgment against the pursuers would not be *res judicata* against him, but would be *res inter alios acta*. *Ralston* v. *Rowat*, 1833, 6 W. & S. 468. Affg. 11 S. 451.

88. Identity of Parties — Superior and Vassal — Charter — Successor of Vassal.—Circumstances in which it was *held* that a judgment of the Court of Session finding that a vassal was not entitled to object to the insertion in a charter by progress of a reservation of the coal under the lands, "as mentioned in the original infeftments of the same," was not *res judicata* so as to preclude a successor of the vassal from maintaining that the superior had no right to the coal. *Harvie* v. *Stewart*, 1870, 9 M. 129 ; 43 J. 73.

89. Identity of Parties — Trust — Denuding — Children Emerging. — *Question*, whether a judgment that trustees were bound to denude in favour of the children of A, alive at the truster's death, would form *res judicata* as against children emerging. *Biggar's Trs.*, 1858, 21 D. 4 ; 31 J. 4.

90. Justice of the Peace Decree—Sheriff Court.—*Question* as to the effect to which a justice of peace judgment could be pleaded as forming *res judicata* in a sheriff court process. *Campbell* v. *M'Gillivray*, 1864, 2 M. 399; 36 J. 194.

91. Media concludendi—Bill of Exchange.—*Held* that the holder of a bill who was assoilzied from an action concluding for restitution, on the ground of having obtained the bill without value, and in collusion with bankrupts to defraud their creditors, was entitled to plead *res judicata* against an action of reduction on the same grounds, and containing the same conclusions. *Pattison* v. *Campbell*, 1827, 5 S. 208.

92. Media concludendi—Calls on Shares—Former Action for Price of Shares.—The defender in an action for payment of calls on shares craved counter issues. He had previously, in another action against him at the instance of the same pursuers, for payment of the price of the same shares which had been advanced by the pursuers on his account, obtained counter issues to the same effect as those craved, which had resulted in a verdict and decree against him. *Held* that this amounted to *res judicata*, and proposed counter issues disallowed. *National Exchange Co.* v. *Drew*, 1861, 23 D. 1278; 33 J. 641.

93. Media concludendi — Decree in General Terms.—*Held* that although a decree in general terms had been pronounced, yet as the rate of interest on the debt which was foreign had not been discussed, the decree was not *res judicata* as to the interest. *Grahame* v. *Kibble*, 1820, 2 Bligh 126; 6 Pat. 616.

94. Media concludendi — Interdict — Action of Damages.—*Held* that a judgment refusing interdict at the instance of a feuar against lessees calcining minerals near his feu was not *res judicata* to bar an action of damages at his instance against the same parties. *M'Callum* v. *Forth Iron Co.*, 1861, 23 D. 729; 33 J. 371.

95. Media concludendi—Poor Rates—Action for Payment—Declarator.—In a former action at the instance of the inspector of poor of North Leith against the Leith Dock Commissioners, concluding for payment of poor-rates, the Court of Session held that poor-rates were leviable in respect of a sum of £7680, set apart out of the harbour revenues for the clergy, creditors, and schools of Edinburgh, but that the remainder of the revenue was not assessable. The commissioners having appealed against this judgment in so far as it held them liable in rates on £7680, the House of Lords reversed the interlocutor, with a declaration that the reversal was not to prejudice any question which should thereafter arise as to the liability of the commissioners to be assessed for the poor for the harbours, etc., vested in them. An action was raised several years afterwards by the inspector and three ratepayers, concluding for declarator that the commissioners were liable to be assessed. *Held* that the proceedings in the first action did not constitute *res judicata*. *Gardiner, etc.* v. *Leith Dock Commrs.*, 1864, 2 M. 1234; 36 J. 617.

96. Media concludendi — Preliminary Plea—Absolvitor.—In a reduction, the defender lodged a defence that no title had been produced; and on its being produced, the Lord Ordinary heard parties, and ordered memorials as to it; and the pursuer having failed, although repeatedly ordered to lodge a memorial, the Lord Ordinary repelled the reasons of reduction, and assoilzied the defender. *Held* that as the sole point before the Lord Ordinary was that of title, and not the merits, his interlocutor was incompetent, and therefore not *res judicata*. *Bogle* v. *Graham*, 1817, Hume 654.

97. Media concludendi—Previous Action Dismissed in Inferior Court.—Circumstances in which, where a party raised an action for payment of a sum in the sheriff small debt court, and the defender entered appearance, and the action was subsequently "dismissed," the party was found entitled to insist for payment of the same account in an action before the Court of Session. *Taylor* v. *Coulston*, 1840, 2 D. 612.

98. Media concludendi—Reduction of Decree.—Successive bills of suspension and liberation presented on the ground that a decree was null on objections to the instance were refused. *Held* not *res judicata* against an action of reduction of the decree on the same ground. *Wood* v. *M'Caul*, 1833, 12 S. 50.

99. Media concludendi—Same Interests—Action of Declarator.—*Held* that an action of declarator by heritors of a parish against the magistrates of a burgh, within the parish, as to whether there should be a single or a separate management and assessment for the poor, was not barred by a plea of *res judicata*, in respect of a judgment in a previous process, at the instance of a pauper before the magistrates against the heritors, involving the same interests, and substantially the same question. *Currie* v. *Sir N. M. Lockhart*, 1841, 3 D. 799; 16 Fac. 795.

100. Media concludendi—Slander—Sheriff Court Decree—Commissary.—A party raised an action before the sheriff against another for damages, on account of slandering him in June and July 1792, and got decree. Thereafter he raised another against him before the commissary for the same slanderous words used in June and July 1791, and he received payment of the damages awarded by the decree. *Held* that although he alleged that he was not aware of the latter slander till after he got the decree, and that it was uttered at a different place, and before other persons than those libelled in the first action, he was not entitled to insist in the second action. *Bruce* v. *Duncan*, 1793, Hume 596.

101. Media concludendi—Suspension of Threatened Charge.—In 1828 a note of suspension of a threatened charge for principal and interest due on a bond was passed as regards certain arrears of interest, the principal

having been paid. In 1849 the court pronounced an interlocutor, in which they sustain the charge for £822 as at 10th July 1827, with legal interest thereon from that date, "grant warrant to the chargers to uplift the sum consigned, so far as the same shall be sufficient to satisfy this decree, and in so far as not so sufficient, allow the charge to proceed." After applying the consigned money, with the bank interest which had accrued on it, a balance remained due of £229. Ten years after, in a suspension of a threatened charge for this balance and interest thereon, *held* that as the decree in the former suspension was unreduced, the court could not consider the competency of the award of interest contained in it, and therefore the suspension was refused, *quoad* the sum of £229. *Findlay* v. *Donaldson*, 1862, 24 D. 665 ; 34 J. 329.

102. Media concludendi—Trust—Declarator—Accounting and Payment, etc.—A party obtained decree of declarator of trust, finding him entitled to the property of a lease, on repayment of the trustee's advances ; and he afterwards raised an action of accounting and payment of the rents which the trustee drew, or might have drawn, from the trust subject, during his possession, and of reparation for damages sustained by the trust subject. *Held* that as the grounds of the second action were not libelled on nor insisted in under the first, he was not barred by the plea of *res judicata*. *Lyon* v. *Reid*, 1833, 11 S. 500.

103. Non-Appearance—Appeal—Amended Petition of Appeal.—An appeal was set down for hearing, but the appellants not appearing, the interlocutors were, on the respondent's motion, affirmed, and the appeal dismissed. Upon an amended petition of appeal, and after hearing parties thereon, *held* that, by the judgment of the House affirming the interlocutors and dismissing the appeal, the same had become absolute and final. *Bank of England* v. *Pulteney*, 1787, 3 Pat. 92.

104. Opinion of Counsel.—An opinion of a counsel, given on two memorials submitted by parties to him, with the view of deciding a matter in dispute, *held* to be *res judicata*. *Fraser* v. *Lord Lovat*, 1850, 7 Bell 171. Affg. 22 J. 614.

105. Poor—Aliment—Payment—Declarator of Support.—Acquiescence by an inspector of a parish in a small debt decree for aliment for a pauper, followed by payment of aliment during subsequent years, *held* not to bar a declarator that the pauper fell to be supported by another parish. *Crawford* v. *Beattie*, 1860, 22 D. 1064 ; 32 J. 488.

106. Preliminary Plea—Final Judgment—Decree of Magistrate.—*Question*, whether a bill of advocation of a judgment of an inferior judge, sustaining his jurisdiction in a pending cause, having been refused by a Lord Ordinary, forms *res judicata* on that point when the whole cause is brought to the Court of Session, after a final judgment by the inferior judge. *Bryson* v. *Weir*, 1828, 7 S. 88.

107. Preliminary Plea—Title to Sue.—Although a preliminary objection to a party's title to sue was repelled, to the effect of allowing him to be heard, this *held* not *res judicata*, so as to exclude the plea that the party had truly no title. *Mackenzie* v. *Houston*, 1829, 8 S. 117 ; 5 Fac. 104. See 5 W. & S. 422.

108. Previous judicium.—The House of Lords *repelled* a plea of *lis finita* and *found* the pursuers "might insist" for certain claims. *Held* the defenders were not thereby barred from pleading that the claims were prescribed. *Cockburn* v. *Hamilton*, 1713, Robert. 61.

109. Previous judicium—Absolvitor.—In an action of reduction of a decree in absence, *inter alia*, on the ground of prescription, the Lord Ordinary found that no sufficient grounds had been hitherto established to set aside the decree, but allowed a proof of an allegation of a partial payment ; and this having failed, he assoilzied. *Held* that the above finding included the plea of prescription, and was final, although not specially referred to. *Knox* v. *Malcolm*, 1832, 10 S. 215.

110. Previous judicium — Acquiescence in Mode of Trial.—A pursuer, in an alternative summons against two defenders, *held* bound by a verdict in a trial between the defenders, he having acquiesced in that mode of determining the cause. *Kippen* v. *Cairns*, 1825, 4 S. 212.

111. Previous judicium—Adjudication in Implement—Payment.—A obtained an obligation from B to become security, and to transfer timber and a lease in security of advances to be made to A by his friends. A and B entered into an agreement, whereby B bound himself to transfer the wood and assign the lease, and to apply the money so to be raised in a specified manner for their joint behoof. A, on the faith of the obligation, received advances from friends who were aware of the agreement, but not of its express terms, and he assigned to two of those friends, as trustees for the others, his right to the transfer of the timber and the lease. These trustees, as his assignees, raised an adjudication in implement against B, who was assoilzied, on the ground that the trustees could not demand implement of the agreement, while A had not fulfilled his part of it in the application of the money. One of A's friends (who had advanced the money) thereafter raised an action against B on the same narrative, but concluding for payment of his advance, as made on the faith of B's obligation. *Held* that the judgment in the first action was *res judicata* as to the second. *Campbell* v. *Grant*, 1827, 6 S. 188.

112. Previous judicium — Advocation — Reduction.—A judgment in an advocation repelling an objection to a proof taken on commission *ex facie* correct, that the depositions had been emitted outwith the presence of the commissioner, is *res judicata* in a process of reduction. *Jaffray* v. *Murray*, 1830, 8 S. 667.

113. Previous judicium—Assignation—Action for Payment—Repetition of Price.

—A assigned two bonds granted to him for a game debt, with warrandice from fact and deed only, and for a price less than the amount of the bonds. An action was brought by the assignee against the granters of the bonds for payment, and *subsidiarie* against A for repetition of the price, should the contents of the bonds not be recovered. No defences were given in for A; and after discussing the defences of the granters, the defenders generally were assoilzied. *Held*, in an action against A for repetition of the price, that the absolvitor in the former action was not *res judicata* as to him. *Ferrier* v. *Graham's Trs.*, 1828, 6 S. 818; 3 Fac. 879.

114. Previous judicium—Bankruptcy—Discharge—Reduction.—A bankrupt, at a meeting of his creditors, made an offer of composition, which was entertained for consideration. At the second meeting, alterations were made on the offer, and it was accepted, and he was thereafter discharged. In a reduction of the discharge, on the ground that the proceedings had not been conducted in terms of the statute, *held* that the deliverance of the sheriff and Lord Ordinary granting the discharge did not constitute *res judicata*. *Miln* v. *Boyack*, 1845, 7 D. 888; 17 J. 465.

115. Previous judicium—Bankruptcy—Expenses.—A bankrupt, with concurrence of his trustee, petitioned for discharge. Some of the creditors successfully opposed the petition, and the court found the bankrupt liable in expenses, and the trustee also liable "*qua* trustee." The trustee afterwards resigned, and a new trustee raised an action against him for these expenses, alleging that he had acted fraudulently, and in collusion with the bankrupt, in getting up the petition for discharge. *Held* that the former judgment had not the effect of barring the trust-estate from seeking relief against the ex-trustee, personally, if sufficient grounds existed for subjecting him. *Maben* v. *Perkins*, 1837, 15 S. 1087; 12 Fac. 1029.

116. Previous judicium—Bankruptcy—Expenses.—In an action of damages by a tenant against his landlord, he set forth that the landlord having appointed a day, some weeks after the legal term, for payment of his rents, the tenant failed to pay on that day, whereupon the landlord on the following day executed sequestration for payment of the past-due rent, of other sums stipulated under the lease, and in security of the rent of the current term, but he failed to give credit for certain deductions which should have been made from the rent, and he did not allege that the tenant was *vergens ad inopiam*; that although the tenant consigned the past-due rent, the landlord would not consent to a recall of the sequestration till two months afterwards. *Held* that although, in deciding the question of expenses, the sheriff-substitute found that the sequestration was legal (which was acquiesced in), and afterwards found the landlord entitled to his expenses (which the sheriff recalled, and found no expenses due), the legality of the sequestration was not *res judicata* under the interlocutor of the sheriff-substitute. *Oswald* v. *Græme*, 1851, 13 D. 1229; 23 J. 663.

117. Previous judicium—Bond for Payment — Prescription. — A purchaser at a judicial sale, in 1792, granted bond for payment of the price "to those who shall be found to have right thereto by the decreet of ranking and scheme of division," and in the same year decreet of sale was pronounced, declaring the subjects to belong to him upon payment or consignation of the price to those who should be preferred thereto. Under an application, in 1836, by the creditors for consignation in terms of 54 Geo. III. c. 137, the bond had been held prescribed. *Held* that the obligation upon the purchaser to pay the price, independent of the bond, was also prescribed; and that this was *res judicata* by the former judgment. *M'Innes* v. *Brander*, 1844, 6 D. 512; 16 J. 234.

118. Previous judicium—Criminal—Civil Action.—The judgment of a Lord Ordinary in the Bill Chamber, refusing a bill of suspension and liberation offered by a wife during her imprisonment till she should execute a discharge, is not *res judicata*, so as to bar a reduction of the discharge thereupon executed by her. *Wilson* v. *Wilson*, 1831, 9 S. 680; 6 Fac. 438.

119. Previous judicium — Decree-Arbitral. — By a decree-arbitral it was found that rents were due for crop 1825, and not 1826, and therefore payable to an executor, and not to the heir; but that the executor was bound, on the heir's requisition, to remove the tenant as at Whitsunday 1830, and the heir to allow the use of his name and titles for that purpose, failing which removal, the executor was to repeat the rents to the heir. The executor, on the requisition of the heir, raised an action of removing in name of the heir, who, on being called on to emit an oath of calumny, deponed to an effect which led to an absolvitor. *Held*, in a question between the executor and the heir, that the decree-arbitral was *res judicata* as to the rents. *Maclagan* v. *Dickson*, 1832, 11 S. 165.

120. Previous judicium — Decree in Absence — Wakening by Consent. — A defender took a summons to see, but returned no defences, and the conclusions were, under an agreement, restricted. Decree in absence was thereupon pronounced accordingly, and a remit made to the auditor. The process was afterwards wakened by consent of both parties, and the defender attended the auditor, lodged objections to his report, and was heard at the bar. *Held* that the decree was not in absence. *M'Donald* v. *M'Kenzie*, 1822, 2 S. 4. See 4 W. & S. 398.

121. Previous judicium—Decree in foro—Reduction of Disposition.—A party raised an action of reduction of a disposition, and of a decree *in foro*, founding his title to insist on a deed which stood reduced by that decree; and no relevant grounds were stated for setting

aside the decree. *Held*, in respect of that decree, that the party had no title to challenge the disposition. *Drysdale* v. *Nairne*, 1835, 13 S. 348.

122. Previous judicium—Defences not having been Tried—Poverty.—A decree of reduction-improbation which had passed against a party, after appearance in all the preliminary stages of the cause, and adducing proof, and lodging pleadings, and acquiescence for several years, *held res judicata* in a reduction of the decree, on the allegation that it had been obtained without the defences having been tried on their merits, and in consequence of poverty and inability to defend himself. *Thomson* v. *Thomson*, 1838, 16 S. 855; 13 Fac. 541.

123. Previous judicium — Entail — Disposition—Obligation to Reinvest.—A judgment in a question tried with the heirs of entail as to the validity of a disposition to a purchaser, is not *res judicata* as to the heir's obligation to reinvest. *Bruce* v. *Bruce*, 1830, 4 W. & S. 240. Affg. 5 S. 822; 2 Fac. 568.

124. Previous judicium—Entail—Reduction of Deeds—Action Founded on Validity of Deed.—An heir of entail was assoilzied from a reduction of certain deeds as in contravention of the entail, and concluding for forfeiture of the estate, and decree of possession in favour of the pursuer. *Held* that the absolvitor was not *res judicata* so as to bar an action by the same heir, founded on the validity of the deed, and claiming the preferable right to the estate in respect of these deeds. *Fullarton* v. *Hamilton*, 1822, 1 Shaw's App. 265.

125. Previous judicium — Extracted Decree—Collusion on Part of Defenders.—An extracted decree of the Court of Session in favour of a pursuer held not to be *res judicata* in a question subsequently arising between the pursuer and the creditors of the defender, who had become bankrupt, on the ground of its having been obtained by collusion on the part of the defenders. *Viscount Arbuthnot* v. *Spottiswood*, 1740, 1 Pat. 284.

126. Previous judicium — Extracted Decree—Heritage.—A final decree of non-entry against a purchaser, but not extracted, is not *res judicata* against the heir of the vassal, so as to bar him from getting an entry. *Haig* v. *Forbes*, 1821, 1 S. 11.

127. Previous judicium — Extracted Decree — Neglect of Agent.—A defender having, by the neglect of his agent, failed to lodge revised answers, the Lord Ordinary pronounced decree in terms of the libel, with expenses. A reponing note was, after the expiration of twenty-one days, but before extract, tendered to the clerk, who refused it, whereupon the decree was extracted; and although the defender offered to find caution for the principal sum, and to pay all expenses, and also raised a reduction, the court *refused* a bill of suspension. *Lumsdaine* v. *Australian Co.*, 1834, 13 S. 215.

128. Previous judicium — Heritable or Moveable.—A party granted a general obligation to pay all the debts of another contained in a list, which included an heritable debt due to a third party. It was decided that this obligation, being of a moveable nature, affected the *jus relictæ* of the widow of the obligant. *Held* that this decision was not *res judicata* as to whether a bond of corroboration, subsequently granted by the obligant to the creditor in the heritable bond, was moveable, so as to affect the *jus relictæ*; and remit made to hear parties as to whether it was moveable or not. *Sir J. Graham* v. *Maxwell*, 1814, 2 Dow 314.

129. Previous judicium — Minor — Reduction.—Circumstances in which a decree of reduction was *held* not *res judicata* against a minor. *Harvey* v. *Hamilton*, 1822, 1 S. 306.

130. Previous judicium — Multiplepoinding — Suspension of Decree. — The nominal raiser of a multiplepoinding appeared and gave in a condescendence of the fund *in medio*; he made no claim of lien, and allowed decree to go out in favour of a claimant. *Held* not entitled afterwards to suspend the decree on the allegation that he had a claim of compensation against the common debtor. *Downie* v. *Rae*, 1832, 11 S. 51.

131. Previous judicium—Partnership—Accounting—Remuneration.—A claim was made under a libel for an accounting on the footing of an alleged partnership, which was negatived on a reference on oath, and the defender assoilzied. *Held* not *res judicata* so as to exclude a new action for remuneration on account of trouble in the defender's business, although in the oath the defender had spontaneously denied such a claim. *Robertson* v. *Davidson*, 1810, Hume 409.

132. Previous judicium — Proceedings under Salmon Fisheries (Scotland) Act, 1862.—*Held* that a complaint laid on the 1st and 4th subsections of s. 11 of the Salmon Fisheries (Scotland) Act, 1862, so far as laid on the 4th subsection, was not excluded by previous proceedings under s. 27, but that *quoad ultra* it had been rightly dismissed by the justices. *Glen* v. *Colquhoun*, 1865, 5 Irv. 203; 38 J. 9.

133. Previous judicium — Reduction of Service — Declarator of Legitimacy. — A daughter was served heir to her father; and another party having been likewise served heir to him, mutual actions were brought for reducing each other's services, in which an issue was sent to a jury to try whether the daughter was "the legitimate daughter" of her father. The jury returned a verdict against her, which was applied, and a decree reducing her service was pronounced. She then endeavoured to set the verdict and decree aside by reduction; but the court having dismissed the action as incompetent, she brought a declarator of legitimacy, which was met by the plea of *res judicata*. The court *repelled* the plea. *Question*, whether sentences

in regard to questions of status and rights of blood can ever form *res judicata*. *Norris* v. *Gilchrist*, 1847, 9 D. 466; 19 J. 154.

134. Previous judicium—Same Subject-Matter — Identity of Parties.—An action was raised at the instance of a member and manager of a widows' fund association to have it declared illegal to apply the funds towards payment of expenses incurred in prosecuting or carrying out a proposal to dissolve and appropriate the funds among the parties interested, or in litigation in support thereof, and concluding for reduction of certain resolutions relative to these proceedings. Judgments of absolvitor had been pronounced in two actions having similar objects, at the instance of another member of the same association. A plea of *res judicata* was sustained, it being *held* (1) that, notwithstanding a small sum of extrajudicial expenses was not expressly referred to in the former judgment, the question thereby decided was identical with that sought to be raised; and (2) that the pursuer, although a different individual, sued as a member of the same association, and represented the same interest which had been represented by the pursuer of the previous actions. *Gray* v. *M'Hardy*, 1862, 24 D. 1043; 34 J. 521.

135. Previous judicium — Service — Advocation of Competing Brieves. — *Observed*, that neither the decree of a court of service refusing to serve a claimant, nor a decree of the Court of Session reducing a service, will bar the claimant, or the person whose service is reduced, from suing out other brieves, and trying their cases again. *Question*, whether a judgment of the Court of Session in an advocation of competing brieves would constitute a *res judicata*. *Officers of State* v. *Alexander*, 6 M. (H. L.) 54; 40 J. 470.

136. Previous judicium—Trust—Decree of Preference—Relief.—A multiplepoinding was raised in name of trustees, and a sum found to be in the hands of one of them, who acted as their agent. Decree of preference was pronounced against the trustees in favour of certain parties, reserving relief to the trustees *inter se*. The one who acted as agent brought an action at his own instance, concluding to have it found that his co-trustees were bound to relieve him of the decree to a certain extent, and that the parties in whose favour it had been pronounced should also free him of sums improperly awarded to them, and for which they were liable to him individually. *Held* that the decree was not *res judicata* in favour of these parties, so as to bar the action. *Mackenzie* v. *Mackenzie's Trs.*, 1829, 7 S. 659.

137. Previous judicium — Unextracted Decree.—An unextracted decree (which was final) in mutual actions between the authors of two competing parties, which proceeded on the footing of the actions being conjoined and being awake, *held res judicata*, although there appeared no interlocutor of conjunction, and although one of the processes must have been at one time asleep, and did not appear to have been wakened—more than twenty years having elapsed from the date of the decree. *Mackenzie* v. *Mags. of Dingwall*, 1834, 7 W. & S. 306. Affg. 7 S. 383; 4 Fac. 484.

138. Same Defender—Factor on Trust-Estate—Personal Action—Same Defence. —A party was called as defender in one action as factor on a trust-estate, and a defence, rested on an averment in fact, was finally repelled. In another action brought against him personally, *held* competent to plead the same defence in the second action. *M'Nab* v. *Hamilton*, 1831, 10 S. 180.

139. Same Subject-Matter. — Circumstances under which it was *held* that a decree was not *res judicata* and decisive of the subject-matter of another suit. *Sinclair* v. *Thriepland*, 1789, 3 Pat. 113.

140. Same Subject-Matter—Absolvitor —Reduction of Deed.—A sister raised an action against her brother of reduction of her father's deed of settlement, so as to obtain right to her *legitim*; and having failed to lodge a condescendence, decree of absolvitor was pronounced, and three short representations were refused. *Held* that the decree did not constitute *res judicata*, so as to bar her from insisting in another action of reduction of the deed and the decree. *Millie* v. *Millie*, 18 Mar. 1807, F. C. Appx.; 5 Pat. 160. Affg. 27 Nov. 1801, F. C.; M. 12176.

141. Same Subject-Matter — Calls on Shares.—An action by the directors of a company for calls was defended on the ground that the calls were not required for the legitimate purposes of the company. These matters became the subject of a reduction of the minutes making the calls, until the issue of which reduction the action for calls was sisted, the parties agreeing by minute to abide by the result of the reduction. The judgment, "assoilzie the defenders from the conclusions of the action as laid," pronounced in the reduction, *held* (on a fair interpretation of that interlocutor by reference to the opinions of the judges who pronounced it) to exclude inquiry into the merits of the action for calls. *Glasgow, Airdrie, & Monklands Junction Rly. Co.* v. *Drew*, 1861, 23 D. 835; 33 J. 443.

142. Same Subject-Matter—Claim of Relief — Supervening Claim. — One parish sued another in the sheriff small debt court for repayment of aliment to a pauper and her bastard. The defender was assoilzied. The same pursuer, some years after, sued in the sheriff court the same defender for repayment of aliment paid to the same pauper and two additional bastard children, and for relief of future aliment. No new facts were alleged to have emerged. *Held* that the judgment in the first action was not *res judicata* in the second. *Robertson* v. *Melville*, 1860, 22 D. 893; 32 J. 375.

143. Same Subject-Matter—Declarator of Property. — It was decided in mutual

declarators of property, in 1678, that the one party had, as the proprietor of the contiguous estate of A, the "right of pasturing" on the disputed ground, and the other (the inhabitants of an adjacent burgh) "only the privilege of walking and making parades thereon." *Held* that the proprietor in possession of the estate of A was not thereby precluded from pursuing as such a new declarator of property in the ground. *Mags. of Dundee* v. *Hunter*, 1843, 6 D. 12; 16 J. 63.

144. Same Subject-Matter — Decree in Absence — Action to Establish Sanity — Damages for Illegal Detention in Asylum. —*Held* that a decree in absence in a declarator brought by A to establish that he was sane while detained in an asylum was not *res judicata* as regards an action by A against the parties called in the declarator for damages for illegal seizure and detention in the asylum. *Mackintosh* v. *Smith & Lowe*, 1865, 3 M. (H. L.) 6; 4 Macq. 913; 37 J. 318.

145. Same Subject-Matter—Decree of Adjudication — Ranking and Sale. — A royal burgh having become insolvent, and a decree of adjudication of its whole property having been obtained *in foro* by a creditor, *held*, in a ranking and sale brought by the creditor, that the decree of adjudication was not *res judicata* so as to prevent the magistrates from opposing the sale of certain parts of the property which had been adjudged. *Phin* v. *Mags. of Auchtermuchty*, 1827, 5 S. 690; 2 Fac. 499.

146. Same Subject-Matter—Decree Refusing Bill of Advocation of Interlocutory Judgment—Advocation of Whole Cause.— An interlocutor of a Lord Ordinary, refusing a bill of advocation of an interlocutory judgment, *held res judicata* on the points thereby decided, and incapable of being reviewed in an advocation of the whole cause. *Whyte* v. *Largo Trs.*, 1803, Hume 649.

147. Same Subject-Matter—Destruction of Building.—A decision in 1803 as to the incompetency of certain alterations proposed on a building, *found* not to afford a plea of *res judicata*, the building having in 1828 been pulled down, and the question being as to the plan of rebuilding. *Young* v. *Cuddie*, 1831, 9 S. 500.

148. Same Subject-Matter — Heritage. —*Held* that a decision in competing actions for the fee-simple of lands did not form *res judicata*, in a question as to an obligation, on the successful party to possess lands under the fetters of an entail. *Fraser* v. *Lord Lovat*, 1842, 1 Bell 105.

149. Same Subject-Matter—Heritage—New Action Relating to other Subjects—Illegitimacy of Pursuer.—*Question* whether, when an action relating to a special heritable subject is decided against a pursuer on the ground of illegitimacy, and such pursuer brings a new action relating to other subjects against the same defender, the pursuer's status of illegitimacy is to be held *res judicata* in the second action. *Kerr* v. *Martin*, 1836, 14 S. 1104.

150. Same Subject-Matter—Lease—Implement — Damages for Breach. — In an action of reduction of a decree of removing, and concluding for implement of an agreement to grant a lease for nineteen years, and declarator of its binding effect, to which the defence was (*inter alia*) that the defender had never agreed to grant a lease, the pursuer gave in a minute passing from the conclusion for implement and declarator, but reserving his action of damages for breach of the agreement; whereupon a judgment was pronounced, which, "in respect of the minute," "sustained the defences against the declaratory conclusions of the libel for a lease of nineteen years." *Held* that this judgment was not *res judicata*, barring the pursuer from insisting in an action founded on the same allegation of the agreement to grant a lease, but which was expressly limited to damages for breach of the alleged agreement. *Heddle* v. *Baikie*, 1846, 8 D. 376; 18 J. 170.

151. Same Subject-Matter — Mineral Lease—Declarator—Reduction.—An action of declarator by the proprietor of a mineral field, to have it found that a certain mineral substance was not included in a mineral lease, resulted in a verdict and judgment for the lessees. The proprietor then raised a reduction of the same lease, so far as it included the same mineral substance, on the ground that the lease, *quoad* this mineral, had been obtained by fraud. *Held* that the verdict and judgment in the declarator did not bar the reduction. *Gillespie* v. *Russell*, 1856, 18 D. 677; 28 J. 242.

152. Same Subject-Matter—Reduction of Trust Deeds of Settlement. — In an action of reduction of trust deeds of settlement, the summons contained, *inter alia*, the usual reasons of vitiation and erasure, but the deeds themselves were not produced, and these reasons were not discussed. *Held* that although decree of absolvitor was pronounced, yet a new action of reduction of the same deeds, libelling vitiation and erasure *in substantialibus*, was not barred by the plea of *res judicata*. *E. of Strathmore* v. *E. of Strathmore's Trs.*, 1833, 11 S. 644.

153. Same Subject-Matter—Same Document.—A competition for the office of executor arose between next-of-kin and a party nominated "sole executor and universal legatory," in a document which he alleged to be a holograph testamentary writ, but which the next-of-kin alleged to be forged. In that process it was found that the document was not the genuine writing of the deceased, and the next-of-kin were preferred. In an action by the representative of the same party against the next-of-kin as executors dative, founded on the same document, and concluding for payment to him as "universal legatory" of the whole moveable estate of the deceased, *held* that the judgment in the prior litigation was *res judicata*. *Anderson* v. *Gill*, 1860, 23 D. 250; 33 J. 111.

154. Same Subject-Matter—Suspension—Reduction.—A party disponed his estate *ex facie* absolutely, but truly in security of debt, as declared by a back letter. On the death of the disponee, his trustees publicly sold the property under authority of the sheriff, and charged the disponer to subscribe a disposition in their favour, against which a bill of suspension was refused. The disponer afterwards raised an action of reduction on the Act, 1696, c. 5. *Held* that this action was not barred *re judicata* by the refusal of the suspension. *Maxwell* v. *Drummond's Trs.*, 1825, 4 S. 137.

155. Same Subject-Matter—Suspension—Reduction.—A party to an arbitration presented a note of suspension and interdict to stop the proceedings. This was unsuccessful, and after the arbitration was ended the same party brought an action of reduction of the arbitration based on the pleas repelled in the suspension and on other pleas applicable to the proceedings in the arbitration since that date. *Held* that the judgment in the suspension was not *res judicata* as regarded the pleas therein considered. *Caledonian Rly. Co.* v. *Lockhart*, 1855, 17 D. 775; 27 J. 389. Point not considered in the appeal, 22 D. (H. L.) 8; 3 Macq. 808; 32 J. 468.

156. Same Subject-Matter—Suspension and Interdict—Declarator.—An action was brought against parties who had rights of salmon-fishing in the river Dee, and had placed yairs within tide-mark, to have it found that they had no right to do so. The Court of Session *found* that they fell within the exception of the stat. 1563, c. 68, as being situated within the water of Solway. Thereafter the same parties erected stake-nets at the same place; and a bill of suspension and interdict against their doing so was refused. In a declarator to have it found that they were not entitled to fish with stake-nets, *held* that the decree in the former action and in the suspension was not *res judicata*, and remit made to the Court of Session to inquire whether the yairs were within the water of Solway or not. *Murray* v. *E. of Selkirk*, 1824, 2 Shaw's App. 299. Revg. 1 S. 106.

157. Sheriff Court Decree—Appeal to Circuit Court—Reduction of Decree.—In an action before a sheriff, he sustained a defence of defective instance, but found no expenses due to the defender, who, having appealed to the circuit, was found entitled to expenses. *Held*, in an action of reduction of the sheriff's judgment as being ill founded, in respect the instance was good, that the judgment of the circuit court was not *res judicata*, as it was pronounced solely on the question of expenses. *Martin & Sibbald* v. *Wilson*, 1851, 14 D. 111; 24 J. 42; 1 Stuart 76.

158. Sheriff Court Decree—Final Decree.—A bill of advocation from a decree in the sheriff court was refused by the Lord Ordinary in vacation, and the case proceeded thereafter in the sheriff court. In an advocation after final decree in the sheriff court had been pronounced, *held* that the decision on the first bill was final as to the matters therein decided. *Whyte* v. *Watson*, 1803, Hume 649.

159. Sheriff Court Decree — Partly Criminal and Partly Civil—Irregularities.—A party raised an action, partly criminal and partly civil, before a sheriff, in which decree was pronounced both for fine and damages, but the decree was reversed by the Court of Justiciary in respect of irregularities. *Held* that this afforded to the defenders a sufficient defence against a new action of damages. *M'Donald* v. *Stuart*, 1825, 4 S. 272; 1 Fac. 91.

160. Summary Application — Ordinary Action—Contract.—Where the construction of a contract and the determination of a party's obligations under it are essentially necessary to a judgment ordaining implement, even though delivered only in a summary process, these points must be *held res judicata* in an action for the contract price. *M'Allister* v. *Stevenson, M'Kellar, & Co.*, 1870, 8 S. L. R. 5.

161. Teinds — Locality. — By minute of sale, the lands of Nybster, with the teinds, were in 1740 sold to a party "free of all stipends, schoolmasters' fees, and other public burdens and impositions whatsoever"; and the seller bound himself to deliver to the purchaser a disposition of the lands of Keiss, "in real warrandice and security of the said lands of Nybster, teinds and pertinents thereof." In various interim localities after that date the lands of Keiss were localled on for the stipend of the lands of Nybster, but the obligation was never made a real burden on the lands of Keiss. The lands of Keiss were sold in 1813. *Held* that the payments made in previous localities which had not been approved of as final did not constitute *res judicata*. *M'Leay* v. *Sinclair*, 1867, 5 M. 976; 39 J. 555.

162. Teinds — Locality. — *Held* that a judgment in a question between two heritors given effect to by a final locality was *res judicata* in a subsequent locality in a question between the common agent and one of these heritors. *City of Edinburgh* v. *Montgomery*, 1872, 11 M. 14; 45 J. 10.

163. Teinds—Locality—College Teinds.—An interlocutor was pronounced in a locality finding that certain teinds were college teinds. The Crown was a party to the process, holding bishops' teinds in the parish, but did not object to the finding. *Held* in a subsequent locality that the judgment, being on a point fairly contested in the locality, and having a practical bearing on its being worked out, was *res judicata* against the Crown. *Thomson* v. *Lord Advocate*, 1872, 10 M. 849; 44 J. 551.

164. Teinds — Locality — "Competent and Omitted." — *Held* that a surrender of valued teinds sustained in one locality without objection on the part of the minister to the decree of valuation, did not bar his successor in the benefice from stating objections to the validity of the decree in a subsequent locality, and pleas of *res judicata* and "competent and

omitted," stated by an heritor, *repelled*. *Thomson* v. *E. of Zetland*, 1868, 7 M. 99 ; 41 J. 57.

165. Teinds — Locality — Decimæ inclusæ Right.—Circumstances in which a plea of *res judicata*, founded on a decree in locality, whereby teind was allocated on a party claiming a *decimæ inclusæ* right, was repelled. *Dickson* v. *Common Agent in Locality of Biggar*, 1828, S. (Teinds) 174.

166. Teinds—Locality—Decimæ inclusæ Right. — *Held* that an interlocutor of the Lord Ordinary in a locality, after the Judicature Act, pronounced of consent of the common agent after discussion, sustaining a claim by two heritors to exemption from payment of tithe, on the ground of a *decimæ inclusæ* right, constituted *res judicata*, although, five years afterwards, and while the locality was still in dependence, the common agent alleged that he had discovered that the two heritors' titles gave them no valid *decimæ inclusæ* right, and a reduction was brought by the other heritors of the parish. *E. of Hopetoun* v. *Ramsay*, 1846, 5 Bell 69. Affg. 3 D. 685 ; 16 Fac. 713.

167. Teinds—Locality—Decimæ inclusæ Right.—From a decree of locality in 1820 certain lands were omitted in consequence of their having been erroneously assumed by the parties to be held upon a title *cum decimis inclusis et nunc quam autea separatis* ; and there not being other teind in the parish to pay the full amount of the modified stipend, a part thereof was not localled. In an action raised by the minister in 1867 for reduction of the decree, *held* that the decree and proceedings in the locality did not constitute *res judicata*, so as to preclude the minister from challenging the validity of the *decimæ inclusæ* right. *Elder* v. *Fotheringham*, 1869, 7 M. 341 ; 41 J. 199.

168. Teinds—Locality—Decree of Augmentation — Reduction. — In a process of augmentation and locality, decree of augmentation was pronounced, and remit made to the Lord Ordinary to prepare a scheme of locality, and in March 1810 he pronounced an interlocutor, assoilzieing a class of heritors from the process, and finding them not liable in teind ; but this interlocutor never was reported to or approved by the court, and no final scheme of locality had been made up, when, after a lapse of nearly twenty years, a reduction was raised by the other heritors. *Held* that as the interlocutor was never approved of by the court, it never became final, and there was no *res judicata*. *M. of Queensberry* v. *Wright*, 1836, 14 S. 1021 ; 11 Fac. 843.

169. Teinds—Locality—Decree of Disjunction and Annexation — Reduction of Bond for Payment of Competent Stipend. —The Court of Teinds pronounced a decree of disjunction and annexation, on the footing that a bond for payment of a competent stipend had been granted by the magistrates of the burgh of which the new parish formed a part. In a reduction of the bond, on the ground that it was *ultra vires* of the magistrates to grant it, *opinion*, that the decree of the Teind Court did not make the matter *res judicata*. *Mags. of Kilmarnock* v. *Aitken*, 1849, 11 D. 1089 ; 21 J. 416.

170. Teinds — Locality — Decree in Respect of no Answers to Reclaiming Petition —Decree not Reported to Lord Ordinary.— In successive processes of augmentation and locality, certain interlocutors were pronounced, one of which was "in respect of no answers" to a reclaiming petition, and the other was never reported to the court by the Lord Ordinary, to whom the locality had been remitted. *Held* insufficient to found the plea of *res judicata*. *D. of Hamilton* v. *Paterson*, 1839, 1 D. 453.

171. Teinds — Locality — Division of Runrig Lands.—In a division of runrig lands situated in two parishes proprietors were under the decree of division, to remain liable to tend as if no division had taken place. The teinds of the whole lands had been localled on in the localities of both parishes, in the proportion of three-fourths of the teind to the minister of the one and one-fourth to the minister of the other. In a new locality of one parish a singular successor objected to being localled on for part of the land lying in the other. *Held* that the decree of the Sheriff, in so far as it referred to the allocation of stipend, was incompetent, and that the practice in former localities did not bind a singular successor. *D. of Buccleuch* v. *Milne & Erskine*, 1868, 6 M. 765 ; 40 J. 394.

172. Teinds—Locality—Double Charge—Judgment as to First Charge.—A burgh became bound by agreement to pay 600 merks to a second minister, and in course of time the charge was recognised by the Teind Court, and in 1680 a decree of modification and locality pronounced, but unaccompanied by a decree of erection. In a process of augmentation raised by the then second minister, in 1807, the court, in 1819, found that the burgh cannot "be liable under the new augmentation, beyond the extent of their teinds, in proportion with the other heritors ; and that in estimating the amount of teind liable to allocation," the burgh "must have credit for the 600 merks Scots which they presently pay." *Held* that this judgment was not *res judicata* in regard to the first charge, or even that the payment was of the nature of the teind ; and that although the payment exceeded the whole teind drawn by the burgh, it did not relieve them of liability for payments made for a period exceeding the years of prescription to the first minister. *Mags. of Haddington* v. *Kennedy*, 1859, 21 D. 729 ; 31 J. 421.

173. Teinds — Locality — Exemption from Stipend.—A judgment without discussion in a locality exempting lands from stipend, with the lapse of forty years, is not sufficient to give a permanent right of exemption. *Leslie* v. *Heritors of Rayne*, 14 Jan. 1800, F. C. ; M. "Stipend" App. No. 2.

174. Teinds — Locality — Exemption from Stipend.—A heritor claimed exemption

from stipend on the ground that he held his lands under a title *cum decimis inclusis*. These and other lands were exempted, but on the representation of the common agent the exemption was recalled except as to the said lands, the exemption of which the common agent did not object to. *Held* in a subsequent locality that the common agent represents the whole heritors, his consent is the consent of the whole heritors, and therefore the plea of *res judicata*, founded on the proceedings of the previous locality, *sustained*. *D. of Buccleuch* v. *Common Agent in Locality of Inveresk*, 1868, 7 M. 95; 41 J. 55.

175. Teinds — Locality — Objections to Scheme Withdrawn—Successor in Lands. — In a locality an heritor objected to the scheme, alleging an heritable right to his teinds. He afterwards withdrew his objections. *Held* that his successor in the lands was not barred from stating the same objection. *Erskine* v. *Common Agent in the Locality of Crail*, 1864, 3 M. 49; 37 J. 26.

176. Teinds—Locality—Manse Assessment — Presbyter's Decree Overturned — Second Assessment.—In a parish where the charge was collegiate, three of the principal heritors raised a suspension of the presbytery's decree for a manse assessment, which was turned into a libel, and after much discussion, decree was pronounced, finding that the ministers were not entitled to a manse; and at a subsequent period, the presbytery again decerned for a manse assessment. *Held*, in a suspension, at the instance of other heritors, of a charge for payment of the new assessment, and the representatives of the three heritors having paid the new assessment without objection, that the former decree did not constitute *res judicata*. *Mags. of Elgin* v. *Gatherer*, 1841, 4 D. 25; 14 J. 7.

177. Teinds—Locality—Proven Rental. —The approval of the proven rental in a process of augmentation is not conclusive against each and all of the heritors in every question that may arise among them in the subsequent locality. *E. of Moray* v. *Inglis*, 1836, 15 S. 2. *Learmonth* v. *City of Edinburgh*, 1857, 20 D. 190; 30 J. 103.

178. Teinds—Locality—Subsequent Process of Locality in same Parish.—*Held* that a judgment pronounced in one process of locality, exempting lands from the burden of teinds under titles "cum decimis inclusis," though not containing the words "et nunquam antea separatis," nor any equivalent term, was *res judicata* between the representatives of these parties in a subsequent process of locality of the same parish. *Lord Blantyre* v. *E. of Wemyss*, 1844, 3 Bell 34. Revg. 16 S. 1009; 13 Fac. 695.

179. Teinds — Locality — Surrender of Teinds.—In a locality an heritor pleaded that his lands of C, forming part of his lands of G, were included in a valuation of the lands of G, and the minister averred that they did not at the date of the valuation form part of the lands of G. Circumstances in which a plea of *res judicata* by the heritor, founded on an interlocutor sustaining a minute of surrender of the teinds of the lands of G, which at the date of the surrender included the lands of C, at the value ascertained by the decree of valuation, *repelled*. *Patton* v. *Cunningham*, 1866, 39 J. 27.

180. Teinds — Locality— Teind Free.— A question as to whether certain lands were teind free *held* to have been decided in a previous locality and therefore to be *res judicata*. *Bonar* v. *The Lord Advocate*, 1870, 9 M. 58; 43 J. 28. *Willoughby D'Eresby* v. *Speir*, 1876, 14 S. L. R. 162.

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1. Accountant — Fees — Documents Obtained under Remit.—An accountant is entitled to retain the vouchers and documents put into his hands, in order to draw up a report under a remit from the court, until his fee be paid. *Stuart* v. *Stevenson*, 1828, 6 S. 591.

2. Accountant—Lien.—*Question* as to an accountant's lien over books and documents put into his possession under professional employment, with reference to the statutory trust of the city of Edinburgh. *Bruce* v. *Edinburgh Trs.*, 1835, 13 S. 437; 10 Fac. 250.

3. Against whom Available.—Where the holder of a fund, due to a third party, possesses a right of retention as against that party, such right is equally available against the arresting creditor of that party. *Brodie* v. *Wilson*, 1837, 15 S. 1195; 12 Fac. 1093.

4. Assignee — Life Insurance Policy—Subsequent Debt—Bankruptcy.—A assigned to B, in security of a debt, a policy of insurance on his own life. He subsequently granted bond to B for another debt, but the bond bore no reference to the former transaction, nor to the policy of insurance. A having died, *held*, in a competition between B and the trustees on A's estate, which was sequestrated, that B's title to the policy was limited to a security of the first debt, and that he had no right to retain it, or the balance of the contents, in security or extinction of the subsequent debt. *National Bank of Scotland* v. *Forbes*, 1858, 21 D. 79; 31 J. 50.

5. Assignee—Specific Debts—Subsequent Debts.—An assignee under an *ex facie* absolute assignation, but qualified by a back-letter declaring it to be in security of certain specified debts, *held*, in a question with creditors, entitled to retain it in security of debts subsequently contracted. *Russell* v. *E. of Breadalbane*, 1831, 5 W. & S. 256. Affg. 7 S. 767; 4 Fac. 1039.

6. Bank—Bill Indorsed for Negotiation.—It is not competent for a bank to retain bills indorsed for the special purpose of negotiation, on an allegation of a debt due by the drawer. *Mathieson* v. *Anderson*, 1822, 1 S. 486.

7. Bank—Bill Indorsed for Discount and Retained against Special Claims—Proof.—A bill of exchange was sent indorsed to a bank for discount, but the bank declined to discount it. *Held* not entitled to retain it in security of claims for which they could not specially instruct that it was agreed to be allowed to be retained. *Borthwick* v. *Bremner*, 1833, 12 S. 121. See 11 S. 716.

8. Bank—Bill of Exchange—Debt Due by Acceptor.—A bill presented for discount by an acceptor on behalf of the drawer, cannot be retained in security of a debt due by the acceptor. *Haig* v. *Buchanan*, 1823, 2 S. 412.

9. Bank — Bill not Due — Current-Account.—*Held* that a bank was not entitled for its own security to retain a sum standing at the credit of a customer's current-account in security of a bill drawn and discounted by him and not yet due, it not being alleged that at the time either the acceptor or drawer of the bill was bankrupt or insolvent or *vergens ad inopiam*. *Paul & Thain* v. *Royal Bank of Scotland*, 1869, 7 M. 361; 41 J. 209.

10. Bank — General Balance — Delivery Order Granted in Security — Advances Covered.—A bank having discounted bills, received as collateral security a delivery order, in virtue of which certain specified goods in a bonded warehouse were transferred to the name of the manager in the books of the warehousekeeper. The bills were duly retired; but previous to their being so, the bank made additional advances. *Held* that this transaction did not constitute a contract of pledge by which the bank were bound to retransfer the goods on the bills being retired, but that it was a mere transference of proprietary right, under which the bank were entitled to retain the goods until all advances made to the owners were repaid. *Hamilton* v. *Western Bank*, 1856, 19 D. 152; 29 J. 77.

11. Bank—Shareholder—Debit Balance—Stock Belonging to Customer.—A bank *held* entitled to retain the shares of stock standing in the name of a shareholder, in satisfaction of debts due to them by the shareholder. *Burns* v. *Laurie's Trs.*, 1840, 2 D. 1348; 5 Fac. 1450.

12. Bank—Shareholder—Bankruptcy—Partnership Debt—Bank Stock.—*Held* that a bank was entitled to retain stock of an insolvent proprietor for payment of debts due by a company of which he was a partner. *Hotchkis* v. *Royal Bank*, 1797, 3 Pat. 618.

13. Bankruptcy—Bills Sent for Specific Purpose—General Account.—Circumstances in which a party, who had been put in possession of bills in a legitimate manner, and had advanced a sum upon them, though sent for a special purpose, for which it turned out they would not be used, was *held* entitled to retain these bills in payment *pro tanto* of his own general account in a question with the trustee on the estate of the party who had remitted the bills, and who had become bankrupt. *Hewit* v. *Elliot & Others*, 1775, 2 Pat. 381.

14. Bankruptcy — Goods Consigned — Trustee — Private Assignee.—A London merchant consigned goods to a mercantile house in Glasgow, who sent them to a branch in Jamaica. The London merchant granted an assignation to a party indebted to the Glasgow house, but it was not intimated till after the issuing of a commission of bankruptcy against the London merchant. *Held* that the Glasgow house were not entitled, in competition with the judicial assignees, to retain the goods in satisfaction of the debt due to them by the private assignee. *Carrick* v. *Assignees of Dickie*, 1822, 1 S. 447.

15. Bankruptcy—Obligation ad factum præstandum—Liquid Debt.—A party *found* entitled to refuse to purge an incumbrance upon an estate which he had sold, till he received payment of a liquid debt due to him by the purchaser (now bankrupt) arising out of a separate transaction posterior to the sale. *Auld* v. *Riddel*, 5 July 1810, F. C.

16. Bankruptcy — Sale for Cash and Part of Price Paid—Prior Transactions.—A party purchased three lots of sugar, which were delivered, but he paid no part of the price. He thereafter bought another lot as a separate transaction, for cash, and he paid the greater part of the price of this, but became bankrupt before delivery. *Held*, in a question between the seller and the creditors of the

purchaser, that the seller was entitled to retain the last lot in security and payment of the price of the former ones, independently of the specialty that the whole price of the last lot had not been paid. *Landale & Co.'s Tr.* v. *Bogle & Co.*, 1828, 6 S. 360; 3 Fac. 390.

17. Bleacher—Agreement.—A party sent linen to be bleached, and before the bleachers gave it up, the party agreed that a portion of it should be retained in payment of the year's account for bleaching. Thereafter the whole was delivered, but other linen was sent. *Held* that the bleacher was entitled to retain the latter linen in security of payment of the account. *Aberdeen & Smith* v. *Paterson*, 1812, Hume 127.

18. Bleacher's Lien — Common Law Right of Retention.—*Question*, whether a bleacher by taking bills for any part of the amount due to him for work done within the year does not *pro tanto* lose his right of lien at common law. *Anderson's Trs.* v. *Fleming*, 1871, 9 M. 718; 43 J. 373.

19. Bleacher's Lien—General Balance for Work Done—Bankruptcy of Customer—Act 1696, c. 5.—Bleachers who for several years were constantly employed by manufacturers to bleach and finish goods for them, were in the regular practice of returning with each parcel of goods a receive-note setting forth the kind and quality of the goods returned, with a notice in these terms: "*N.B.*—All goods received by us are subject to a lien, not only for the work done thereon, but also for the general balance of our accounts, including not only open accounts but also acceptances and promissory-notes, whether past-due or current." The manufacturers became bankrupt, the bleachers having then in their hands goods sent to them by the bankrupts in the ordinary course of business within sixty days of their sequestration. *Held*, in a question with the trustee, that a general lien was constituted by the notice above mentioned, which was not a preference struck at by the Act, 1696, c. 5, but entitled the bleachers to retain the goods in their hands at the date of the sequestration in security not only of their charges for work performed on these goods, but also for the amount of an open account and acceptances (both past-due and current) for work done upon other goods within the year. *Observed*, that the stipulation in the notice must be construed conformably to the usage of trade as importing a lien only for the price of work done within the year, and that for a longer period it would be illegal. *Anderson's Trs.* v. *Fleming*, 1871, 9 M. 718; 43 J. 373.

20. Calenderer — Yearly Account. — *Observed*, that where a manufacturer sends goods to a calenderer to be calendered, and the parties are in the practice of settling accounts once a year, any parcel may be retained for the account of the year. *Handyside* v. *M'Intosh & M'Indoe*, 1805, Hume 651.

21. Carrier—Demand for Tolls—Railway Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. c. 33), s. 90.—A railway company petitioned the sheriff for warrant to sell, for payment of tolls, certain goods belonging to a bankrupt firm, and craved service of the petition on the trustee on the firm's sequestrated estates. *Question*, whether such service was sufficient "demand" for "tolls" under the Railway Clauses Act, 1845, s. 90. *N. B. Rly. Co.* v. *Carter*, 1870, 8 M. 998; 42 J. 611.

22. Carrier — General Balance. — A carrier's lien does not extend over goods for a general balance, but only over each article for its own carriage. *Stevenson* v. *Likly*, 1824, 3 S. 291.

23. Cautioner—Condition of Payment.—Funds *ordained* to be paid over by a debtor only on condition of his being duly secured against such cautionary obligations as he had undertaken for the creditor. *Boswell* v. *Montgomerie*, 1836, 14 S. 554.

24. Cautioner—Mala fide Possession.—A son bought goods for his father, and became security for the price, and they were by mistake sent to the son's warehouse, where they were when the father became bankrupt. *Held*, in a question with the father's creditors, that the son had not lawful possession, and therefore was not entitled to plead retention. *Louson* v. *Craik*, 1842, 4 D. 1452.

25. Clerk to Commissioner in cessio—Process—Fee.—The clerk of the commissioner, who took the oath of the pursuer of a *cessio*, has no hypothec over the process for his fee. *M'Donald* v. *Taylor*, 27 Feb. 1813, F. C.

26. Commission Agent—Advances on Goods Consigned.—A commission agent who has made advances on goods consigned to him, is entitled to sell them for his indemnification, although the consigner has become bankrupt before the sale, and his estate has been sequestrated. *Broughton* v. *Stewart, Primrose, & Co.*, 17 Dec. 1814, F. C.

27. Commission Agent—Termination of Agency—Business Books—Factor's Lien.—A party, who for some years acted as agent for a trading firm, was furnished by them with a ledger and other books for entry of sales, etc., it being stipulated, *inter alia*, that the books should remain the property of the firm. The agent, ceasing to act for the firm, pleaded a right to retain the books until all the outstanding debts had been recovered. *Held* that the firm, as having the greatest interest in the books, were entitled to recover them. *Murray* v. *Bernard*, 1869, 6 S. L. R. 230.

28. Company — Decree-Arbitral — Partner's Private Debt.—An arbiter gave decree in favour of a retiring partner for £406 as his share of the company's stock. A suspension was brought of a charge given on this decree, on the ground that the charger owed a private debt to the company (sufficient to extinguish

his claim) which had been included by the arbiter as an asset of the company. *Held* that the remaining partner was entitled to retain the £406 until the debt was paid, and the charge *suspended*. *M'Ewan* v. *Middleton*, 1866, 5 M. 159; 39 J. 87.

29. Contract—Ground-Annual—Assignee—Prior Agreement.—Circumstances under which an assignee to a ground-rent was not entitled to claim the full amount from the party who was bound to pay it, and who had right by agreement to retain a part of it. *Scott* v. *Bain*, 1825, 3 S. 583.

30. Contract — Husband and Wife — Marriage-Contract — Assignation.—In his marriage-contract a husband undertook to pay his wife a sum in name of aliment and mournings after his death. The husband died insolvent and the obligation was not fulfilled. *Held* that as the obligation was merely personal the wife could not retain against it a fund belonging to her but which had been assigned to the husband in the marriage-contract. *Boswell* v. *Miller*, 1846, 8 D. 430; 18 J. 210. *Greenhill* v. *Aitken*, 1824, 3 S. 169.

31. Contract—Payment by Instalments—Claim for Damages.—Work was contracted to be done for a price payable by instalments during its progress, and at the sight of an architect, who was appointed arbiter in case of dispute between employer and contractors. An instalment had been sent for behoof of a contractor to the architect, who returned it to the employer with a request that he would send it direct to the contractor. *Held* that the employer had no right to retain the instalment so sent in extinction of a claim of damages for non-fulfilment of the work, and that it was liable to arrestment in his hands by a creditor of the contractor. *Field & Allan* v. *Gordon*, 1872, 11 M. 132; 45 J. 82.

32. Contract — Railway — Contractors' Unpaid Claims.—The period for completing a line of railway under a contract had elapsed, and it appeared from the admissions of parties, the certificate of the Board of Trade, and the interlocutor of the arbiter named in the contract, that the line was ready for public traffic. *Held* that the contractors were not entitled to retain possession of the line, or to prevent the opening of it, although certain operations under the contract still remained to be executed, and certain claims, alleged by them to be due under the contract, were still unpaid. *Castle-Douglas Rly. Co.* v. *Lee & Co.*, 1859, 22 D. 18; 32 J. 12.

33. Contract—Scrip-Note—Obligation to Deliver—Third Party.—An obligation by an ironmaster was in these terms: (Date) "I will deliver 1000 tons pig-iron when required, after 10th September next, to the party lodging this document with me." A party who received this obligation granted his bill for the price, which was not due till 10th October. He sold to a third party, who presented the document, and demanded, on 28th September, delivery of the iron. The original purchaser had then become bankrupt, and the master refused delivery, and pleaded retention. Plea *repelled*, in respect of the terms of correspondence between the parties. *Dixon* v. *Bovill*, 1856, 19 D. (H. L.) 9; 3 Macq. 1; 28 J. 684. Cf. *Dimmack* v. *Dixon*, 1856, 18 D. 428; 28 J. 362.

34. Contract — Superior and Vassal — Breach.—It is not a defence to a declarator of irritancy of a contract of ground-annual that the ground-annual is retained because the superior has failed to put the defender into possession of part of the subjects. *Dunlop's Trs.* v. *Anstruthers*, 1867, 3 S. L. R. 269.

35. Contract—Superior and Vassal—Clause of Exemption—Feu-Duties—Taxes.—In a feu-charter granted by the magistrates of a burgh, the subjects were declared free of all public burdens. *Held* that the vassal was entitled to retain the feu-duties of these or other subjects held by him in feu of the magistrates, until relieved by them of all taxes (embraced in the clause in the charter) that had been or might in future be paid by himself or his tenants. *Ainslie* v. *Mags. of Edinburgh*, 1842, 4 D. 639.

36. Contract — Superior and Vassal — Feu-Charter — Public Burdens — Relief.—A clause in a feu-charter bound the vassal to pay the public burdens, "he always having allowance thereof in the first end of the foresaid feu-duties yearly at clearing." *Held*, on a construction of this clause, that the vassal was entitled to retain payments of poor-rates from arrears of feu-duties in an action for payment of the latter by the superior. *Hope* v. *Lumsdaine*, 1871, 9 M. 865; 43 J. 466.

37. Contract — Superior and Vassal — Feu-Duties.—Circumstances in which a vassal under a building feu was *held* not entitled to retain his feu-duties till the superior should exhibit certain plans. *Russell* v. *Anderson's Trs.*, 1839, 2 D. 184; 15 Fac. 167.

38. Contract — Superior and Vassal — Servitude — Feu-Duty Retained. — *Held ex parte* that a vassal in an urban tenement was not entitled to retain his feu-duties, on the allegation that the superior had bestowed on him a servitude *altius non tollendi* over houses on the opposite side of the street, which had been violated, the vassal having been found entitled to enforce that servitude by having the houses reduced in height. *Cockburn* v. *Wallace*, 1826, 2 W. & S. 293. Revg. 4 S. 128. Cf. *Heriot's Hospital* v. *Gibson*, 1814, 2 Dow, 301.

39. Effect of Right — Adjudication. — When a first adjudication is brought for payment of a sum over the whole of which the debtor instantly instructs a right of retention, it cannot proceed even to the effect of intimation. *Exrs. of D. of Queensberry* v. *Tait*, 11 July 1817, F. C.

40. Expenses — Trustee — Legatee's Creditors. — Trustees in an action between them and a party for whom they held a legacy

got expenses. *Held* that they were entitled to retain these expenses out of the legacy, although an arrestment of the legacy had been used. *Brodie* v. *Wilson*, 1837, 15 S. 1195 ; 12 Fac. 1093.

41. Factor—Agent and Principal—Consigned Goods—Specialty of Agreement.—*Held* upon the special terms of an agreement that an agent had no lien over goods consigned to him. *M'Donald & Halkett* v. *M'Grouther*, 1821, 1 S. 190.

42. Factor — Agent and Principal — Delivery Order—Factor's Lien.—A merchant gave his agent an order of delivery of goods on a consignee, but the order was not intimated, nor any possession taken ; and the goods were sold by the consignee. *Held* that the agent had no right of lien for his general balance in a question with an arresting creditor of the merchant. *Levitt* v. *Cleasby*, 1823, 2 S. 184.

43. Factor—Agent and Principal—Firm Debts Collected by Agent—Knowledge of Principal's Insolvency—Arrears of Salary.—A traveller for a firm, in the knowledge of their impending insolvency, uplifted debts due to them, and retained them to account of his own claims against the firm for, *inter alia*, arrears of salary. The firm was sequestrated, and the traveller having become bankrupt his trustee in bankruptcy claimed on the sequestrated estate of the firm for the balance due to the traveller, crediting the estate of the principals with the debts already collected. *Held* that the agent was not entitled to collect the funds of the company (in the knowledge of the principal's insolvency) and apply them in payment of his own debt.

Observed that, apart from insolvency, the traveller, having collected the money in the capacity of a servant, was not entitled to retain. *Dickson* v. *Nicholson*, 1855, 17 D. 1011 ; 27 J. 515.

44. Factor — Agent and Principal — Guarantee—Relief.—An agent sold goods, and took the purchaser's bill, which he guaranteed, and indorsed to the owner of the goods. The purchaser became bankrupt, and the owner discharged him on a composition, and delivered up the bill. *Held* that the agent was not entitled to withhold part of the undelivered goods from the purchaser till relieved of his guarantee. *Stirling & Sons* v. *Duncan & Co.*, 1823, 1 Shaw's App. 389.

45. Factor — Agent and Principal — Insurance Policy.—*Held* that an agent who effects an insurance for his principal has a lien over the policy, although the policy continue in the broker's custody. *Wilmot* v. *Wilson*, 1841, 3 D. 815 ; 16 Fac. 816.

46. Factor—Agent and Principal—Possession — Bankruptcy. — Stockbrokers purchased stock, which was paid for out of the funds of the employer, but was allowed for some time to remain untransferred in the name of the sellers, under the control of the stockbrokers. Thereafter the brokers caused transferences to be executed by the sellers, in favour of bankers, in security of their promissory-note, discounted to them by the bankers. *Held*, in a question between the bankers and the true owners of the stock, after the bankruptcy of the brokers, that the bankers were entitled to retain the stock in security of their advances. *Attwood* v. *Kinnear & Sons*, 1832, 10 S. 817 ; 7 Fac. 620.

47. Factor—Agent and Principal—Possession—Waiver.—An agent, in the ordinary course of his business for his principal, purchased and shipped a cargo of wheat, and employed a broker to insure it, in neither case disclosing the name of his principal, to whom, however, he indorsed the bill of lading, and on whom he drew a bill, which was accepted, for a sum including the price, commission, charges, and interest till the bill should become due. The policy of insurance remained in the hands of the broker. The wheat was lost at sea, and soon after—but before the bill alluded to became due, and while many others drawn in similar circumstances were then current—the principal was sequestrated. The agent thereafter received payment of the sum in the policy. In an action in which the amount was claimed by the trustee in the principal's sequestration, *held* (1) that the possession of the policy by the broker was possession for the agent ; (2) that the agent was entitled to a lien over the principal's property in his possession, in security of any general balance due on factorial transactions, and therefore to a lien over the proceeds of the policy ; (3) that the right of lien was not waived by taking a bill, in the ordinary course of dealing, from the principal for the amount due on any particular transaction. *Gairdner* v. *Milne & Co.*, 1858, 20 D. 565 ; 30 J. 387.

48. Factor—Agent and Principal—Sale—Commission on Previous Transaction.—The court *sustained* the right of a mercantile agent to retain, as against his principal, from the price of a consignment of goods sold by him, the commission due to him upon a previous transaction. *Sibbald* v. *Gibson & Clark*, 1852, 15 D. 217 ; 25 J. 143 ; 2 Stuart 108.

49. Factor — Agent and Principal — Specific Goods—General Balance—Undisclosed Joint Adventure.—Goods were purchased by a joint adventure, and the bills of lading taken in name of one of the partners, who, without the knowledge of his copartner, delivered the goods to a third party. They were consigned by that party, along with goods belonging to himself, to an agent, who made an advance to him on the consignment. *Held*, in a question between the agent and the copartner, that the goods of the joint adventure were subject to a lien for the money advanced on the consignment ; that they were not subject to a lien for the general balance due by the third party to the agent ; but that the agent was entitled to apply their proceeds *primo loco* in extinction of the special advance, so as to enlarge his security over the goods of the third party for payment of the general balance

Johnston & Manley v. *Findlay, Duff, & Co.*, 1826, 4 S. 407.

50. Factor — Agent—Broker — Advances —General Balance—Joint Adventure.—An agent purchased and shipped goods for a company, on which he had made large advances. He purchased other goods as their broker, but on which he made no advances. It was afterwards disclosed that the latter goods formed part of a joint adventure, in which the company were interested. *Held*, in a question with the creditors of the joint adventure, that the agent had no lien over these goods for his general balance against the company. *M'Call & Co.* v. *Black & Co.*, 1824, 2 Shaw's App. 188.

51. Factor — Broker — Advances on Goods.—The owner of goods sent them and indorsed the bills of lading to a merchant for sale. He delivered them to a broker for sale, and he *bona fide* made advances to the merchant on the credit of them. *Held* that the broker was entitled to retention of them against the true owner, in security of his advances. *Ede & Bond* v. *Findlay, Duff, & Co.*, 15 May 1818, F. C.

52. Factor — Judicial — Law Agent's Hypothec — Rental Book. — *Held* that a law agent for the beneficiary under a trust deed was not entitled to plead his right of hypothec, in regard to the rental book of the estate, against a judicial factor, the latter being the natural custodier of such vouchers. *Mackay*, 1867, 3 S. L. R. 329.

53. Flax Spinner — Lien — How far Effectual.—A party sent flax to be spun into yarn, and the manufacturer impledged the yarn, when spun, for an advance equal to the cost of spinning. *Held*, in a question with the pledgee, that the owner was entitled to delivery, free of pledge, if the manufacturer was indebted to him (as he alleged) in a larger amount than the cost of spinning at the date of impledging, but the pledgee allowed to go into the question of accounting. *Paton* v. *Wills*, 1833, 11 S. 703.

54. Innkeeper—Subject of Lien.—*Held* that an innkeeper had a right to detain the wearing apparel of a guest who neglected to pay his bill when demanded, even though payment was refused on the ground that the charges exceeded what had been agreed on. *M'Kichen* v. *Muir*, 1849, J. Shaw 223.

55. Insurance Broker—Policy—General Claim for Premiums.—A effected in his own name an insurance on goods belonging to B through an insurance broker. Loss ensued, and B brought an action against the insurance broker, who defended, on the ground that A having become bankrupt, indebted to him in the premium on this as well as on other policies, he had a lien on the policy for all the premiums. It was *found*, by the verdict of a jury, that the broker knew that A had insured only as agent. *Opinion*, that the broker was entitled to retain the policy until payment of the premium. *Losh, Wilson, & Bell* v. *Douglas*, 1857, 20 D. 58; 30 J. 34.

56. Law Agent—Cautionary Obligation.—A law agent who had become cautioner for his client, and obtained a loan of a sum from him, *held* entitled to retain till relieved of his cautionary obligation, but liable in compound interest, in respect that he could not make profit by his right of retention. *Exrs. of D. of Queensberry* v. *Tait*, 23 May 1822, F. C.; 1 S. 428.

57. Law Agent—Claim Transferred to Country Correspondent—Discharge.—The country agent in a sequestration employed a writer in Edinburgh to conduct the proceedings there, who debited the former with the expenses; and on the sequestration being wound up on a composition-contract, the bond for these expenses was taken to the country agent, as the sole creditor, with the knowledge of the Edinburgh agent. *Held* that the claim was transferred to the country agent, so as not to afford a ground of retention or compensation on the part of the Edinburgh agent against a creditor of the bankrupt. *Mackintosh* v. *Macdonald*, 1831, 9 S. 626; 6 Fac. 416.

58. Law Agent — Consigned Money.—A fund *in medio* was ordered to be consigned in bank in the joint names of the agents of the claimants. In a competition between one of the agents and the trustee on the sequestrated estate of a client, a party to the multiplepoinding, *held* that the agent had no right of retention over the fund for payment of business accounts incurred to him by his clients in legal proceedings, although by means of them the fund had been recovered. *Cullen* v. *Smith*, 1845, 8 D. 77; 18 J. 37.

59. Law Agent—Deposit for Special Purpose—General Accounting.—A builder borrowed money on the security of houses. The houses not being completed, part of the loan was deposited in bank in the joint names of the builder's and the lender's agents, and on the loan being repaid the deposit-receipt was delivered to the builder. The builder's agent had made advances to the builder on the understanding that he would be paid out of the sum so deposited and having an account against him for professional services claimed to be preferred on the money. *Held* that the money having been deposited for a special purpose the agent had no right of retention or other claim on it. *City of Glasgow Bank* v. *Sword*, 1862, 24 D. 703; 34 J. 352.

60. Law Agent — Funds Received for Specific Purpose.—Law agents received from a client a sum of money for the special purpose of getting the opinion of counsel as to procedure in a case. The opinion was adverse. The auditor having reported that the sum received was more than required for that purpose—*held* that, the money having been given for a specific purpose, the agents must return the balance, whatever counter claim they had against their client. *Hendry* v. *Grant & Jamieson*, 1868, 5 S. L. R. 544.

61. Law Agent — Sale — Preferred to Seller's Creditors.—A party who purchased

an estate under burden of the price, employed, on the death of the seller, a law agent to make the sale effectual against the heir, and placed the title deeds in his hands; and the purchaser was infeft. *Held*, in a ranking and sale of the estate, that the agent, in virtue of his hypothec, was preferable for his account to the parties having right to the price. *Observed*, that even although the principle of the decisions should be considered erroneous, yet the rule had been settled. *Campbell & Clason* v. *Goldie*, 15 Nov. 1822, F. C.; 2 S. 16.

62. Payment—Decree for Admitted Debt—Charge—Finding of Expenses Reclaimed against.—In an action for payment, interim decree was granted for a balance admittedly due, and a charge was thereafter given upon it. The defender suspended, and pleaded a right of retention in respect that subsequently to the decree an interlocutor which had been reclaimed against contained a finding of expenses in his favour. Suspension *refused*. *M'Allister* v. *Duthie*, 1867, 5 M. 912; 39 J. 509.

63. Printer — Stereotype Plates. — A printer into whose hands stereotype plates are put, for the purpose of printing from them, has no retention over them for his account for printing from them the work of which they are the plates. *Brown* v. *Somerville*, 1844, 6 D. 1267; 16 J. 544, 604.

64. Proof of Debt—Delivery of Goods—Bill of Exchange.—In a petition for delivery of goods claimed as the property of the petitioner, the respondent alleged that they were the property of another party, and that he had a right to retain them, in respect of a debt due to him by that party. As the ground of his debt he produced a bill, which bore to be a foreign bill, and was unstamped, but which was admitted to have been drawn in this country; and he referred to a schedule given up by the debtor under the Insolvent Act in England, in which the bill was stated as a debt due by him. *Held* that the respondent had failed to prove the debt in respect of which he claimed the right of retention. *Ogilvie* v. *Taylor*, 1849, 12 D. 266; 22 J. 75.

65. Requisites of Retention.—Possession is essential to an agent's claim of retention. *Callum* v. *Ferrier*, 1825, 1 W. & S. 399. Affg. 2 S. 102. *Levett* v. *Cleasby*, 1823, 2 S. 184.

66. Sale—Agent and Client—Bankruptcy of Agent after Receiving Price—Extent of Right.—The tenant under a lease of minerals, which excluded assignees and subtenants, sold it with consent of the landlord, who acted as his agent and received the price, but failed to pay it to the tenant. The landlord became bankrupt, and his estates were sequestrated. *Held* that the purchaser, who had entered into possession, was entitled to retain the rents which fell due prior to the sequestration, until he got a valid discharge for the price, and a conveyance of the lease from the tenant; but that he was bound to pay the rents which fell due subsequent to the sequestration. *Martin* v. *Marshall*, 1850, 12 D. 1172; 22 J. 522.

67. Sale—Price—Burden upon Subjects.—A singular successor who had purchased a property, *found* entitled to retain a part of the price during the subsistence of the widow's terce as a preferable burden. *Boyd* v. *Hamilton*, 7 Mar. 1805, F. C.; M. 15874.

68. Sale — Purchaser's Title Reduced — Removing—Meliorations.—Purchasers from an heir in possession of an entailed estate, whose titles were reduced, *held* not entitled, in an action of removing by a posterior heir, to retain the lands in security of alleged meliorations. *Agnew* v. *E. of Stair*, 7 July 1824, F. C.; 3 S. 229.

69. Sale—Ranking and Sale—Sale under Burden of Allocated Debts—Prescription.—Part of an estate was sold under a ranking and sale, and several of the debts were allocated on it. Thereafter it was sold privately, under burden of the debts. *Held* that although more than forty years had elapsed from the first sale, yet the purchaser was entitled to retain a part of the price in his hands corresponding to the allocated debts. *Falconer* v. *Campbell*, 1821, 1 S. 214.

70. Sale—Retention in Security for Damages.—A purchaser who paid the price of goods, on finding they did not answer their description, immediately gave notice to the seller; but instead of returning them on being offered repayment of the price, he retained them in security of damages and expenses. *Held* that the only legal retention being in security of the price, he must be treated as abiding by the contract, and was barred from pleading that the goods were of inferior quality, and from claiming damages. *Melville* v. *Critchley & Co.*, 1856, 18 D. 643; 28 J. 277.

71. Sale — Retention in Security for Repayment. — By a contract of sale, the purchaser agreed to take goods, "all in new condition, at invoice prices." The goods were handed over to the purchaser with a list, docqueted, "Objections to any found damaged should be made before the end of the month." Part of the price was paid, and before the end of the month the purchaser stated objections to the goods, but intimated that he would hold the whole in his hands as security for the payment already made. *Held* that the delivery in the face of the docquet had not completed the transaction, and that by retaining the goods in security, the purchaser had not deprived himself of his right to return them. *Laing* v. *Westren*, 1858, 20 D. 519; 30 J. 275.

72. Sale — Seller's Lien — Delivery—Unpaid Price.—Hastie, who had sugars lying in a bonded warehouse, entered in the name of his importing agent, sold part of them to Bowie, who paid the price and obtained an order of delivery on the agent. Bowie having sold to Melrose, who paid the price, indorsed the order to Melrose, who intimated it to the agent, but not to the keeper of the warehouse, and got partial delivery. In the meantime Hastie had sold another parcel of the sugars to Bowie, who became bankrupt without pay-

ing the price of this parcel, and Hastie stopped delivery of the sugars sold to Melrose. *Held* that there was no delivery, actual or constructive; and that the payment of the price of the first parcel did not bar Hastie from retaining these sugars for the price of the second parcel. *Melrose & Co.* v. *Hastie & Co.*, 1851, 13 D. 880; 23 J. 398. Verdict *applied*, 1851, 14 D. 268; 24 J. 120; 1 Stuart 219. Cf. *M'Naughton* v. *Baird & Co.*, 1852, 24 J. 623; 1 Stuart 1051.

73. Sale — Seller's Lien — General Balance.—*Observed*, that the property of goods sold remains with the seller until delivery, actual or constructive, and that in consequence he is entitled to retain them against the buyer and his assignees till every debt due to him by the buyer is paid or satisfied. *Black* v. *Incorporation of Bakers, Glasgow*, 1867, 6 M. 136; 40 J. 77.

74. Sale — Seller's Lien — General Balance — Purchaser's Bankruptcy — Act, 19 and 20 Vict. c. 60.—A seller's right of retention in security of a general balance as against the trustee in the purchaser's sequestration, is not cut down by the Mercantile Law Amendment Act, 19 and 20 Vict. c. 60. *Wyper* v. *Harveys*, 1861, 23 D. 606; 33 J. 298.

75. Sale of Goods — Agent — Agent's Separate Debt. — A party sold goods to a general agent, for which he received a bill accepted by the purchaser, and indorsed by the agent. *Held* not entitled, on the bankruptcy of the agent, to retain the bill and goods in satisfaction of a separate debt due by the agent, but *ordained* to restore the bill to the purchaser, failing delivery of the goods. *Duthie* v. *Paterson*, 1822, 1 S. 532.

76. Scourer — Lien — Usage of Trade — General Balance.—At common law, scourers have no right of lien for a general balance over goods entrusted to them, beyond the amount of the expense of scouring these particular goods; and a practice of allowing such a lien, not being universal even in the locality, is insufficient to control the common law. *Smith* v. *Aikmans*, 1859, 22 D. 344; 32 J. 141.

77. Ship—Consignee—Delivery Taken—Freight. — Consignees having taken delivery of a cargo in bad condition, without warning the master that they would not pay the freight, *found* not entitled to retain it on account of a claim of damages against the master for signing (as alleged) a false bill of lading. *Pillans* v. *Pitt*, 1825, 4 S. 350.

78. Ship — Freight — Arrears — Sale — Delivery — Bankruptcy. — A merchant in Glasgow ordered goods from manufacturers in Newcastle, who shipped them to him in a carrying vessel; but before their arrival, the merchant had become bankrupt. In consequence thereof, no delivery was required on his behalf, and they were placed in the warehouse of the shipowner's agent. *Held*, in a question with the manufacturers, requiring delivery, that the agent had no lien over the goods for the arrears of former freights due by the merchant. *Ridley & Co.* v. *Sloan*, 1837, 15 S. 469; 12 Fac. 424.

79. Ship—Freight—Delivery before and after Merchant's Insolvency.—A cargo of wood was in part delivered to the agent of the merchant before, and part after, the insolvency of the merchant was known to the agent, and part was undelivered. *Held* that the lien for freight remained over the part delivered, whether the delivery took place after the agent was in the knowledge that the merchant had stopped payment, or after an application for sequestration of his estates, if such application were prior to the agent's knowledge, and also over the undelivered part of the cargo for the whole freight. *Malcolm* v. *Bannatyne*, 24 June 1813, and 15 Nov. 1814, F. C.

80. Ship — Insurance—Broker — Unpaid Premiums.—Circumstances in which *held* that an insurance broker was entitled to retain the amount of unpaid premiums due on a vessel, but was not entitled to retain premiums due on insurances effected in the same manner on other vessels belonging to the same owner. *Dowson & Son* v. *Orr & Co.*, 1862, 24 D. 566; 34 J. 289.

81. Ship—Lien—Certificate of Registry. —In the reduction of the sale of a ship on the Act, 1696, c. 5, a plea of retention of the certificate of registry, alleged to have been previously delivered in security of the debt, but which had afterwards been given up, and subsequently restored under the contract of sale, *repelled*. *Petrie* v. *Geddes*, 1823, 2 S. 562.

82. Ship—Lien for Freight—How Lost —4 Geo. IV. c. 24.—A shipowner, by a voluntary landing of goods, to be placed in a private bonded warehouse, under the Warehousing Acts, loses his lien for the freight. *Johnstone* v. *Duncan*, 1827, 5 S. 660; 2 Fac. 481.

83. Ship—Lien for Freight—"In Dock" —Act 4 Geo. IV. c. 24, s. 83.—A delivery "in docks," in the meaning of the 4 Geo. IV. c. 24, s. 83, which reserves the lien for freight, does not extend to docks of the description of those belonging to the magistrates of Edinburgh at the port of Leith. *Johnstone* v. *Duncan*, 1827, 5 S. 660; 2 Fac. 481.

84. Ship — Shipowner's Lien — Dead Freight—Holder of Bill of Lading.—*Question*, whether a lien on the cargo for dead freight can be effectual against the holder of a bill of lading. *M'Lean & Hope* v. *Fleming*, 1871, 9 M. (H. L.) 38; 43 J. 365; L. R. 2 Sc. App. 128.

85. Ship — Shipowner's Lien — Sub-Freighter.—*Held* that a shipmaster appointed by the owners of a vessel employed under a charter-party had, as representing the owners, a lien over cargo placed on board by a sub-freighter to the extent of the sub-freight, irrespective of any stipulations regarding the payment thereof between the sub-freighter and the charterer. *Youle* v. *Cochrane*, 1868, 6 M. 427; 40 J. 222.

86. Ship — Underwriter — Insurance Policy.—Underwriters are not bound to part with or exhibit a policy of insurance till the premium is paid. *Scott & Gifford* v. *Sea Insurance Co.*, 22 Jan. 1825, F. C.; 3 S. 467.

87. Specific Debt—Security—Subsequent Debt.—A creditor who had received from his debtor a vendition of a ship *ex facie* absolute, but at the same time granted a missive obliging himself to reconvey on payment of a specific debt, *found* entitled to retain in security of another debt afterwards contracted. *Balleny* v. *Raeburn & Co.*, 7 June 1808, F. C.; M. "Compensation" App. No. 5.

88. Storekeeper — General Balance—Specific Debt — Bankruptcy. — A grain merchant was in use to deposit grain with a storekeeper, and to pay the warehouse rent, not at any fixed period, nor as applicable to any particular parcel of grain, but at irregular intervals, and generally to account. On the bankruptcy of the grain merchant, *held* that the storekeeper had no right of retention for the general balance due by the bankrupt, but only for the rents and charges applicable to the particular parcels themselves. *Laurie & Co.* v. *Anderson*, 1853, 15 D. 404; 25 J. 226; 2 Stuart 207.

89. Storekeeper—Lien—How far Effectual. — *Question*, whether the keeper of a bonded warehouse has a lien over goods deposited for payment of an extrinsic debt. *Reid* v. *Watson*, 1836, 14 S. 223.

90. Storekeeper—Sale of Goods in Store—Advances to Original Owner—Delivery. —A storekeeper made advances to the owner of a lot of grain deposited in the storehouse. The owner sold the grain, and the delivery order was intimated to the storekeeper. Several parcels of the grain were subsequently delivered to the purchaser's order; but no transfer was made in the storekeeper's books to the name of the purchaser, nor was the grain measured over to him. *Held* that the storekeeper was not entitled to withhold delivery of the remainder, on the ground of a lien for the advances to the original owner. *Laurie* v. *Black*, 1831, 10 S. 1.

91. Subjects of Retention—Company's Property.—The executors of the governor of the York Buildings Company *held* not entitled to retain the seal and charter of the company in security of debts and salary due to him, but entitled to retain other papers which had been delivered to him as governor. *York Buildings Co.* v. *Robertson*, 6 July 1805, F. C.; M. "Hypothec" App. No. 2.

92. Trust—Ex facie Absolute Disposition with Back-Letter—Debts Covered.—*Held* that a party infeft under an *ex facie* absolute disposition, qualified by a back-letter declaring it to be in trust for payment of a specific debt to a third party, was entitled to hold it till relieved of a debt subsequently contracted to himself, but not till relieved of a debt which existed prior to the date of the disposition, which it was not the intention of the parties should be so secured. *Robertson* v. *Duff*, 1840, 2 D. 279; 15 Fac. 275.

93. Trustees—Lien.—*Observations* on the right of trustees to hold the trust-estate as a lien for all obligations incurred by them as trustees. *Henderson, etc.* v. *Norrie*, 1866, 4 M. 691; 38 J. 355.

94. Woodcutter—Possession.—A person employed to cut wood under the superintendence of the manager of the employer, and who is not in actual possession of the wood, has no right of lien or retention for payment of his wages. *Callum* v. *Ferrier*, 1825, 1 W. & S. 399. Affg. 2 S. 102.

95. Warehouseman—Advances—Factor—Principal and Agent.—An agent deposited for custody with the owner of a warehouse goods consigned to him, but without intimating that they were not his own property. The owner of the warehouse made advances to him, but not specially on the faith of the goods, or with relation to them, and the agent became bankrupt. *Held* that the owner of the warehouse was not entitled to retention against the proprietors of the goods, till repaid the advances to the agent. *Stuarts & Fletcher* v. *M'Gregor & Co.*, 1829, 7 S. 622; 4 Fac. 882.

96. When Competent — Possession. — A party obtaining accidentally possession of property belonging to his debtor, is not entitled to retain it in security of his debt. *Mackenzie* v. *Newall*, 1824, 3 S. 206.

97. When not Pleadable — Charge on Decree.—Retention cannot be pleaded by an arrestee in a suspension of a charge on an extracted decree of forthcoming, although pronounced in absence of the arrestee. *Cunningham, Stevenson, & Co.* v. *Wilson & Co.*, 17 Jan. 1809, F. C.

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1. Annuity Tax — Annuity Tax Act, 1661—Bar to Recovery—Errors of Pro-

cedure.—*Held*, on construction of the Annuity Tax Statute of 1661, that errors committed in the course of following out the steps of procedure, essential as warrants for the summary diligence provided by the statute, do not operate immunity from payment of the tax constituted by the leading enactment of the statute, so as to prevent recovery thereof by ordinary action. *Aitken* v. *Darlington & Young* (O. H.), 1869, 6 S. L. R. 463.

2. Customs and Excise — Arrears — Interest.—In an action by a distiller against a collector of excise for repetition of interest charged against and paid by him to the collector as arrears of duties, *held* that, whether the public were or were not entitled to the interest, the distiller had no right to it. *Young & Co.* v. *Leven*, 1816, 4 Dow 138.

3. Customs and Excise — Drawback—Act 33 Geo. III. c. 61.—In a claim by distillers in Scotland for drawback allowed on the duty on spirits distilled for exportation to England, *held* that the Act 33 Geo. III. c. 61, allowing the abatement "for every day" the still should work, did not include Sundays, though the stills were worked on Sundays. *Easton & Co.* v. *Brown*, 1798, 4 Pat. 39.

4. Customs and Excise—Exported Lead Duty.—*Held* that the lead and ore raised from the mines of Waterhead, etc., belonging to the Earl of Hopetoun, were only liable in the *ad valorem* duties of 10s. and £1 for every £100 exported, in terms of the statutes (27 Geo. III. c. 13, 43 Geo. III. c. 68, 49 Geo. III. c. 98) imposing the same, and were exempt from all other duties. *King's Advocate* v. *E. of Hopetoun*, 1827, 2 W. & S. 644.

5. Customs and Excise—Impost Duties—Importer — Act 3 Geo. I. c. 53.—Brewers of porter in Aberdeen, who there sold to dealers in Edinburgh quantities which were sent to them by sea, *found* not liable for the impost duties leviable under the 3 Geo. I. c. 53, in respect they were not the importers. *Mags. of Edinburgh*, 19 Nov. 1812, F. C.

6. Customs and Excise—Licence—Distiller's Licence — Renunciation — Sale of Remaining Stock of Spirits—Dealer's Licence.—A distiller having a licence as such till the 10th of October 1797, intimated to the Crown that he had on 7th June 1797 ceased to be a distiller, having sold his distillery. At the date of sale he had a quantity of spirits on hand; and the question was raised, whether he could sell these under his then current distillery licence, or required to take out a dealer's licence. *Held* that, having renounced the character of distiller, he required to take out a dealer's licence in order to sell the spirits. *Lord Advocate* v. *Menzies*, 1799, 4 Pat. 92.

7. Customs and Excise—Licence—Horse Hiring Licence — Contravention — Keeping Horses for Hire in Excess of Number Allowed by Licence—Act 16 and 17 Vict. c. 88, s. 15.—*Held* that a post-horse hirer, holding a licence to keep two horses for hire, contravened the stat. 16 and 17 Vict. c. 88, s. 15, by keeping four horses, two of which were regularly let for hire, and the other two, though kept for agricultural purposes, were occasionally let for hire when the other two were not out on hire. *The Queen* v. *Caird*, 1867, 5 M. 288; 39 J. 142.

8. Customs and Excise — Licence — Licence to Deal in Coffee—Offence of Keeping and Selling Chicory—Act 43 Geo. III. c. 129, s. 5—Prosecution Barred by Treasury Regulation.—An information charged that a certain quantity of chicory "was found in the custody and possession" of the defendant, a dealer in coffee. By regulation of the Board of Inland Revenue, dealers are allowed to "keep and sell" chicory prepared and mixed with coffee, provided the packages in which such mixture is delivered to purchasers be labelled in a particular manner. It was proved that the defendant sold a mixture of chicory and coffee not so labelled. *Held* that an officer of excise was barred from prosecuting under the 5th clause of 43 Geo. III. c. 129, in so far as it enacts penalties when chicory "shall be found in the custody or possession of any dealer." *Perth Quarter Sessions*, 1861, 24 D. 221; 34 J. 110.

9. Customs and Excise — Licence — Penalty — Retailing Liquor without a Licence — Isolated Act — Excise Licences Act, 1825, s. 26.—*Opinion* by the court upon a case in Exchequer, that the provisions of the Excise Licences Act, 1825, s. 26, imposing penalties for retailing beer, etc., without a licence, applied only to dealers; so that a person who, it was proved, had, without a licence, sold one bottle of beer, was not liable in the penalty, because it appeared from the proof that the sale was an isolated act; but *observed*, that a single act may legitimately lead to the conclusion that the seller is a dealer. *The Queen* v. *Beattie*, 1866, 5 M. 191; 39 J. 90.

10. Customs and Excise—Permit—Improper Use—Penalty—Excise Permit Act, 1832, s. 16.—*Held* that the sending out a cask of spirits to a purchaser with a permit in the name of another person, renders the seller liable in the penalty of £500, imposed by s. 13 of the Excise Permit Act, 1832, for using a permit for any other purpose than to accompany the commodity therein expressed. *Advocate-General* v. *Grants*, 1853, 25 J. 514.

11. Customs and Excise — Permit — Transfer of Excisable Goods — Excise Permit Act, 1832.—A retail spirit-dealer, being indebted to the wholesale merchants with whom he dealt for the price of spirits, agreed to convey to them a heritable subject belonging to him in payment. In an action by them for delivery of the disposition, the court, in respect no permits had been obtained for the spirits, and that the claim for the delivery of the disposition fell under the operation of the 2 Will. IV. c. 16, s. 12, *dismissed* the action. *Russell* v. *Liston's Trs.*, 1844, 6 D. 1138; 16 J. 495.

12. Customs and Excise—Privileges of Officers—Customs Tariff Act, 1853.—*Held* that the statutory privileges conferred on custom-house officers by 16 and 17 Vict. c. 107 (Customs Consolidation Act, 1853) are in lieu of, not in addition to, the ordinary privileges possessed by public officers. *Christie* v. *Thompson*, 1858, 20 D. 1114; 30 J. 670.

13. Customs and Excise — Right to Conduct Experiments Outwith Presence of Revenue Officers.—In a prosecution against a maltster for alleged compression of couch, the defender, with a view to the trial of the question by a jury, applied to the court for leave to perform experiments in private, contrary to the revenue statutes, by which grain cannot be interfered with outwith the presence of an officer. *Held* that as the court were not satisfied that it was essential to the due preparation of the case that the experiments should be conducted outwith the presence of revenue officers, and as the prosecutor consented to the experiments if officers were present, the case was not one where the court should interfere with the revenue regulations. *Question* whether, if essential to the justice of the case, the court could have allowed the experiments in defiance of the revenue laws. *Lord Advocate* v. *Melvin*, 1857, 20 D. 119; 30 J. 72.

14. Customs and Excise—Salt Duty—Exemption.—The plaintiffs in error had been in the practice of making salt of a coarse description by extracting it, by a certain process, from sand impregnated with salt; alleging an exemption from duty on salt so made given to the inhabitants of Annandale (where they lived) by the Act of 1661. In the Court of Exchequer a jury returned a special verdict on the facts, and the Barons gave judgment in favour of the defendant in error. The House of Lords reversed, and the Barons were ordered to issue a new writ of *venire facias* to try the issue between the parties *de novo*. *Grier & Others* v. *Mitchell*, 1814, 6 Pat. 1.

15. Customs and Excise—Survey by Officers of Excise—Survey Prior to Passing of Act of Parliament but Subsequent to Resolutions of House of Commons.—*Held* that the officers of excise were legally entitled to make a survey of distilleries, with reference to a new Act of Parliament regulating the duties on spirits and mode of collecting them, before the passing of the Act. *Hume* v. *Haigs*, 1799, 4 Pat. 95.

16. Customs and Excise—Tobacco Duty—Drawback on Re-Exportation—Fraud—Relanding—Indemnity Act, 1744.—Tobacco was imported from the plantations abroad by merchants in Leith, upon which the usual duties were paid. Afterwards it was exported, and, in terms of the Act in such cases, a drawback of the whole duty was obtained, and the goods exported under a certificate that they were for foreign export. After the ship proceeded to sea, the tobacco was clandestinely relanded. This was made an offence punishable by forfeiture of the goods and other penalties by 3 Anne, c. 13. *Held* that the Indemnity Act, 1744, did not apply to such a case, and that the tobacco was forfeited and the penalties attached. *Grosset* v. *Ogilvy*, 1753, 2 Pat. 1.

17. Exemption from Taxation—Property other than Crown Property.—*Opinion*, that there is no exemption from taxation, general or local, in this country of any property whatever, except Crown property, *i.e.* property belonging to the State, or devoted to State purposes, and in the hands or under the management and control of departments of the Government. *Adamson* v. *Clyde Navigation Trs.*, 1860, 22 D. 606; 32 J. 203.

18. Imprisonment — Aliment — Act of Grace (1696, c. 32).—The Crown is bound, under the Act of Grace, to aliment a prisoner imprisoned for non-payment of taxes. *Advocate-General* v. *Mags. of Inverness*, 1856, 18 D. 366; 28 J. 303.

19. Income Tax — Agreement not to Deduct Tax—Free Yearly Annuity—Income Tax Act, 1842, s. 103.—*Held* that the declaration of nullity enacted by the Income Tax Act, 1842, against "all contracts, covenants, and agreements" for payment of "interest, rent, or other annual payments" in full without deduction of income tax, was continued in force under the Income Tax Act, 1853, ss. 5 and 40, and applied to an obligation in an antenuptial contract of marriage to pay to a widow a free yearly annuity "exempted from all burdens and deductions whatsoever." *Blair* v. *Allen*, 1858, 21 D. 15; 31 J. 1.

20. Income Tax—Agreement not to Deduct Tax—Income Tax Act, 1842, ss. 102, 103—Annuity.—By agreement, a widow accepted an annuity of £400 per annum, in full of her claim for terce, to be increased or to suffer diminution in case the free rental, as at the date of the agreement, should be increased or diminished on the expiry of current leases. The tenants were bound by their leases to pay income tax without recourse on the landlord, and the sum stated in the minute as the free rental was the rent so paid, clear of taxes, insurance, repairs, etc. *Held*, on a construction of the Income Tax Act, 1842, ss. 102, 103, that the widow was only entitled to payment of her annuity under deduction of income tax. *Robson* v. *Macnish*, 1861, 23 D. 429; 33 J. 217.

21. Income Tax — Agreement not to Deduct Tax — Property Tax. — A debtor, notwithstanding an obligation in a bond for borrowed money to pay the interest without deduction of the property tax, is entitled to deduct the same from any after-payment of interest. *Butcher* v. *Barclay*, 16 Dec. 1814, F. C.

22. Income Tax—Land Tax—Liability—Apportionment—Right of Possession of Heritage Ceasing on 26th February.—An heir of entail assigned his interest and died on 26th February 1856. His assignee had right

to the rents from Martinmas till that date. *Held* that he was not liable for the amount of the income tax for the year April 1856–57 corresponding to that period, although the rents which he had right to for that period were not paid and the crop was not reaped till after that year's income tax was laid on; and the same held as to the land tax. *Hard* v. *Anstruther*, 1862, 1 M. 14; 35 J. 19. See 2 M. (H. L.) 1; 36 J. 323.

23. Inventory-Duty—Claim not Valued — Executor-Creditor — Title to Sue. — An executor-creditor, in confirming to a defunct, having stated that he could put no value on one item till the claim was constituted, *held* that this was no objection, under the Stamp Act regarding inventories, to his title to pursue for it, and that it would be sufficient to add the amount to the inventory, when constituted, before extract. *Williamson* v. *Fraser*, 1832, 11 S. 7.

24. Inventory-Duty — Deductions — Marriage-Contract — Provisions to Children—Railway Passenger Duty Act, 1842, s. 23.—By antenuptial contract of marriage a person bound himself to pay to his spouse an annuity of £800 during her survivance, and to invest a capital sum sufficient for that purpose, taking the rights and titles thereof to himself and spouse in conjunct-fee and liferent . . . to the children of the marriage, in fee, with power of apportionment among the children. This obligation was not implemented, but the husband by his settlement bequeathed to one of his sons £10,000, which was declared to be in full of any share he might be entitled to claim of the capital sum foresaid. *Held* that the £10,000 was a debt "due and owing from the deceased" in the sense of the 23rd section of the Act 5 and 6 Vict. c. 79, which fell to be deducted from the gross amount of his personal estate in ascertaining whether the executors were entitled to a return of inventory duty. *Lord Advocate* v. *Hagart's Exrs.*, 1872, 10 M. (H. L.) 62; 44 J. 381; L. R. 2 Sc. App. 217.

25. Inventory-Duty — Discovery — Additional Inventory—Subjects Known at Date of Inventory but not Included Therein—Stamp Act, 1804, s. 23—Probate and Legacy Duties Act, 1808, s. 98—Stamp Act, 1815, Schedule Part 3 — Stamp Act, 1853, s. 8.—At the time of his death a husband had a reversionary interest in the funds settled by his marriage-contract. It was not given up in the inventory of his estate because, on the ordinary calculation of lives, it was of no value. The widow died young, and a reversion became payable to the husband's estate. *Held* that as the existence of the reversionary right was known at the date of giving up the inventory, it was not a discovery of property of which the executors were bound to give up an additional inventory. *Lord Advocate* v. *Meiklam's Exrs.*, 1860, 22 D. 57; 33 J. 26.

26. Inventory-Duty—Mutual Settlement —Testamentary or inter vivos.—Five sisters executed, in 1825, a deed, whereby they assigned, disponed, and conveyed over, "from us and our heirs severally, to and in favour of each other, and to the heirs and assignees of the last survivor," their whole heritable and moveable property, effects, means, and estate, then belonging or which might belong to them. On the death of one of the granters, the Crown, treating the deed as of a testamentary nature, claimed inventory duty on the estate of the lady as personal succession. The House of Lords, considering that the clauses of the deed imported that it was a conveyance *inter vivos*, and not of a testamentary nature, *held* that duty was not exigible. *Brown* v. *Lord Advocate*, 1852, 1 Macq. 79. Revg. 24 J. 565; 1 Stuart 1024.

27. Inventory-Duty—Repayment— Railway Passenger Duty Act, 1842, s. 23—Heritable Securities—Heritable Securities Act, 1860—Stamp Duties Act, 1860.—*Held* that the whole of the debts due to the deceased heritably secured should be added to the gross amount of the personal estate in order to ascertain the inventory-duty payable, from which the executors will be entitled to a return in respect of debts due by the deceased paid by them. *Lord Advocate* v. *Hagart's Exrs.*, 1872, 10 M. (H. L.) 62; 44 J. 381; L. R. 2 Sc. App. 217.

28. Inventory-Duty — Residue Duty — Heritable or Moveable—Pupil's Funds Invested by Tutors in Heritage.—Savings from entailed estates and other property, amounting to £65,000, which had been invested by tutors in heritage in name of the pupil, and which, on his death, descended to the next-in-kin as executry, *held* liable to inventory-duty as part of the pupil's personal estate, and to duty on the residue upon intestacy. *Lord Advocate* v. *Anstruther*, 1842, 13 D. 450.

29. Inventory-Duty—Subject Chargeable —Bond for Improvement Expenditure on Estate Held under Defective Entail—Heritable Securities Act, 1860, s. 1.—The proprietrix of an estate under a deed of entail granted a bond of annualrent for improvement outlay under the Montgomery Act in favour of herself, her "heirs, executors, successors, and assignees," on which bond infeftment was taken. It was afterwards discovered that the entail was defective, and that she held the property in fee-simple. She thereupon executed a new deed of strict entail, under burden of the bond of annualrent, but with the provision that, in the event of her making no separate conveyance of it, it should accrue to the institute or heir of entail succeeding to the estates. She died without making any such separate conveyance. *Held* that the bond of annualrent did not fall to be included in the inventory of the deceased's estate under the Heritable Securities Act, 1860. *Lord Advocate* v. *Marchioness of Lansdowne*, 1872, 11 M. 6; 45 J. 5.

30. Inventory-Duty—Valuation of Debts —Debt Valued at Less than Full Amount

—**Full Amount Recovered — Additional Duty.**—An executor who has stated a debt at its full amount, but valued it at less in the inventory lodged with the Stamp Office, and paid stamp duty on the lower amount, is entitled to pursue for, and on obtaining decree to charge for, the entire sum, an additional stamp duty being paid when the full sum is recovered. *Brown* v. *Millar's Exrs.*, 1853, 16 D. 225; 26 J. 117.

31. Land Tax—Assessment Roll.—In a petition by the Crown to compel the commissioners of supply for the county of Edinburgh to furnish annually to the collector of the land tax an assessment roll of that tax, specifying the lands and parties liable and the amounts payable, and praying, failing performance, for decree for the *cumulo* amount of tax payable by the county, *held* that the recent Acts transferring to the Crown the collection of the tax did not impose on the county the duty of furnishing such an assessment roll; and therefore petition *refused*. *Lord Advocate* v. *Commrs. of Supply for the County of Edinburgh*, 1862, 24 D. (H. L.) 7; 4 Macq. 387; 34 J. 657.

32. Land Tax—Trade-Stent—Collection—Diligence—Act 52 Geo. III. c. 95.—The "trade-stent," levied in Glasgow, is land tax, payable to the Crown, and to be collected by the collector of land and assessed taxes; and payment of it is to be enforced as a Crown debt by the diligence under the Act 52 Geo. III. c. 95. *Renfrew* v. *Mags. of Glasgow*, 1861, 23 D. 505.

33. Legacy-Duty — Annuity — Sale by Legatee—Liability of Purchaser.—A legatee sold an annuity, "as settled and bequeathed to me by the trust deed and will of my late father, such annuity . . . to be receivable by you from the 7th June 1831," the period at which it had vested in the legatee. *Held*, in a question between the purchaser and the representatives of the legatee, that the purchaser was liable for the legacy-duty upon a sum of £12,000 (which constituted a part of the capital from which the annuity was derivable), and upon the interest of this sum from June 1831 (the date at which he acquired it) down to 1842, at which period the duty had been settled for with Government by the trustees of the testator. *Nisbett's Trs.* v. *Learmonth*, 1845, 8 D. 69; 18 J. 34.

34. Legacy-Duty—Heritable or Moveable—Conversion—Change of Investment—Ordinary Management.—A party who died possessed of £4000 of moveable property, and £16,000 on heritable bond, directed her trustees to pay debts and legacies, and the residue to a residuary legatee; and she gave them power to uplift and change existing investments, and to convert the estate into money. The debts and legacies amounted to £13,500, so that it was impossible to discharge them without encroaching on the £16,000 bond. The trustees uplifted it; and having taken as much of the money as was required to satisfy the debts and legacies, they reinvested upon heritable bond the residue, amounting to £6000. *Held* that this residue was not liable in legacy duty, the change of investment being simply in ordinary management, and for better preservation, and not a permanent change for distribution, so as to alter the conditional into an absolute direction to realise the estate. *Lord Advocate* v. *Smith*, 1854, 17 D. (H. L.) 14; 26 J. 533; 1 Macq. 760.

35. Legacy-Duty — Heritable or Moveable—Conversion—Direction to Offer Heritage to Sons in Certain Terms—Heritage Conveyed to Son.—A truster directed his trustees to offer his heritage to his sons in succession on certain terms, failing acceptance of which they were to sell, and divide the price as residue. The eldest son elected to take the estate, and the trustees conveyed to him. *Held* that the conveyance was in execution of the will: therefore that legacy-duty was not exigible. *Lord Advocate* v. *Meiklam, etc.*, 1860, 22 D. 1427; 32 J. 651.

36. Legacy-Duty—Heritable or Moveable—Power of Sale.—*Held* that, to warrant the imposition of legacy-duty, an express direction by the testator to trustees to sell is not indispensable, but that a power to sell becomes as imperative as an express direction, when converting into money is the fair meaning of the deed. *Advocate-General* v. *Blackburn's Trs.*, 1847, 10 D. 166.

37. Legacy-Duty — Heritable or Moveable—Sale of Heritage, Contemplated by Will.—*Held* that where a trust deed conveying both heritage and moveables, contemplated but did not direct a sale of the heritage, legacy-duty was exigible, although an arrangement was entered into between the trustees and the residuary beneficiary, under which the heritage was not sold, but conveyed to the beneficiary. *Lord Advocate* v. *Williamson*, 1843, 2 Bell 89. Affg. 13 D. 436.

38. Legacy-Duty — Heritable or Moveable—Scots Patent.—A testator, who died in 1837, conveyed the benefit which belonged to him in Scots and English patents to trustees, directing them to hold his share till the expiry of the patents (1842), to accumulate the profits into a fund for the protection of his estate from unexpected claims, and then to divide and appropriate the same to parties in certain proportions or shares. Large sums were realised from the Scots patent, which consisted partly of licence-duties, and partly of sums recovered from infringers of the patent, in name of damages. *Held*, in a suit for legacy-duty on the deceased's interest in the Scots patent, that the right was personal property, and so liable to duty; and that duty was due upon the whole sums realised, and forming the fund for division. *Lord Advocate* v. *Oswald*, 1848, 10 D. 299.

39. Legacy-Duty — Liability — Compromise—Foreign Action.—A legacy bequeathed to foreigners having, in consequence of a dispute, been compounded in a foreign country for a specific sum, but which was agreed to be paid in this country, and full and ample

discharges granted, *held* that the legacy-duty was a burden on the legacy so compounded, and that it was payable by the legatees. *Fischer* v. *E. of Seafield*, 18 Nov. 1825, F. C.; 4 S. 192.

40. Legacy-Duty — Liability — Domicile of Testator — Legacy Duty Act, 1796, s. 2.—The liability of a testator's estate to legacy-duty depends upon his domicile at his death, and not on the circumstance of his will having been confirmed or proved, and acts of administration having taken place under it within the kingdom. *Advocate-General* v. *Thomson*, 1845, 4 Bell 1; 17 J. 458. *Inland Revenue* v. *Gordon's Exrs.*, 1850, 12 D. 657; 22 J. 233.

41. Legacy-Duty—Liability—Legatee or Trustee—Transfers of Shares not Accepted Prior to Death of Truster.—*Held* that legacy-duty was exigible on the value of certain shares of which transfers had been executed (but not delivered) by the truster during his life, in favour of his daughters, to take effect after his death; but that it was the parties interested in the transfers who were liable in such legacy-duty, and that these shares did not form part of the trust-estate for which the trustees were accountable in settling residue-duty. *Lord Advocate* v. *Hill*, 1862, 24 D. 808; 34 J. 410.

42. Legacy-Duty — Marriage-Contract — Provision to Children—Spes successionis.—A husband, by antenuptial contract, bound himself to pay £20,000 to the children of the marriage, at the first term of Whitsunday or Martinmas after his death, reserving power of division or apportionment by writing under his hand, and declaring it in full of bairns' part of gear, *legitim*, portion-natural, executry, or anything else which they could claim through his decease. *Held* that this provision was not liable to legacy-duty. *Advocate-General* v. *Trotter*, 1847, 10 D. 56.

43. Legacy-Duty — Separate Legacies—Legacy under £20 — Stamp Act, 1815, Schedule, Part 3—Legacies to Different Schemes of one Church.—A bequest under £20 being made to each of several mission, educational, and church extension schemes of the Free Church of Scotland, *held*, by the Lord Ordinary in Exchequer, that these were not to be considered as several legacies to one legatee (the Free Church), but several and distinct legacies to different legatees; and therefore, being each under £20, legacy-duty was not exigible therefrom. *Stewart's Trs.* v. *Lord Advocate*, 1858, 20 D. 453.

44. Legacy-Duty — Settled Funds — Second Liferent Emerging on Cesser of Prior Liferent. — By a testamentary trust deed a husband and wife were each entitled to the liferent of half of £34,000, the whole to be liferented by the survivor, the fee to go to their children. After the death of the testator, and during the lives of the liferenters, legacy-duty was paid on the liferent of both halves, and, by anticipation, on the fee of the whole sum. The husband survived his wife, but no legacy-duty was paid on the life interest he acquired by survivance of her. After his death, duty was paid on the fee of the half liferented by him, in ignorance that it had been paid before. *Held* that legacy-duty was due on the life interest acquired by the husband on the death of his wife, and that the Board of Inland Revenue was entitled to retain this duty in accounting for the sum erroneously paid to it. *Weir* v. *Lord Advocate*, 1865, 3 M. 1006; 37 J. 522.

45. Property Tax—Liability—Charitable Corporation.—A corporation whose funds are not applied exclusively to charitable purposes, is liable in property tax. *Weavers of Ayr* v. *Bone*, 1823, 2 S. 401.

46. Property Tax — Liability — Foreign Debt — Interest Paid without Deducting Tax.—Interest was paid in London, for a series of years, on a debt which was originally a West India debt, during the period when the property tax statute was in force, without deducting that tax. *Held* that it was not competent to withhold payment of a balance to that extent, as it appeared that no such relief would be allowed in England, or, at least, that the party must go to the courts there to seek such relief. *Fraser* v. *Fraser*, 1827, 5 S. 348.

47. Property Tax — Liability — Friendly Society.—*Question* as to the liability of a friendly society to pay property tax, in the case of the debtor claiming retention of it. *Wilson* v. *Paterson*, 1822, 1 S. 431.

48. Residue-Duty—Deduction—Heritable Debts Paid out of Trust Funds—Unsold Heritage—Stamp Act, 1815, Schedule, Part 3.—*Held* that the heritable debts secured over lands forming part of a trust-estate, and which had been paid off by the trustees out of the trust funds, formed a proper deduction in estimating the amount of residue chargeable with duty, although part of the lands had not been sold, and that the value of the unsold lands was not "residue" chargeable with duty under the Stamp Act, 1815, part 3 of schedule. *Lord Advocate* v. *Hill*, 1862, 24 D. 808; 34 J. 410.

49. Residue-Duty—Subject Chargeable—New Shares Created Subsequent to Truster's Death.—New shares in a joint stock company were created and allocated upon old shares belonging to a trust-estate after the death of the truster. They were not taken up by the trustees, but by one of the beneficiaries, who was debited with the value thereof. *Held* that the shares were not chargeable with residue-duty as part of the residue of the truster's estate. *Lord Advocate* v. *Hill*, 1862, 24 D. 808; 34 J. 410.

50. Revenue Officer — Appointment — Proof of.—*Held* that letters and other documents from the office of Woods and Forests, referring to a commission in favour of a person as an "interim receiver" of Crown rents and feu-duties, and to accounts rendered by him as such, were sufficient evidence of the fact

that he was a revenue officer, although no commission was produced. *Borthwick* v. *Lord Advocate*, 1862, 1 M. 94; 35 J. 68.

51. Revenue Officer—Bond for £250 becoming Null if Officer Performed his Duties—Summary Diligence—Act 19 and 20 Vict. c. 56, ss. 38 and 39.—A receiver of Crown rents in Scotland was sequestrated. He had been charged at the instance of the Crown upon an extract registered bond for £250, which provided that if he faithfully discharged the duties of his office the bond should be null. The bond had been registered and extracted in virtue of the 19 and 20 Vict. c. 56, s. 38, but no stated account of the sum due had been recorded along with it, as required by s. 39 in the case of bonds in which the sum due is not specifically set forth. In a suspension of this charge, on the ground that there ought to have been a stated account in terms of s. 39, *held* that the bond was one upon which summary diligence could proceed for the sum mentioned, subject only to modification in a suspension, and that the procedure had been competent and regular. *Borthwick* v. *Lord Advocate*, 1862, 1 M. 94; 35 J. 68.

52. Seizure of Goods—Authority.—A seizure, before trial, of articles alleged to be manufactured contrary to a statutory regulation, cannot take place unless specially authorised by the statute; and therefore *found* that as the Act 28 Geo. III. c. 17, which makes certain regulations with regard to the manufacture of thread under the sanction of forfeiture, does not expressly give a power of seizure before trial, damages were due for such seizure having been made. *Mitchell & Co.* v. *Meek*, 1819, 6 Pat. 420.

53. Seizure of Goods—Act 1 James I. c. 22—Post Office Revenues Act, 1710—24 Geo. III. c. 19.—The Acts 1 James I. c. 22, 9 Anne c. 11, and 24 Geo. III. c. 19 (regulating the trades of currier and tanner) give only a power of forfeiture, not of seizure. *Anderson & Co.* v. *Campbell*, 28 Feb. 1811, F. C.

54. Succession Duty—Beneficial Interest—Succession Duty Act, 1853, s. 2—No Benefit Acquired—Titles not Made Up.—*Held* that the interest in heritage acquired by a successor who dies before making up titles, and so shortly after the predecessor's death as to derive no beneficial possession or interest in it, is not a beneficial interest in possession or in expectancy, and hence not a "succession" in the sense of the Succession Duties Act, on which succession duty is payable. *Lord Advocate* v. *Stevenson*, 1869, 7 M. (H. L.) 1; 41 J. 304; L. R. Sc. App. 411.

55. Succession Duty—Beneficial Interest—Date of Acquisition—Succession Duty Act, 1853, s. 2.—A proprietor died in 1809, leaving his estates to trustees, whom he directed to hold the same (1) during the life of A, one of the trustees; (2) till the truster's debts and legacies had been paid; and (3) during the life of B, a nephew of the truster, whom he excluded from all interest in the trust-estate, and thereafter to denude in favour of certain heirs of entail. A having died, and all debts and legacies having been paid, the trust subsisted till the death of B, in 1857, when the trustees denuded in favour of C in terms of the trust deed. *Held* that C had "become beneficially entitled" to the estates upon the death of a person dying after 19th May 1853, within the meaning of the Succession Duty Act, 1853, s. 2. *Lord Advocate* v. *E. of Fife*, 1864, 3 M. 1172.

56. Succession Duty—Deductions—Insurance Premiums—Insurance Policies to Provide for Payment of Debt Affecting Entailed Estate.—*Opinion*, that an heir who, on succeeding to an entailed estate burdened with a debt forming "a prior principal charge," provides for paying off such debt by obtaining policies of insurance on his life, is not entitled to a deduction from succession duty in respect of the premiums payable on these policies. *Lord Advocate* v. *E. of Fife*, 1866, 5 M. 138; 39 J. 73.

57. Succession Duty—Entail—Beneficial Interest—Entail Fortified by Prescription—Prior Defective Entail—Succession Duty Act, 1853, s. 2.—Certain lands were entailed in 1704 without an effectual prohibition against sales. In 1775 the heir in possession executed a new entail, embracing other estates held by him in fee-simple, in favour of the same series of heirs, with an effectual prohibition against sales, and also requiring the heirs of entail to hold the whole lands under that entail and no other. In a question as to the succession duties payable by an heir of entail who succeeded after the second entail had been fortified by prescription, *held* that he was to be regarded as a person entitled to the lands by reason of the second entail, and took no beneficial interest under the first. *Observations* on the mode of construing an Act of Parliament imposing a tax leviable throughout the United Kingdom. *E. of Breadalbane* v. *Lord Advocate, etc.*, 1870, 8 M. 835; 42 J. 513.

58. Succession Duty—Entail—Nominatim Substitutes—Disposition or Devolution.—A, who was called *nominatim* under an entail executed by his grandmother, took as a substitute after an uncle. *Held* that he was liable in succession duty at the rate of 1 per cent. as taking by "disposition" from his grandmother, and not by devolution from his uncle. *Lord Advocate* v. *Lord Saltoun*, 1860, 22 D. (H. L.) 12; 32 J. 641; 3 Macq. 659. See also *Lord Advocate* v. *Drummond*, 1867, 40 J. 21; 5 S. L. R. 17.

59. Succession Duty—Entail—Substitute called by Description—Disposition or Devolution.—An entailed estate, after the failure of other heirs, passed in terms of the destination to M. G. and the heirs-male of her body, one of whom having died without issue was succeeded by his paternal uncle, to the exclusion of his sisters, who but for the entail would have succeeded as heirs-portioners. *Held* that in the sense of the Succession Duty Act the uncle did not succeed by "disposi-

tion" to the entailer as his predecessor, but that his predecessor was his nephew, the last possessor of the estate, from whom he took "by devolution of law." *Lord Advocate* v. *Gordon*, 1872, 10 M. 1015; 44 J. 571.

60. Succession Duty—Increase of Benefit—Succession Duty Act, 1853, s. 5—Death of Annuitant.—A testator directed his trustees to invest his whole estate in land and to hold the land until the whole trust debts were paid off, when they were to entail and convey to a series of heirs. They were also to pay an annuity to the truster's widow. On the death of the widow, *held* that the increase of benefit resulting from the cesser of the annuity was a succession on which succession duty was exigible from the heir of entail in possession at the time. *Lord Advocate* v. *Macdonald*, 1862, 24 D. 1175.

61. Succession Duty—Marriage-Contract Provision — Obligation by Wife's Father Prestable after his Death.—A sum of £2000 was settled by antenuptial contract, to which the father of the wife was a party. He bound himself to pay that sum to the marriage-contract trustees at the first term after his death; the interest being declared payable from that term, first to the wife during her life, and then to the husband in the event of his survivance—the fee being destined to the children of the marriage, whom failing, to the granter's testamentary trustees. *Held*, by the Lord Ordinary in Exchequer, that this was a succession within the meaning of the Succession Duty Act, 1853, and that succession duty was chargeable thereon. *Lord Advocate* v. *Robert's Trs.*, 1858, 20 D. 449.

62. Stamp—Acknowledgments of Advances — Creditor Acting as Banker.—Written acknowledgments for money advanced by a party not a banker, but who was truly making the advances in that character, do not require to be stamped. *Sloan* v. *Birtwhistle*, 1827, 5 S. 742.

63. Stamp — Acknowledgment of Advances.—Circumstances in which the court remitted to proof before answer an account of advances of money in sums under £8, 6s. 8d., of which vouchers were produced, which the defender contended were promissory-notes, and inadmissible as unstamped. These documents (which had been held by the Lord Ordinary not to require stamps) were all nearly as follows: "I hereby acknowledge to have received on loan from my son-in-law, James Braid, the sum of £1, 1s. 6d., and which sum I promise to repay him, with interest at the rate of 5 per cent. (Signed) ADAM LINTON." *Braid* v. *Linton*, 1858, 20 D. 728; 30 J. 385.

64. Stamp—Acknowledgment of Debt.—Mere acknowledgments of debt do not require to be stamped. *Hamilton's Exrs.* v. *Struthers*, 1858, 21 D. 51; 31 J. 42.

65. Stamp—Acknowledgment of Money Received.—A money broker, through whom a loan on heritable security was transacted, granted to the lender a letter acknowledging that he had received the amount, and binding himself to see the heritable security duly completed. *Held*, in a question between the lender and the borrower, who denied that the full sum had been advanced to the broker, that this letter might be admitted as evidence, although unstamped. *Mackintosh* v. *Pitcairn*, 1851, 14 D. 188; 24 J. 81; 1 Stuart 166.

66. Stamp—Acknowledgment of Money Received—Obligation to Account.—Documents written in the form of letters acknowledging to have received money, for which the writer bound himself "to account," *held* to be stampable as agreements, not as receipts. *Pirie's Reps.* v. *Smith's Exrs.*, 1833, 11 S. 473.

67. Stamp—Acknowledgment of Money Received—Obligation to Repay.—A holograph acknowledgment in these terms—"Received from A. B. £186. C. D."—imports *in dubio* the constitution of a debt and a general obligation to repay; and though unstamped, *held*, along with other circumstances, to establish resting-owing. *Allan* v. *Murray*, 1837, 15 S. 1130; 12 Fac. 1054.

68. Stamp — After-Stamping.—Although an objection had been sustained by the Lord Ordinary to the title of a pursuer, rested on an heritable bond, that it was inadequately stamped, *held* competent for the pursuer to get it duly stamped before a reclaiming note was advised; and the objection thereupon *repelled*. *Scottish Union Insurance Co.* v. *Bontine*, 1838, 16 S. 1241.

69. Stamp—After-Stamping.—An action being raised on an obligation unstamped, but stampable, *held* competent to sist process till it be properly stamped, and not incumbent to dismiss the action. *Hatton* v. *Richards*, 1833, 11 S. 727.

70. Stamp — After-Stamping.—A party bound himself by a missive to execute a regular stamped deed, and an action being brought for implement on the missive, he objected that the missive was not stamped. The court *sisted* process till it should be stamped at his expense, including the penalty. *Boyd* v. *M'Kenna*, 1824, 2 S. 712.

71. Stamp—After-Stamping—Agreement to Fight Cocks.—The court *refused* to dismiss a reclaiming note on an objection that an agreement to fight cocks libelled, not being stamped, could not be looked at, but allowed time to have it stamped. *Harvey* v. *Miller*, 1845, 7 D. 398; 17 J. 198.

72. Stamp—After-Stamping—Bank Draft—Stamp Duties (No. 2) Act, 1860, s. 18—Revenue (No. 2) Act, 1860, s. 32.—*Held* that bank drafts are liable in stamp duty as bills of exchange, and cannot, where issued without any stamp, be stamped afterwards—the court being of opinion that the Stamp Duties (No. 2) Act, 1860, s. 18, authorising bankers, in certain circumstances, to affix and cancel the necessary adhesive stamp, did not take drafts out of the class of instruments not stampable after issue, and that the Revenue (No. 2) Act, 1861, s. 32, empowering officers of

inland revenue to affix and cancel the proper adhesive stamp in any case where it is "competent to or incumbent upon any person or persons" to affix and cancel an adhesive stamp, was inapplicable. *M'Lellan* v. *Turner's Exr.*, 1864, 2 M. 845; 36 J. 422.

73. Stamp — After-Stamping — Competency—Bond Impressed with Bill Stamp.—*Held* that a document erroneously impressed with a bill stamp might competently be impressed with the appropriate bond stamp. *Campbell* v. *Fisher*, 1838, 16 S. 1279.

74. Stamp — After-Stamping — Competency—Document Ordered to be Stamped by Sheriff—Order not Obtempered—Final Judgment given in Sheriff Court.—An unstamped minute of lease was produced by a pursuer in the sheriff court, and was ordered to be stamped. The pursuer refused to obtemper the order, both parties proceeded on the footing that stamping was not necessary, and the sheriff assoilzied. *Held*, in an advocation, that it might competently be stamped, but that the pursuer was not bound, before having this done, to pay the previous expenses; reserving to the defender any claim for expenses, from the document not having been stamped at an earlier period. *Church* v. *Sharpe*, 1843, 5 D. 876; 15 J. 364.

75. Stamp — After-Stamping — Competency — Case Heard before House of Lords.—*Question*, whether an unstamped obligation can be stamped after the case has been heard in the House of Lords. *Miller* v. *Anderson*, 1833, 7 W. & S. 12. Affg. 9 S. 542.

76. Stamp — After-Stamping — Effect — Bankruptcy—Election of Trustee.—A party was unsuccessful in a competition for the office of trustee in the inferior court, in respect of a document having been rejected there for want of a stamp; but having got it duly stamped on bringing his appeal, and it being admitted that this vote turned the election, the court *recalled* the judgment, and appointed him trustee. *Ironside* v. *M'Gowan*, 1847, 19 J. 597.

77. Stamp — After-Stamping — Effect — Validation of Sequestration.—*Held* that as no objection was taken to an assignation of a debt on which an application for sequestration was awarded till afterwards, as improperly stamped, and as the defect was subsequently supplied, the sequestration was valid. *Robb* v. *Forrest*, 1831, 5 W. & S. 740.

78. Stamp — After-Stamping — Effect — Validation of Diligence.—An heritable creditor brought an action of maills and duties in a sheriff court, founding upon a bond and sasine not duly stamped; and on an objection being stated, they were properly stamped. *Held* that the stamping operated *retro*, and rendered the process valid *ab initio*. *Davidson* v. *Gibb*, 1838, 1 D. 10; 14 Fac. 7. And the same decision pronounced as to a poinding of the ground. *Wood* v. *Kerr*, 1838, 1 D. 14; 14 Fac. 12.

79. Stamp — After-Stamping — Effect — Validation of Charge.—A party holding an assignation to a decree, obtained in consideration of £20 for a debt of £35, and interest and expenses executed on an *ad valorem* stamp of 10s., gave a charge to the debtor, who objected that the assignation should have been impressed with a stamp of the value of £1, 15s. Bill of suspension *passed* on caution, and motion refused to delay disposing of it in the Bill Chamber, until the assignation should receive a stamp of £1, 15s. *Lillie* v. *Findlater*, 1835, 14 S. 127.

80. Stamp — After-Stamping — Effect — Validation of Diligence.—The acceptor of a bill incarcerated on a diligence which proceeded on a misstamped assignation of the bill, brought a suspension and liberation on that ground, and the Lord Ordinary suspended the charge. The charger reclaimed, and got the proper stamp adhibited to the assignation. *Held* that the assignation, with the diligence which had proceeded on it, was validated from its date. *King* v. *Baillie*, 1844, 7 D. 228; 17 J. 110.

81. Stamp — After-Stamping — Effect — Vote at Election of Trustee—Validation.—A creditor, in his affidavit, stated his debt at £400, secured by bond and vendition in security over a vessel; and deducting the security afforded by the vendition (£250), he claimed to vote for the balance in the election of trustee. The bond and vendition, which contained all the usual clauses of a bond as well as the vendition, was not stamped, but the latter was by statute exempted from stamp. *Opinion*, that effect having been given so far as related to the vendition by the deduction of its value, the claim to vote on the balance rested on the bond, and that, this being unstamped, the vote was invalid. But the bond having been subsequently stamped, *held* that the vote was thereby validated as at the date when it was given. *Mories* v. *Glen*, 1843, 6 D. 97; 16 J. 88.

82. Stamp—After-Stamping—Insufficient Stamp—Payment of Additional Duty.—An objection to a disposition that it is written on a stamp of too low a value, may be obviated by payment of additional duty. *Denniston* v. *Campbell*, 7 July 1824, F. C.; 3 S. 218.

83. Stamp—After-Stamping—Insufficient Stamp—Claim of Enrolment as Freeholder.—Three several infeftments under three several charters were taken, and included in one instrument written on a 9s. stamp. *Held*, in a question as to a claim of enrolment as a freeholder, that the instrument afforded no legal evidence of the infeftment, and therefore that the claim was properly dismissed; and that, in a complaint against such rejection, the objection could not be cured to the effect of altering the judgment of the freeholders, by having the additional stamps adhibited to the instrument. *Macintosh* v. *Grant*, 1831, 9 S. 583.

84. Stamp—After-Stamping—Unstamped Document Produced by Party who did not

Found on it.—An agreement which was ordered to be produced, being unstamped, *held* that the party producing it must get it stamped, although he pleaded that it was not necessary for him to found on it. *Hogarth* v. *Crichton*, 1850, 22 J. 413.

85. Stamp—After-Stamping—Unstamped Lease in Court at Trial, but Stamped before Bill of Exceptions Discussed.—An exception taken to an order of a judge permitting a document to be read to the jury, which, in the preamble to the issues, was admitted to be the copy of a lease by the defender to the pursuers, *disallowed*, although the principal lease was in court at the trial, and was then unstamped, but there was no notice of it in the bill of exceptions, and it was stamped before the bill of exceptions came to be discussed. *Graham* v. *Gordon*, 1842, 4 D. 903.

86. Stamp — Agreement. — A document *held* to be an agreement and sufficiently stamped by having a sixpenny stamp affixed. *Sharp* v. *Stewart*, 1866, 5 M. 76; 39 J. 31.

87. Stamp — Agreement — Entries in Minute-Book of Society.—An agreement, conveying to certain parties a right to a well, which was written in a minute-book of a society, and duly signed and tested, but unstamped, *held* not to be legal evidence of the agreement, the entry in the minute-book not being stamped as required by statute. *Brown & Others* v. *Murdoch & Others*, 1810, 1815, 6 Pat. 94.

88. Stamp — Agreement to make Operations on Road.—A letter or missive of agreement, by which a roadmaker had contracted and engaged to make certain operations on a road, not admitted in evidence, in respect of its not being stamped. *Gordon* v. *Millar*, 1838, M'F. 175.

89. Stamp — Agreement to Prorogate Submission — Unstamped — Reduction of Decree-Arbitral. — A submission containing no power to prorogate was prorogated by the parties. The prorogations were indorsed on the submission and were unstamped. *Held* that a stamp was not necessary, and that in any view the omission was not a ground for reducing the decree-arbitral. *Paterson* v. *Sanderson*, 1829, 7 S. 616.

90. Stamp—Assignation.—A party alleging that certain effects poinded on a farm for the debt of the tenant belonged to him, applied to the sheriff for an interdict, which he afterwards judicially abandoned; and thereafter, founding on an unstamped deed of assignation, presented a bill of suspension and interdict. The court *refused* the bill. *Kincaid* v. *Love*, 1835, 14 S. 188.

91. Stamp — Assignation — Assignation of Debt—Deed Stamp.—An assignation to a debt purchased at an under-value requires to be stamped with a deed and not with an *ad valorem* stamp. *Robb* v. *Forrest*, 1831, 5 W. & S. 740.

92. Stamp—Assignation—Assignation of Redeemable Bond of Annuity—Ad valorem. —An objection to an assignation of a redeemable heritable bond of annuity, that it was not stamped with an *ad valorem* stamp, but only with a common deed stamp, *sustained*. *Scottish Union Insurance Co.* v. *Bontine*, 1838, 16 S. 1241.

93. Stamp—Assignation—Assignation of two Bills on one Stamp — Diligence — Stamp Applied to Assignation of Bill on which Diligence done.—An assignation by a company of a bill for £25, and by a partner, of another bill, in security of a debt due by the company, were written on a single deed stamp, and letters of horning were raised on the bill for £25. *Held* that the stamp was to be considered as applicable to the assignment of the £25 bill; and therefore an objection to the assignation as not duly stamped, with reference to the legality of the diligence, *repelled*. *Robertson* v. *Ogilvie*, 1834, 12 S. 580.

94. Stamp—Bank Draft—Ten-Mile Limit —Stamp Act, 1815, s. 13.—An unstamped draft was drawn by a party on his banker at a place beyond ten miles from the office of the bank, but the place was so little known, and so obscure, that they could not be presumed to be aware that the draft had been drawn beyond the ten miles. *Held* that, to preclude the bank from availing themselves of it as a voucher to discharge them, it was necessary to instruct their knowledge, when they paid it, of the place being beyond the limit. *Aytoun* v. *Dougal*, 1830, 9 S. 194; 6 Fac. 133.

95. Stamp — Bank Receipts — Clause of Interest. — *Question*, whether bank receipts for money, with a clause of interest, be liable in stamp duty. *Bank of Scotland* v. *Watson*, 1813, 1 Dow 40.

96. Stamp — Bill — Bill Payable on Demand. — *Opinion*, that a bill payable on demand requires only a penny stamp. *Ritchie* v. *M'Lachlan*, 1870, 8 M. 815; 42 J. 477.

97. Stamp — Bond of Caution — Bond of Caution for Separate Debts — Amount of Duty.—A bond of caution for payment of separate debts to several creditors of one debtor, does not require a stamp duty corresponding to each of the debts, but only to the aggregate amount of them. *Johnstone & Co.* v. *Attwell*, 7 Mar. 1801, F. C.; M. "Writ" App. No. 5.

98. Stamp — Cheque — Bearer Cheque— Order to Debit Account without Mention of Payee—Addition of "per A. B."—Stamp Act, 1815.—*Held* that drafts drawn in the form of an order to debit the drawer's account without mentioning the bearer or a payee were drafts payable to bearer in the sense of the Stamp Act, 1815; that such drafts do not cease to be bearer drafts merely because they bear on the lower part of the paper, apart from the signature and the address, a jotting "per A. B.," but that a draft having such an addition inserted in the body of it before the signature and as a continuous part of the draft is to be regarded as drawn in favour of the person mentioned in the addition, and is not a bearer

draft. *Swan* v. *Bank of Scotland*, 1841, 4 D. 210; 14 J. 82.

99. Stamp — Cheque — Ten-Mile Limit—Place of Issue—Stamp Act, 1815, s. 13.—*Held* (1) that drafts on a banker, dated at the place where he resided, but written at a place beyond ten miles from the banker's residence, and sent to the bank by a messenger, who cashed them and took the money back to the drawer, were to be considered as issued at the place of the banker's residence, and were not objectionable, on the stamp laws, as they were not issued beyond the statutory distance; (2) that drafts dated at the place where the banker resided, and issued by the drawer to third parties at a place beyond the statutory distance, were good vouchers, it not being proved that the banker knew that the place where they were issued was not truly specified. *Swan* v. *Bank of Scotland*, 1847, 9 D. 1062; 19 J. 484.

100. Stamp—Commission—Clerk Authorised to Sue by Act of Parliament.—A clerk of a society authorised to sue by Act of Parliament, does not require to have his commission stamped, to entitle him to insist in an action. *Bell* v. *Hill*, 1825, 3 S. 458.

101. Stamp — Commission — Collector of Taxes in Royal Burgh.—The collector of taxes appointed by magistrates of a royal burgh, by minute entered in the council books, requires no separate commission on stamped paper. *Hunter* v. *Hill*, 1833, 11 S. 989.

102. Stamp—Commission—Collector of Taxes.—*Held* that a stamped commission was not necessary to entitle the collector of the annuity tax of Edinburgh to perform his statutory duties. *Aitken* v. *Brydone*, 1861, 23 D. 838; 33 J. 426.

103. Stamp—Contract—Obligation to Pay Price of Goods.—A document in these terms —"Received from J. L. a cargo of Newcastle coals, which I bind to pay before the 1st of September at the rate of eight shillings per ton delivered"—does not require a stamp. *M'Gregor* v. *Turnbull*, 1848, 10 D. 1520; 20 J. 551.

104. Stamp — Contract of Service.—A written contract of service *held* binding, although not stamped. *Campbell* v. *Baird*, 1827, 5 S. 335.

105. Stamp—Discharge of Bond—Receipt Stamp.—It was objected to the admissibility of the discharge engrossed on a bond, as evidence of the payment of the debt contained in it, that as it contained clauses of warrandice and registration, and a declaration that certain deeds were delivered along with it, a receipt stamp was not sufficient, and a deed stamp was required. Objection *repelled*. *Fleming* v. *Robertson*, 1859, 21 D. 982; 31 J. 542.

106. Stamp—Disposition—Disposition in Liferent and Fee—Ad valorem Duty.—*Question*, whether a disposition of lands to two persons, one as fiar and the other as liferenter, requires a stamp *ad valorem* of the interest of each. *Denniston* v. *Campbell*, 7 July 1824, F. C.; 3 S. 218.

107. Stamp — Disposition Creating an Annuity by Reservation—Stamp Appropriate to Annuity. — *Held* by the Lord Ordinary, and acquiesced in, that where an annuity was created by a reservation in a disposition, the disposition could not be received as an actionable document, in so far as regarded the annuity, unless it were written on paper which had the stamp appropriate to a grant of annuity, as well as the conveyance stamp. *Wilkie* v. *Flowerdew*, 1850, 12 D. 818; 22 J. 354.

108. Stamp—Disposition omnium bonorum — Act of Grace, 1696 — Stamp Act, 1815, Schedule, Part 2. — *Held* that a disposition *omnium bonorum*, executed under an application for the benefit of the Act of Grace, falls within the exemption of the Stamp Act applying to "all proceedings under the Scots statute relative to the aliment of poor prisoners," and does not require a stamp. *Rae* v. *Henderson*, 1837, 15 S. 653; 12 Fac. 616.

109. Stamp — Disposition omnium bonorum.—*Held* that an unstamped disposition *omnium bonorum* by a pursuer could not be looked at as evidence of divestiture, so as to entitle the defender to caution for expenses. *M'Queen* v. *Murdoch*, 1861, 23 D. 725; 33 J. 350.

110. Stamp—Evasion.—*Question*, whether it be not an evasion of the stamp laws for the holder of diligence and bill who has got payment from one of the obligants, and he from a third party, to grant an assignation, with consent of the obligant, to the third party—the objection being that there should have been two assignations. *Oliver* v. *Haliburton*, 1822, 1 S. 519.

111. Stamp — Evasion — Agreement to Hold Copy as Equivalent to Original—Court of Session Act, 1868, s. 41.—Consent of parties in a cause to hold a copy of an agreement in process as a true copy, and equivalent to the original, the original not being said to have been either lost or destroyed, does not save the necessity of having the copy stamped under the 41st section of the Court of Session Act, 1868. *Cowan* v. *Stewart*, 1872, 10 M. 735.

112. Stamp — Execution of Poinding—Containing Appraisement.—A stamp is not necessary to an instrument of execution of poinding containing an appraisement. *Drummond* v. *Kerr*, 25 Nov. 1824, F. C.; 3 S. 311.

113. Stamp—Heritable Security — Bond Granted by A and Security by B.—*Held* that a bond containing a personal obligation by a husband and an heritable security by his wife, was subject only to the single stamp duty imposed on heritable bonds. *Brown* v. *Bedwell*, 1830, 9 S. 136; 6 Fac. 99.

114. Stamp—Indorsation—Letter Directing Payment of Account.—The words "pay the within account," endorsed on an open account, operate as an effectual conveyance;

and no stamp is necessary. *Lawrie* v. *Ogilvie*, 6 Feb. 1810, F. C.

115. Stamp — Indorsation — Iron Scrip Note—Whether Transferable by Indorsation.—*Held* that a document in these terms—"I will deliver 1000 tons of No. 1 pig iron free on board here when required, after the 16th day of September next, to the party lodging this document with me"—imposed a valid obligation and was transferable by indorsation without a stamped assignation. *Dimmack* v. *Dixon*, 1856, 18 D. 428; 28 J. 362. Cf. *Bovill* v. *Dixon*, 1856, 3 Macq. 1, where opinions were expressed that such documents were invalid.

116. Stamp — Insufficient Stamp — Part of Stamped Sheet Removed.—An objection to a lease, that the second half or leaf of one of the sheets of stamped paper on which it was written had been removed, and been replaced by an unstamped half-sheet, *sustained*, and process sisted till it was stamped. *Nicol* v. *Fraser*, 1841, 3 D. 890; 16 Fac. 874.

117. Stamp — Law Agent — Advocate's First Clerk.—An advocate's first clerk admitted to act as an agent in court, is liable to pay the stamp duties exigible on the admission of other agents. *Lord Advocate* v. *Moncrieff*, 1848, 10 D. 987.

118. Stamp — Lease — Pars judicis.—A contract of lease being unstamped, the court *refused* to allow it to be pleaded upon. *M'Niven* v. *Hunter*, 1836, 14 S. 685.

119. Stamp—Letter—Letter by Minister Consenting to Appointment of Assistant and Successor.—The minister of a parish addressed a letter to the presbytery, stating his inability to perform his duties, and intimating his wish to have an assistant and successor appointed, and requesting that this should be communicated to the patron. *Held* that the letter, although unstamped and improbative, was sufficient evidence of that consent having been given. *Paton* v. *E. of Zetland*, 1843, 5 D. 1049; 15 J. 422.

120. Stamp—Letter Adopting Stamped Charter-Party.—A regular stamped charter-party, signed by A as agent for B, having been produced, *ruled*, that a subsequent letter from B, tendered as evidence of his adoption of it, was not objectionable as unstamped and improbative. *Gray* v. *Sutherland*, 1849, 12 D. 438.

121. Stamp — Letter Compromising Litigation.—A defender granted a letter, by which, "in order to prevent further litigation or expense in the process," he agreed to pay £30 in full of the account libelled on; but having failed to pay, decree for that sum passed. *Held*, in a bill of suspension of the decree, that an objection that the document was unstamped was irrelevant. *Halley* v. *Leitch*, 1833, 12 S. 58.

122. Stamp—Letter of Credit.—A bank agent signed a letter unstamped—"Be so good as pay the orders of A. B. on me, which will be paid on presentation here, the sum to be confined to £1000, and to be paid within a fortnight from this date." *Held* that this document was a letter of credit, and required to be stamped; and not being so, that action could not be maintained upon it. *Waterson* v. *Edinburgh & Glasgow Bank, etc.*, 1858, 20 D. 642; 30 J. 319.

123. Stamp — Letter of Obligation by Prisoner—Produced by Crown in Court of Justiciary.—*Held* that a letter of obligation by a prisoner need not be stamped when produced by the crown in the court of justiciary. *Dick*, 1832, 4 J. 594.

124. Stamp — Mandate — Letter of Instructions to Broker.—A letter to a broker, desiring him to buy shares of the stock of a company, is a mandate, and not an "agreement" requiring the stamp applicable to "agreements." *Brown* v. *Michie*, 1849, 11 D. 1131; 21 J. 436.

125. Stamp — Mandate — Mandate to Raise an Action. — *Question*, whether a mandate to raise an action requires a stamp. *Ellis* v. *Connel*, 1822, 1 S. 528.

126. Stamp — Mandate — Proxies—Company—Act 7 and 8 Vict. c. 21.—The subscribers to an academy in whom the property of the institution was vested, but who were precluded by the constitution from deriving pecuniary profit from it, are not a joint stock company, subject to the provisions of the Act 7 and 8 Vict. s. 21 (for alteration of certain stamp duties); and proxies may vote at the meeting of the proprietors, although their mandates are not stamped. *Davidson* v. *M'Gregor*, 1850, 12 D. 789; 22 J. 338.

127. Stamp — Marriage-Contract — Provision to Children—Bond—Definite and Certain Sum.—A party bound himself and his representatives, in an antenuptial marriage-contract, to pay to trustees in favour of his children, according to the number that might be born, the sums of £15,000, £20,000, and £30,000. *Held* (1) that this provision was a bond for a definite and certain sum of £30,000, and assessable in stamp duty as such; (2) that, being a bond, it created a debt to be deducted from the executry, and could not be regarded as a settlement regulating the distribution of executry. *Maxwell* v. *Commrs. of Inland Revenue*, 1866, 4 M. 1121; 38 J. 579.

128. Stamp — Mercantile Agreement — Contract for Purchase of Street Dung—Exemption—Probate and Legacy Duties Act, 1808.—*Held* that a contract between the commissioners of police of a city and the purchaser of the dung and sweepings of the streets fell under the exemption of the Stamp Act in favour of "memorandums, agreements, etc., for or relating to the sales of goods, wares, or merchandise," and therefore did not require to be stamped as an "agreement." *Fisken* v. *Glasgow City Gas Co.*, 1850, 12 D. 757; 22 J. 262.

129. Stamp — Missive — Consent to Remove without Warning. — A missive containing a consent to remove without warning, does not require to be written on

stamped paper. *Maclaren* v. *M. of Breadalbane*, 1831, 10 S. 163; 7 Fac. 136. *Bain* v. *Stewart*, 1852, 24 J. 621.

130. Stamp — Missive of Sale — Pars judicis.—The want of a stamp to a missive of sale, though not insisted in by the party, renders a document inadmissible. *Cadzow* v. *Wilson*, 1830, 5 Mur. 98.

131. Stamp — Obligation not to Leave Country. — A holograph letter by a party arrested on a *meditatio fugæ* warrant to his cautioner *de judicio sisti* that he will not leave the country, *held* admissible as evidence, though it had no stamp. *Clark* v. *Thomson*, 1817, 1 Mur. 180.

132. Stamp—Personal Bar—Unstamped Bank Drafts — Docquet Bringing out Balance Signed by Co-Obligant — Stamp Act, 1815, s. 13.—A party who was entitled to operate under a cash-credit bond, having signed a docquet bringing out a balance against him, *held* that the co-obligants were entitled to plead that the advances by which that balance was brought out had been made on drafts in violation of the Stamp Act. *Swan* v. *Bank of Scotland*, 1835, 2 S. & M'L. 67. Revg. 13 S. 403; 10 Fac. 225.

133. Stamp—Receipt—Book Containing Note of Payments on Credit Side only.—A book containing a credit side, on which payments made were entered from time to time and subscribed by the creditor, but containing no debit side, *held* not a pass-book, but a series of receipts; and, in accordance with Ross *v.* Matheson (reversed by House of Lords), that the book being unstamped, it was incompetent to look at it to any effect. *Couper* v. *Young*, 1849, 12 D. 190; 21 J. 366; 22 J. 29.

134. Stamp—Receipt—Receipt Indorsed on Missives.—Circumstances where receipts endorsed on missives were *held* not to require a separate stamp. *Foggo* v. *Hill*, 1840, 2 D. 1322.

135. Stamp—Receipt—Receipt of Price of Subject Sold. — *Held* that a document acknowledging the receipt of money "as the value" of certain shares of a vessel "sold by me to you," does not fall under the exemptions in the statute 6 Geo. IV. c. 41, but is truly a receipt for money, and, if unstamped, cannot be used as evidence of payment. *Davidson* v. *Swanson*, 1854, 16 D. 991; 26 J. 519.

136. Stamp—Receipt—Receipt for Price of Ship — Act 6 Geo. IV. c. 41 — Exemptions.—*Held* that a document acknowledging the receipt of money as the value of shares of a vessel sold does not fall under the exemptions in the statute 6 Geo. IV. c. 41, but is truly a receipt for money, and, if unstamped, cannot be used to establish the sale of the shares or to entitle the holder to an action of count, reckoning, and payment. *Davidson* v. *Swanson*, 1854, 16 D. 991; 26 J. 519.

137. Stamp—Receipt for Interest—Discharge of Prior Claims for Interest. — *Question*, whether a receipt for interest must, in order to operate as a discharge of all prior claims for interest, be on a stamp applicable to a general discharge. *Duguid* v. *Mitchell*, 1824, 3 S. 96; 1825, 1 W. & S. 203.

138. Stamp—Transfer Written on Paper on which Another Deed Previously Engrossed but not Executed—Previous Deed Declared to be pro non scripto.—A transfer was written on paper, bearing a stamp duty of sufficient amount, but on which another deed had been previously engrossed, though never executed. The testing clause of the transfer bore that all the words on the sheet other than those contained in the transfer should be "held *pro non scripto*, and as erased." *Held* that the transfer was valid. *Longmore* v. *Lindsay*, 1845, 7 D. 1098; 17 J. 566.

139. Stamp—Unstamped Bill and Protest—Plea of Competent and Omitted.—An objection to a bill and protest on the stamp laws is liable to the plea of competent and omitted. *Barbour* v. *Grierson*, 1828, 6 S. 860; 3 Fac. 920. *Napier* v. *Carson*, 1828, 6 S. 501.

140. Stamp—Unstamped Deed—Decree of Adjudication Following on Deed — Reduction.—*Held* that an inadequate stamp on a deed, which formed the foundation of a decree of adjudication, was not a sufficient ground for a reduction of the decree *in toto*. *Wilkie* v. *Flowerdew*, 1850, 12 D. 818; 22 J. 354.

141. Stamp — Unstamped Document — Admissibility — Account — Evidence of State of Balance. — An account containing entries of money paid, although not stamped, allowed to be produced in evidence, not of the payment of that sum, but of the state of the balance as between the parties at the date at which it was rendered. *Bannatyne* v. *Wilson*, 1855, 18 D. 230; 28 J. 99.

142. Stamp — Unstamped Document — Admissibility — Evidence as to Qualification.—A back-letter was founded on in the Registration Court, as showing that a qualification was limited, but *held* that it was inadmissible as evidence, in respect it was not stamped. *Macfarlane* v. *Cooper*, 1866, 5 M. 79; 39 J. 29.

143. Stamp — Unstamped Document — Admissibility—Deposition—Witness Dead. —An unstamped deposition taken in an inferior court, not admitted in evidence, although the witness was dead. *Scott* v. *Wilson*, 1829, 5 Mur. 53.

144. Stamp — Unstamped Document — Admissibility—Discharge and Assignation —Proof of rei interventus.—Objection to a discharge and assignation, on the ground of want of stamp, *repelled*, in respect that the document was not put in as a discharge and assignation, but to prove *rei interventus*. *Gray* v. *Johnston*, 1838, M'F. 54.

145. Stamp—Unstamped Document—Admissibility—Action for Repayment of Loan — Evidence as to Partnership. — A party

raised an action against another for repayment of a loan of money. The defender alleged that the money was given to him in relation to a partnership with the pursuer; and the pursuer thereupon produced an unstamped letter by the defender, to show that the money had not been so given. The Lord Ordinary having ordered the letter to be withdrawn as not stamped, the court *recalled* the interlocutor, and *remitted* to hear parties as to the admissibility of the document. *Henderson* v. *Steel*, 1829, 7 S. 303.

146. Stamp—Unstamped Document—Admissibility—Evidence as to Application of Remittance.—In an action of damages for wrongously obstructing the removal of goods sold by the defender to a third party, and by him resold to the pursuer, an unstamped correspondence was tendered as evidence that the pursuer had paid the price of the goods to the party from whom he purchased. *Ruled*, that the letters being as to the application of a mercantile remittance, were competent. *Melrose & Co.* v. *Hastie & Co.*, 1850, 12 D. 665; 22 J. 207, 252.

147. Stamp—Unstamped Document—Admissibility—Evidence of Collateral Fact.—A missive produced not to prove a conveyance, but a collateral fact, received though not stamped. *Erskine* v. *Erskine*, 1819, 2 Mur. 184.

148. Stamp—Unstamped Document—Admissibility—Lease—Reduction on Ground of Fraud.—In an action to reduce the renunciation of a lease constituted by missives, on the ground of its having been fraudulently impetrated, *held* that the missives, being unstamped, could not be produced in evidence. *Summers* v. *Fairservice*, 1842, 4 D. 347.

149. Stamp — Unstamped Document — Admissibility — Notarial Instrument — Evidence as to Facts before Notary.—A notarial instrument of assignation of subrents was extended in paper inadequately stamped. After several years a new instrument was extended on paper properly stamped, and both documents were tendered at a trial. *Held* that both were admissible, the second instrument being duly stamped. *Balfour* v. *Lyle*, 1832, 10 S. 853.

150. Stamp—Unstamped Document—Admissibility—Promissory-Note—Evidence of Loan.—*Question*, whether an unstamped promissory-note could be looked at as evidence of a loan. *Pilling* v. *Drake*, 1857, 19 D. 938; 29 J. 434.

151. Stamp — Unstamped Document — Admissibility — Jottings on Back of Promissory-Note — Proof of Loan. — Jottings relating to interest, made on the back of an unstamped promissory-note, admitted in support of other competent evidence of a loan. *Fraser* v. *Bruce*, 1857, 20 D. 115; 30 J. 70.

152. Stamp — Unstamped Document — —Admissibility—Proof of Collateral Fact. —Under an issue as to whether a testator was weak and facile, and the defender had by fraud obtained a deed of settlement from him, *held* competent to receive, in evidence for the defender, a deed not duly stamped to the collateral effect of negativing the leading issue. *Mackenzie* v. *Crawford*, 1839, 1 D. 1091; 14 Fac. 1106; M'F. 207.

153. Stamp — Unstamped Document — Admissibility — Receipt — Evidence as to Person Making Payment.—In an action of count and reckoning for the adjustment of partnership accounts, an unstamped acknowledgment of the receipt of money was tendered in evidence of the particular partner by whom the payment (which was admitted to have been made to the creditor) had been admitted. *Held* that it was inadmissible. *Scott* v. *Burd*, 1845, 8 D. 25; 18 J. 30.

154. Stamp—Unstamped Document—Admissibility—Receipt—Evidence of State of Accounts between Parties.—In an action for debt, the defender produced a state of accounts between him and the pursuer, on which there was a small balance due by him, of which payment was acknowledged by the pursuer (and the fact was not disputed) by an unstamped receipt appended to the accounts. *Held* that the state was admissible as evidence, not of the payment of the balance, but of the accuracy of the accounts between the parties. *Ross* v. *Matheson & Son*, 1849, 6 Bell 374; 21 J. 373. Revg. 9 D. 1366; 19 J. 598. Cf. *Cooper* v. *Young*, 1849, 12 D. 190.

155. Stamp—Unstamped Document—Admissibility—Receipt—Collateral Evidence. —*Question*, whether unstamped receipts may be referred to as collateral evidence. *Duguid* v. *Mitchell*, 1825, 1 W. & S. 203, footnote; 3 S. 96. See *Brown*, 1825, 1 W. & S. 211, footnote.

156. Stamp—Unstamped Document—Admissibility—Receipt—Proof of Delivery of Bills and Purpose for which Delivered.—An unstamped missive was granted, acknowledging receipt of "bills and cash to the amount of £55, 4s. 6d., which shall be placed to account of your rent," and the amount was afterwards stated to be erroneous as to the cash, but the bills were admitted to have been received of the date of the missive, and the missive was ultimately stamped with a £1 agreement stamp. *Held* good evidence that the bills were to be specially imputed to the rent. *Bennie* v. *Mack*, 1832, 10 S. 255.

157. Stamp—Unstamped Document—Admissibility—Receipt—Proof of Embezzlement.—Where a panel, who had received certain sums of money in payment of accounts due to his master, and had granted unstamped receipts for the same, was afterwards tried for embezzling the sums, *held* that it was competent to produce the receipts in evidence that the money had been so paid to him, although the receipts were unstamped. *Mackenzie*, 1846, Ark. 97.

158. Stamp — Unstamped Document — Admissibility—Receipt—Proof of Theft.—*Held* that an unstamped receipt was admissible

to show theft from an employer, although it was the only evidence against the employer that his claim was discharged against the debtor. *Beattie*, 1850, J. Shaw 356.

159. Stamp — Unstamped Document — Admissibility — Refreshing Memory of Witness.—An unstamped contract between a coalmaster and a collier cannot be given in evidence, but a witness, being one of the parties to it, may look at it to refresh his memory as to its contents. *Dickson* v. *Taylor*, 1816, 1 Mur. 141.

160. Stamp—Unstamped Lease—Action of Removing—Caution for Violent Profits.—Where an action of removing was brought on an unstamped lease, *held* that the sheriff could not ordain the tenant to find caution for violent profits while the lease was unstamped. *Ross* v. *Webster*, 1834, 12 S. 308. *M'Naught* v. *Gram*, 1834, 12 S. 619.

161. Stamp—Unstamped Lease—Parole Evidence—Competency.—*Question*, whether an unstamped missive of lease, to which the subsequent possession was conformable, excluded parole proof of the terms of the agreement. *Harrold* v. *Pollexfen*, 1844, 6 D. 1103.

162. Stamp—Unstamped Lease—Parole Proof of Tenancy—Competency.—In an action of damages at the instance of a tenant against the occupier of a conterminous subject, for illegally taking possession of part of his tenement, and in which the fact of the tenancy was put in issue, it appeared that the rent was £16, that writings had annually passed between the tenant and his landlord, in which the landlord inquired whether the tenant intended to continue his occupation, with an affirmative answer by the tenant, and the tenant was continued in possession from year to year. *Held* that the tenant's occupancy could be proved only by these writings, and that, being unstamped, they could not be received in evidence. *Hutchinson* v. *Ferrier*, 1852, 1 Macq. 196; 24 J. 404; 1 Stuart 677. Affg. 13 D. 837; 23 J. 379.

RIGHT IN SECURITY

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1. Annuity — Bond of Annuity — Real Burden—Construction.—A party holding an irredeemable bond of annuity, with a power to sell in the event of arrears being incurred, in order to purchase a similar annuity, *held* not compellable, in a question with the granter's creditors, to accept of payment of the original price of the annuity; but further *held* that although entitled to insist that the annuity should remain a burden on the property, he could not sell so as to realise a sum sufficient to purchase a similar annuity. *Hamilton* v. *Rodger*, 1823, 2 S. 325.

2. Annuity — Infeftment in Security—Precept—Trust for Creditors.—A husband bound himself by contract of marriage to secure to his wife, on his predecease, an annuity payable out of any lands he then had or might acquire. He afterwards got a disposition to a house with precept, and executed a trust disposition and deed of settlement, by which he disponed the house to her in security of the annuity, and she was infeft on the open precept. *Held*, in a question with trustees for creditors under the subsequent deed, that although the same proceeded on a precept to infeft in the property, it was effectual to secure her in the annuity. *Bonthrone* v. *Bonthrone's Crs.*, 1805, Hume 238.

3. Bond and Disposition in Security—Accretion—Mid-Impediment.—A purchaser of lands, whose right stood on missives of sale,

granted a bond and disposition in security over the lands, on which the creditor took infeftment. A creditor of the seller obtained a bond and disposition in security, under which he was infeft, and another creditor of the seller had used inhibition. Some years thereafter the purchaser obtained a disposition from the seller, under which he was infeft. *Held* that the plea of accretion, on the part of the purchaser's creditor, was barred by mid-impediment. *Munro* v. *Brodie*, 1844, 6 D. 1249 ; 16 J. 338.

4. Bond and Disposition in Security—Construction—Trust.—A bond and disposition in security set forth that a sum had been advanced chiefly by a daughter, and in part also by her mother. The whole sum was payable to the daughter, and she alone was infeft. *Held* in a question with the creditors of the daughter's heir that the sum advanced by the mother was a loan upon the daughter's personal security ; and that there was no trust for her behoof constituted in the person of the daughter as disponee. *Stewart* v. *Stewart*, 1842, 5 D. 240 ; 15 J. 77.

5. Catholic Security—Secondary Security — Competition — Right of Secondary Creditors.—An estate was burdened with a catholic security over the whole, and a secondary security over part of it. *Held* that the holder of the latter was entitled to insist that the creditor holding the preferable catholic security should make good his debt in the first instance out of the part of the estate not covered by the secondary security, or that he was bound to assign the secondary creditor into his security. *Littlejohn* v. *Black*, 1855, 18 D. 207 ; 28 J. 87.

6. Competition — Cautioner — Posterior Heritable Creditor.—A bought lands *ex facie* for himself, but truly for B, and thereafter disponed them to B under burden of certain sums which he (A) had borrowed in order to pay the price, and infeftment was expede. A was compelled to pay the sum borrowed, and arrears and interest. *Held*, in a question with a posterior heritable creditor, that A was entitled to be ranked preferably, not only for the principal sum and interest paid by him, but for interest on the whole sums paid as a new capital. *Ford* v. *Riddell*, 7 July 1801, F. C. ; M. "Annualrent" App. No. 3.

7. Competition — Confirmation — Accretion.—A party infeft *a me*, but unconfirmed, granted (1) a heritable bond *a me* to H, on which sasine was taken ; and (2) a later bond also *a me* to B, who took sasine, and got a charter of confirmation of his bond and sasine. H afterwards got a charter confirming both the titles of the proprietor and his own bond and sasine. *Held* that this confirmation of the proprietor's title accresced to that of B's bond ; and that, as it was confirmed prior to that of H, it was preferable. *Henderson* v. *Campbell*, 5 July 1821, F. C. ; 1 S. 103. *Leslie* v. *M'Indoe's Trs.*, 1824, 3 S. 48.

8. Competition—Double Holding—Public Holding—Infeftment.—A party granted a bond and disposition in security to be holden "from me, of and under my immediate lawful superiors," and granted procuratory and precept of sasine, "to the end the said H. W. and his foresaid may be immediately infeft and seised, etc." Sasine was taken, but no confirmation expede. *Held*, in a question with a posterior creditor, infeft under a double holding, that the latter was preferable. *Rowand* v. *Campbell*, 30 June 1824, F. C. ; 3 S. 196. [See also No. 34.]

9. Competition — Double Holding — Public Holding—Infeftment.—An heritable bond with a double holding, and infeftment following, *preferred* to a prior bond with a public holding, the infeftment on which was unconfirmed. *M'Nair* v. *M'Nair*, 1827, 5 S. 372 ; 2 Fac. 217.

10. Competition—Ex facie Absolute Disposition of Heritage—Heritable Creditor.—A proprietor disponed his estate *ex facie* absolutely, but only in security of a sum of borrowed money as expressed in a back bond. He afterwards borrowed other sums from the same person, on bonds which declared that the lender should be entitled to retain the estate till they, as well as the original sum, should be repaid. The borrower afterwards married, and died. *Held* that as the lender was infeft *ex facie* absolutely, he was entitled to retain the estate in satisfaction of the whole sums. *Bartlet* v. *Buchanan*, 21 Feb. 1811, F. C. ; 27 Nov. 1812, F. C.

11. Competition — Heritable Creditor — Assignation—Personal Debt—Sale—Rent—Allocation.—A party, in 1753, borrowed money and granted to the lender a bond and disposition in security under reversion, in virtue of which he was infeft. In 1764 the lender assigned his right, and the assignee, who was a creditor of the borrower for other personal debts, was infeft, entered into possession, and levied the rents. The assignee afterwards disponed the subjects to several purchasers who entered into possession of the several parcels purchased by them, were infeft, and drew the rents. *Held* in a question between them and the heir of the borrower (1) that the rents were to be imputed *primo loco* to payment of the personal debts, and next to the debt for which the security was granted ; and (2) that each of the purchasers was liable to account for his own intromissions only, and was not responsible for the super-intromissions of any of the others. *Sturgeon* v. *M'Lellan*, 20 Jan. 1813, F. C.

12. Competition—Heritable Creditor of Uninfeft Granter—Adjudging Creditor—Title Deeds.—A party holding a personal right to heritable subjects, granted a heritable bond, on which the creditor was infeft ; and thereafter, while the right of the granter still remained personal, creditors adjudged. *Held* that the heritable creditor was entitled, in competition with them, to get possession of the title deeds, and thereby complete his right. *Gordon* v. *Hunter's Trs.*, 1822, 2 S. 78.

13. Competition—Personal Bond—Heritable Bond.—An heir of entail in possession granted a lease of part of the estate, and a relative bond, binding himself to renew it periodically, and pay the interest of a sum advanced to him. Thereafter he granted a heritable bond of annuity to another party during the granter's life, on which infeftment was taken, and decree of maills and duties obtained. *Held* in a competition between the tenant claiming retention for the interest under the personal bond and the creditor under the heritable bond of annuity, that the latter was preferable, and that his right was not affected by a prohibition in the entail against contracting debts. *Nairne* v. *Gray*, 15 Feb. 1810, F. C.

14. Competition — Trust — Infeftment — Assignation—Subsequent Disposition.—A party granted, in security of specific debts, a trust disposition of an estate on which the trustees were infeft. Thereafter he granted a personal bond for a new debt, and assigned the creditor into the benefit of the trust, and intimation was made to the trustees. He afterwards, in security of another debt, granted a disposition of the estate on which the creditor was infeft. *Held*, in a competition between the two last creditors, that the assignation and intimation were ineffectual to create a security preferable to the last creditor's infeftment. *Nairne* v. *Douglas*, 1836, 14 S. 1074.

15. Competition — Widow Infeft for Jointure—Prior Wadset Acquired by Purchaser of Lands — Preference. — The purchaser of lands, which had been conveyed to the seller's wife in security of her jointure, acquired right to a wadset of the lands, older in date, in consideration of which he had reserved a part of the price. *Found* that the wadset, though prior in date, was not preferable to the widow's jointure. *Gordon* v. *Urquhart*, 1736, 1 Pat. 176.

16. Contract—Sale or Security?—*Held* that a written contract, purporting to be an absolute conveyance, was intended as a security only. *M. of Queensberry* v. *Scottish Union Insurance Co.*, 1842, 1 Bell 183. Affg. 1 D. 1203; 14 Fac. 1214.

17. Creditor's Rights—Policy of Insurance — Power to Sell. — A party assigned policies of insurance on his life to another in security of lent money, and bound himself to repay the premiums to be advanced by the lender, and pay interest. He failed to do so and became bankrupt. *Held* in an action of declarator at the instance of the lender, that he was entitled to sell the policies by public auction, under articles prepared judicially. *Wood* v. *Anstruther*, 1842, 4 D. 1363.

18. Disposition—Absolute or in Security?—Circumstances in which *held* that a conveyance in favour of the defenders was a security for sums advanced by them. *Fairlie* v. *Skirving*, 1840, 3 D. 149.

19. Disposition—Absolute or in Security?—A party granted a disposition of lands *ex facie* absolute and irredeemable without any back bond. For many years thereafter he continued to act in all respects as proprietor, drawing rents and granting receipts for the rents and leases of the lands. His representative raised an action to have it found that the disposition was only in security, and that he was entitled to redeem. *Held* that the disposition was absolute and irredeemable. *Douglas, etc.* v. *Wilson*, 1810, 5 Pat. 303.

20. Disposition—Construction—Deed of Sale.—A party who had granted a heritable bond, afterwards, on a further advance of money, executed a deed, which, without prejudice to the bond and in security of the full sum, disponed the property, and also, as the full price of it, disponed it *simpliciter*, with absolute warrandice, as in a deed of sale. *Held* that it was to be construed as a deed of sale. *Hadden* v. *Weavers of Haddington*, 1814, Hume 159.

21. Disposition and Back Bond with Right of Pre-Emption—Completion of Title—Real Burden.—A party who had obtained a disposition to lands, granted a back bond giving the superior a right of pre-emption. No infeftment was taken on the disposition, and the clause in the bond never entered into the investitures. *Question*, whether the right of pre-emption was not a real burden on the lands, and effectual against creditors. *Preston* v. *E. of Dundonald's Crs.*, 1802, 4 Pat. 331.

22. Disposition ex facie Absolute — Trust—Bankruptcy.—A proprietor infeft in an estate, with the view of separating the property from the superiority for the purpose of creating votes, granted an *ex facie* absolute feu-disposition of certain portions of the estate, upon which the disponee was infeft, but no possession followed. *Held*, in a question with the trustee on the proprietor's sequestrated estate, that the feu-disposition having been granted in trust for a temporary purpose, the proprietor was not thereby divested of the real right in the lands under his original infeftment; and that heritable securities granted by him constituted valid rights affecting the lands. *Lindsay* v. *Giles*, 1844, 6 D. 771; 16 J. 357.

23. Disposition ex facie Absolute — Trust — Proof. — A party disponed certain heritable subjects to another by a disposition *ex facie* absolute. Although the conveyance bore that a price had been paid, yet the only consideration was the disponee becoming the disponer's cautioner in a cash-credit bond, under which he eventually paid a considerable sum. The disponee having offered to reconvey on being repaid his advances, with interest and expenses, *held* that the disponer was not entitled to succeed in a declarator of trust, no proof of trust by writ or oath being tendered. *Leckie* v. *Leckie*, 1854, 17 D. 77; 27 J. 13.

24. Disposition ex facie Absolute Qualified by Back Letter—Specific Debt—Subsequent Debts—Retention.—*Held* that a party infeft under an *ex facie* absolute disposi-

tion, qualified by a back letter declaring it to be in trust for payment of a specific debt to a third party, was entitled to hold it till relieved of a debt subsequently contracted to himself, but not till relieved of a debt which existed prior to the date of the disposition, which it was not the intention of the parties should be so secured. *Robertson* v. *Duff*, 1840, 2 D. 279; 15 Fac. 275.

25. Disposition ex facie Absolute with Back Bond—Compensation—Partnership.—A party disponed heritable subjects *ex facie* absolutely to a partner of a company, but under a back bond declaring the conveyance to be in security of advances made and to be made in relation to the premises. Advances were made by the company, for repayment of which the partner sold the subjects, and thereafter a creditor of the disponer arrested in the hands of the partner and of the company. *Held* that the arrestees were entitled to retain the price in liquidation of advances made by the company. *James* v. *Downie*, 1836, 15 S. 12; 12 Fac. 3.

26. Double Securities—Separate Estates — Bond by Husband and Wife — Bond Granted by Husband.—A husband and wife, on the narrative that they had borrowed £4000, granted a heritable bond to the creditors over their separate estates, on which sasine was taken. Thereafter the husband borrowed £5000 from another party, to whom he granted a bond, on which infeftment was taken, over his own estate alone; and that estate proved insufficient to pay both debts. *Held* in a question between the postponed creditor and the wife (1) that the wife, although *ex facie* a joint obligant with her husband, was truly a cautioner; and (2) that being so, she was not bound to submit to an arrangement by which the prior creditor should take only a proportional part of the debt out of her husband's estate and the residue out of her own, or that the prior creditor, on getting full payment out of the husband's estate, should grant an assignation to the postponed creditor of the security over the wife's estate. *Stewart* v. *Maxwell*, 11 Jan. 1814, F. C.

27. Double Securities—Separate Estates — Bond of Annuity over one Estate — Arrears.—John was proprietor of a subject, A, over which he granted a bond of annuity for £40, and of a separate heritable subject, B. His son and heir, William, made up titles to A, but not to B, which, on his death, fell to his son Alexander as heir-at-law of John; but Alexander declined to take up A, in order to avoid representation of William. *Held*, in a question between the creditors of William and Alexander, that arrears of annuity which the rents of A were insufficient to pay must be paid out of the price of A alone, and not out of B, in respect the bond was secured on A alone. *W. Robertson's Crs.* v. *A. Robertson's Crs.*, 13 Dec. 1803, F. C.; M. "Competition" App. No. 2.

28. Double Securities—Secondary Creditor with Security over one Subject—Sale.—A creditor holding a security over two tenements, A and B, refused, at the request of a secondary creditor holding a security over A, to exercise his power of sale as to B, and allowed B to be sold to a purchaser. On exposing A to sale, he refused to take payment of his debt from the secondary creditor on the same terms as the purchaser was required to pay the price. *Held* that he was liable to the secondary creditor for his debt. *Kemp's Trs.* v. *Ure*, 1822, 1 S. 235.

29. Expenses — Heritable Creditor — Interim Warrant.—Creditors under preferable heritable bonds of annuity with penalties, obtained interim warrants for payment of their annuities out of the rents of the estate, pending a ranking and sale; but the court *refused* to grant warrant for the expense of obtaining them, reserving any claim for these expenses in the ranking. *Wood's Trs.* v. *Ferrier*, 1835, 13 S. 645; 10 Fac. 417.

30. Heritable Bond—Deed of Eik without new Infeftment—Validity.—*Held* in a question with creditors, that although in the case of a wadset where the property itself is vested in the creditor an eik is effectual under the creditor's sasine, yet it cannot be so in the case of a heritable bond without a further infeftment, as the sasine on the bond is limited to the burden created by the bond, while *quoad ultra* the property remains free in the debtor. *Turner* v. *M'Intyre*, 1816, Hume 660.

31. Heritable Creditor in Possession—Interest—Payment—Reduction of Debt.—A creditor in possession under a first heritable bond is entitled, after applying the rents to payment of the interest, to pay the surplus to the proprietor, and is not bound to apply that surplus to extinction of the principal sum, notwithstanding the existence of a contingent heritable security in favour of the wife of the proprietor, in the event of her survivance. *Brown* v. *Rae*, 1835, 13 S. 256.

32. Heritable Creditor — Disposition ex facie Absolute with Back Bond—Indefinite Payments.—A creditor holding a security over an estate by an *ex facie* absolute disposition and sasine qualified by a back bond, made advances on general account to the debtor, and received indefinite payments. The debtor died indebted in a large balance; and the creditor thereafter sold the estate. *Held*, in a question with an executor-creditor, that the heritable creditor was entitled to apply the price in extinction of the advances. *Maitland* v. *Cockerell*, 1827, 6 S. 109; 3 Fac. 89.

33. Heritable Securities Act, 10 and 11 Vict. c. 50, s. 2—Creditor Entering into Possession—Maills and Duties.—A heritable creditor in a bond and disposition in security, under the form provided in the Heritable Securities Act, served a notarial schedule of intimation, requisition, and protest upon the debtor, intimating that in respect of the non-payment of interest as stipulated in a back letter, he, in virtue of the powers in the bond,

entered into possession of the subjects. Similar schedules were also served upon the tenants, intimating the entry into possession, and requiring the rents to be paid to the creditor. Suspension without caution *refused*. *Question*: Is it competent for a heritable creditor to enter into possession under s. 2 of 10 and 11 Vict. c. 50, without a decree of maills and duties? *Neills* v. *Lyle*, 1863, 2 M. 168; 36 J. 75.

34. Infeftment — Real Right — Sasine.—*Held* that a sasine taken in virtue of a precept proceeding on an obligation to infeft by two manners of holding, and that either by confirmation or resignation, the sasine not being confirmed, did not vest a real right. *Peebles* v. *Watson*, 1825, 4 S. 290; 1 Fac. 111.

35. Insurance—Annuitant in Possession —Payment of Premiums.—An urban subject was disponed in security of an annuity, but the disposition did not contain special power to insure and charge the premiums upon the subject. The annuity not being paid, the annuitant entered into possession, and drew the rents. *Held* that, in accounting with the holders of a postponed security, the executors of the annuitant were not entitled to credit for sums disbursed for insuring the property against fire. *Pollock* v. *Marnoch*, 1859, 21 D. 1210; 31 J. 671.

36. Interest—To what Bond Imputed—Postponed Bond Held by Creditor with Prior Bond. — A creditor who held prior heritable bonds as an assignee, and one in his own name posterior to another heritable bond, in favour of another creditor, *found* entitled to impute indefinite payments of interest to his postponed bond. *Mackenzie* v. *Gordon*, 1839, M'L. & R. 117. Affg. 16 S. 311; 13 Fac. 289.

37. Liferent and Fee—Competing Deeds —Mortis causa Disposition—Revocation—Heritable Creditor. — A party executed a *mortis causa* disposition in favour of a lady, reserving his liferent, and full power to alter, sell, or burden the subjects. Thereafter he married her, and had a son by her, after whose birth he executed a second disposition, revoking his former deed, and disponing to her in liferent and his son in fee. After his death, his widow was infeft on the first deed. The instrument of sasine, which was recorded, made no mention of the reserved power, and she granted heritable securities. More than thirty years after the father's death, the subjects were brought to sale by a heritable creditor, and the price was claimed both by the creditor and by the son, who maintained that the fee of the subjects was in him, and that the securities granted by his mother were ineffectual. *Question*, whether the first deed fell by the subsequent birth of the son, as well as by the revocation in the subsequent and latent deed, and the recorded infeftment was unavailing to support the claim of the heritable creditor; or whether the latent deed could compete with the real right derived by the creditor from the widow appearing on the record to be the absolute fiar. *Galloway* v. *Grant*, 1851, 13 D. 756; 23 J. 332.

38. Long Lease Assigned in Security—Redemption—Acquiescence.—A ninety-nine years' lease was assigned in security of a debt, with this provision, that if the debt was not repaid at a certain term, the lease should belong absolutely to the creditor. The debt was not repaid at the specified term, and the creditor (who had become landlord in the lease) possessed the subject for several years without objection, and erected additional buildings on it, but never obtained declarator of irritancy. *Held* that the debtor was entitled to redeem the lease, upon payment of the debt and interest. *Thomson* v. *Threshie*, 1844, 6 D. 1106; 16 J. 486.

39. Maills and Duties—Bond of Annuity —Heritable Creditor Infeft.—A heritable creditor under a bond of annuity, infeft in lands, with an assignation to the rents, is entitled to a decree of maills and duties for subsequent annuities. *Bruce* v. *Grant*, 1824, 2 S. 657.

40. Maills and Duties—Competency—Action by Heritable Creditor.—A creditor under a heritable bond is entitled to bring an action of maills and duties for payment of the principal debt, although an arrear of interest (as to the amount of which there was a dispute) be consigned in bank. *Davidson* v. *Douglas*, 1839, 2 D. 159; 15 Fac. 145; 12 J. 211.

41. Maills and Duties — Process — Competency.—An action of maills and duties by a creditor in a heritable bond was raised before interest was due, but his debtor's estate had been sequestrated, and the action was not called in court till after a term's interest was past due. *Held* not to be prematurely brought. Although three months' premonition was stipulated before calling up a principal sum, and no such premonition was used before raising an action of maills and duties, the action *sustained*. *Ferrier* v. *Dunlop*, 1831, 9 S. 837.

42. Obligation—Bond and Disposition in Security — Verbal Agreement. — A verbal agreement cannot affect the right of the creditor in a bond to exact payment in terms thereof. *Wallace* v. *Henderson*, 1867, 5 M. 270; 39 J. 124.

43. Obligation—Bond for Definite Sum—Back-Letter Limiting Liability.—A bond for a definite sum, but declared by back-letter to be intended only to cover certain obligations, *held* good to the extent of those obligations which were actually due at the date of the bond. *Maxwell* v. *Drummond's Trs.*, 1825, 4 S. 137.

44. Obligation — Cautioner for Interest on Heritable Bond — Principal Security Reduced. — *Held* that a separate personal obligation for payment of the interest of a loan heritably secured was not dependent upon the validity or sufficiency of the heritable security. *Royal Bank* v. *Ranken*, 1844, 6 D. 1418; 16 J. 598.

45. Obligation—Contract—Bond of Annuity—Insurance Premiums—Deduction—Assignation—Proof.—An heir in possession of an entailed estate, who held a policy of insurance on his life, thereafter borrowed money on a redeemable bond of annuity, and in security disponed the estate, and assigned to the lenders, absolutely, the policy, which was of considerable value. At this time he had paid the current year's premium; but, without taking any deduction on that account, he paid the first year's full annuity in advance. Thereafter he raised an action for repayment of a portion of the premium, maintaining that the annuity had been fixed on the principle of being equal to the premium, and interest on the money lent, and that it was by oversight that he had not retained the portion of the premium when he paid the annuity. *Held* that there was no evidence that the annuity had been fixed on such a principle, and that, in the absence of evidence to the contrary, he must be taken to have agreed to pay the full year's annuity, and to assign the policy with all its value consequent on the paid-up premiums. *Adam* v. *Aberdeen Assurance Co.*, 1848, 10 D. 722.

46. Obligation — Heritable Bond — Proof of Advances.—A heritable bond was granted for £900, on the narrative that the sum was "actually received of the date of these presents"; but the creditor, while he admitted that that sum had not been advanced, alleged that he had advanced £300, and the debtor admitted only an advance of £5. *Held* that the bond afforded no proof of the payment of the £300, and therefore a charge *suspended*, except for the £5. *Hotson* v. *Walker's Trs.*, 1831, 9 S. 685. *Yuill* v. *Fergusson*, 1833, 11 S. 550 (Duration of Loan).

47. Obligation—Ex facie Absolute Disposition — Correspondence — Construction.—Construction of a clause regarding the extent of claims to be covered by a right in security, constituted by an *ex facie* absolute disposition to one party, and a relative correspondence with the creditor. *Tierney* v. *Court*, 1832, 10 S. 664.

48. Obligation — Personal Obligation — Ground-Annual.—In the absence of stipulation to the contrary, the personal obligation for payment in a contract of ground-annual remains with the granter thereof, though the subjects be transferred; but the burden of the ground-annual transmits against the lands. *Millar* v. *Small*, 1853, 15 D. (H. L.) 38; 1 Macq. 345; 25 J. 334; 2 Stuart 60. *Royal Bank* v. *Gardyne*, 1853, 15 D. (H. L.) 45; 1 Macq. 358; 25 J. 399; 2 Stuart 81. *King's College, Aberdeen* v. *Hay*, 1854, 17 D. (H. L.) 30; 1 Macq. 526; 26 J. 643 (Feu-Duty). *Elmsley* v. *Brown*, 1855, 18 D. (H. L.) 16; 2 Macq. 40; 27 J. 346 (Feu-Contract). Cf. *Peddie* v. *Gibson*, 1846, 8 D. 560; 18 D. 578. *Leslie* v. *Wyllie*, 1870, 43 J. 95.

49. Obligation — Personal Obligation — Sale under Burden of Heritable Bond—Assignation. — The proprietor of certain lands who had granted a bond and disposition in security, containing a personal obligation and a conveyance of the lands in security, sold them to joint purchasers, under burden of the heritable bond. The amount of the bond was retained by the purchasers, who only paid to the seller the balance of the price. The seller assigned to the bondholder his right of relief against the purchasers. The bondholder having brought the subjects to sale, they did not realise the full amount of the debt. *Held* that the purchasers were jointly and severally liable to the bondholder in the balance of the debt. *Reid* v. *Lamond*, 1857, 19 D. 265; 29 J. 129.

50. Obligation — Sale — Price — Ground-Annual—Bona fide Purchaser.—A party accepted a disposition declaring part of the price to be a ground-annual, but without any express obligation on him to pay it. *Held* that he was personally liable, and could not refute; but without prejudice to any question with a *bona fide* purchaser. *Mags. of Inverness* v. *Bell's Trs.*, 1827, 6 S. 160; 3 Fac. 133.

51. Penalty—Cautioner Paying Interest on Bond—Assignation—Principal Debtor's Liability.—A cautioner paid interest to a heritable creditor and got from him an assignation of the bond. *Held* that although between the creditor and the principal debtor the penalty stipulated in the bond would be modified it was otherwise in the case of a cautioner; and that the cautioner could claim from the principal debtor (under the penalty) interest on the interest he had paid and the expenses of the assignation. *Inglis* v. *Rennie*, 23 June 1825, F. C.; 4 S. 113.

52. Penalty — Expenses. — Extra-judicial expenses *allowed* under the penal sum in an English bond. *Eckford* v. *Dunbar*, 1828, 6 S. 382.

53. Penalty — Expenses. — A heritable creditor was assoilzied from a reduction of his bond on fraud and the Act, 1696, c. 5, but found not entitled to expenses. *Held* that he could not recover them out of the property in virtue of the penalty in the bond. *Smith* v. *M'Lean's Trs.*, 3 June 1800, F. C.; M. "Expenses" App. No. 1.

54. Penalty — Expenses — Competition between Heritable Creditors.—A party, in virtue of the penalty in a heritable bond under which he was infeft, *found* entitled to payment of it to the extent of expenses incurred by him in a litigation in the Court of Session (where nothing was said as to expenses), and of those in an appeal to the House of Lords (which were found not due), although the effect was to diminish a surplus payable to his opponent, a postponed creditor out of the estate, and to give the expenses which had not been awarded in the litigation. *Orr* v. *Mackenzie*, 1839, 1 D. 1046; 14 Fac. 1076.

55. Penalty — Expenses Incurred by Heritable Creditor.—In a process of multiplepoinding, the creditor in a bond is entitled, in virtue of the penalty, to be preferred for all his necessary or reasonable expenses, in the same place in the ranking as for the principal sum in his bond. *Jameson* v. *Beilby*, 1835, 13 S. 865.

56. Penalty—Expenses of Litigation Incurred by Heritable Creditor against Third Party.—A creditor under a bond, who has incurred expenses in defending it in a question with a third party, is entitled, in claiming on the estate of his debtor, to rank for these expenses under his penalty, notwithstanding that, in the litigation with the third party, the court had found no expenses due. *Ramsay* v. *Goldie*, 1826, 4 S. 737.

57. Personal Bar—Calling up Bond—Condition of Loan—Adjudication in Satisfaction.—A party lent money on a heritable bond under an obligation not to call it up for five years if the interest was regularly paid. For the two first terms he sent to the borrower's agent for the interest a few days after the term, and always received it when demanded, without any complaint on account of delay. At the next term, on two days having passed, and the interest not being sent to him, he intimated that he was to call up the money, on the ground that the interest had not been regularly paid. He thereafter raised an adjudication. *Held* that, after his preceding conduct, he could not take advantage of the two days' delay, and the adjudication *dismissed*. *Paterson* v. *Tod*, 1828, 6 S. 1062.

58. Pledge—Arrestment—Title to Sue.—The right of a creditor who had possession of goods in pledge *preferred* to a creditor of the pledger who had arrested subsequently in the hands of the custodier. *Bridges* v. *Ewing*, 1836, 15 S. 8.

59. Pledge — Bankruptcy — Delivery Order.—In security of their acceptance for £3000, M. N. & Co. received from L. a sale-note acknowledging them to have bought certain copper rollers lying at their disposal in the hands of a third party. The third party intimated to M. N. & Co. that he held the rollers at their disposal, "on the special understanding" that L. was to be at liberty to add to the number "or remove therefrom from time to time for engraving or other purposes requisite to carry on his business." L. became bankrupt. *Held* that the trustee on L.'s sequestrated estate was entitled to be preferred to M. N. & Co., in respect (1) that no effectual pledge of the rollers had been constituted, and (2) that there had been no actual transfer of the property. *Mackinnon* (*Liebert's Tr.*) v. *Max Nanson & Co.*, 1868, 6 M. 974; 40 J. 560. Cf. *Hamilton* v. *Western Bank*, 1856, 19 D. 152; 29 J. 77.

60. Pledge—Bar—Sale of Goods—Action for Payment — Goods Impledged after Refusal to Take Delivery.—*Opinion*, that a purchaser having refused to take delivery of goods, the fact that the seller impledged them to a third party in security of a temporary advance of money, was no bar to an action at his instance to compel the purchaser to take the goods. *Athya & Co.* v. *Rowell & Co.*, 1856, 18 D. 1299; 28 J. 654.

61. Pledge — Calls on Share Certificates Deposited in Security. — Clelland purchased shares of railway stock, and took the certificates in name of Barron, and thereafter pledged them with a bank in security of advances, informing them that Barron was merely his trustee. Clelland having become insolvent, and Barron being required by the railway company to pay certain calls, he applied to the bank either to pay them or to deliver the certificates to him to enable him to sell them, which they refused to do. *Held* that the bank being identified with Clelland, were liable to relieve Barron. *Barron* v. *National Bank*, 1852, 14 D. 565; 24 J. 278; 1 Stuart 505.

62. Pledge — Competition — Subsequent Assignation.—A party, in security of a debt owing by another, deposited a bond due to himself with the creditor, but did not assign it; and on his death, his executor assigned the bond to another person. *Held*, in a competition between the person with whom the bond had been deposited and the assignee, that the former was entitled to be ranked on the fund preferably to the assignee if he were merely a creditor of the executor, but inquiry ordered as to whether the assignee was a creditor of the defunct. *Innes* v. *Craig*, 22 June 1821, F. C.; 1 S. 82.

63. Pledge — Pawnbroker — Refusal to Deliver — Payment. — When a pawnbroker does not, on demand, and on tender of the money lent, with the profit as fixed by the Act (39 and 40 Geo. III. c. 99, s. 14), deliver up an article pawned with him within the time fixed by the Act, the justices may fix the value of the goods, and order payment of the value by the pawnbroker. *Scoular* v. *M'Laughlan*, 1862, 34 J. 302; 1864, 2 M. 955; 36 J. 465.

64. Pledge—Pawnbrokers Act (39 and 40 Geo. III. c. 99), s. 14—Forfeiture.—*Held*, by Lord Ordinary, that goods pawned for a sum under 10s., and not redeemed by the pawner within fifteen months, are (under the Pawnbrokers Act) forfeited, and become the absolute property of the pawnbroker. *Lundie* v. *Buchanan*, 1862, 24 D. 620; 34 J. 303.

65. Pledge—Pawnbrokers Act, s. 14—Jurisdiction.— In a suspension brought by a pawnbroker of a sentence by two justices, ordaining him to deliver a shawl which had been pledged to him for 8s. 6d., or to make satisfaction therefor, proceeding on a complaint at the instance of the pawner, under the Act 39 and 40 Geo. III. c. 99, *held* that the complaint not bearing that the pawner had offered to redeem the subject of the pledge within the period of twelve, or the extended

period of fifteen months from the date of pawning prescribed by the statute (and the pawner admitting that such offer had not been made), the justices had no jurisdiction under the 14th section thereof to entertain the complaint, and therefore their sentence *suspended*. *Lundie* v. *Buchanan*, 1862, 24 D. 620; 34 J. 303.

66. Pledge — Pawnbrokers Act — Jurisdiction.—*Question*, whether a claim for the value of an article impledged, which the pawnbroker refused to account for, was an offence under the Pawnbrokers Act which could only be dealt with as is provided as to offences in that Act, or whether it was a civil claim competent in the small debt court. *Henderson* v. *Wilson*, 1834, 12 S. 313; 9 Fac. 184.

67. Pledge—Pawnbrokers Act—Offence.—As to wearing apparel pledged with a pawnbroker by the wife of the owner without his knowledge, see *Tweddle* v. *Duncan*, 1841, 3 D. 998; 16 Fac. 1034.

68. Pledge—Plant Brought on to Works Impledged to Employers by Contractor—Bankruptcy—Possession.—A railway contract stipulated that "all plant brought or left on or near the site of the works contracted for should from the time of its being so brought or left be held to be the property of and to belong to the company, and should not, without their consent in writing, be removed therefrom." The company were also authorised to use or sell it, and impute the price in extinction of the obligations of the contractors, but until default or bankruptcy it was to remain under the care and custody and be entirely at the risk of the contractors. The contractors being unable to fulfil the contract, assigned to their cautioner the contract and the plant, and in terms of the assignation the cautioner took possession of the plant and completed the contracts. By docquet indorsed on the assignation, the railway company declared it to have been executed with their consent and concurrence. *Held* that a real right of pledge had been vested in the railway company of all plant brought upon their ground, and that they had assigned it to the cautioner, so as to make his right preferable to the other creditors of the contractors, although he had only taken possession within sixty days of their bankruptcy. *Moore* v. *Gledden*, 1869, 7 M. 1016; 41 J. 567.

69. Pledge — Pledgee's Right. — Goods were consigned to a party *ex facie* of the bill of lading, absolutely, and with power to sell. He delivered them to a third party, who thereupon granted his acceptance for the greater part of the value. *Held*, in a question between him and the consigner (who alleged that the consignee was merely his factor, and had no power to pledge), that the third party had, to the extent of the acceptance, acquired a real right to the goods. *Colquhoun* v. *Findlay, Duff, & Co.*, 15 Nov. 1816, F. C.

70. Pledge—Proof—Bill of Exchange—Depositation — Redelivery. — Bills due to a company were deposited with guarantors on behalf of the company in security of the guarantee. Afterwards they were redelivered to one of the company's partners, who discounted them and used the proceeds for company purposes. *Held* that as the partner swore that he had possession of the bills after the redelivery for behoof of the guarantors and not of the company, the right of pledge subsisted. *M'Dowall & Grey* v. *Annand & Colquhoun's Assignees*, 1776, 2 Pat. 387.

71. Pledge — Retention — Delivery of Article Impledged.— A party sent flax to be spun into yarn, and the manufacturer impledged the yarns when spun for an advance equal to the cost of spinning them. *Held*, in a question with the pledgee that the owner was entitled to delivery of them free of pledge, if the manufacturer was indebted to him (as he alleged) in a larger amount than the cost of spinning at the date of impledging. *Paton* v. *Wyllie*, 1833, 11 S. 703.

72. Pledge — Sale — Mercantile Law Amendment Act, 1856. — *Held* that the Mercantile Law Amendment Act, 1856, applied only to sale and not to pledge. *Connon* v. *Lindsay & Oakeley*, 1869, 6 S. L. R. 552.

73. Pledge—Subject of—Title Deeds.— *Held* that the title deeds of a heritable estate were incapable of being made the subject of pledge. *Christie* v. *Ruxton*, 1862, 24 D. 1182; 34 J. 568.

74. Redemption—Discharge of Heritable Creditor — Debtor's Heir — Obligation — Adjudication. — A debtor infeft granted a heritable bond and disposition in security, on which the creditor was infeft, with the usual clause of redemption. Thereafter the debtor, for a sum of money, granted a discharge of the redemption, to the effect of vesting the absolute property in the creditor, which was recorded in the Register of Reversions, but no disposition was granted. On the death of the debtor, the creditor got a decree constituting against the heir of the debtor the obligation to convey the property; and the heir being bankrupt, a competition arose between the trustee for his creditors, adjudging the property, and the creditor under the bond. *Held* that the discharge of the reversion did not convert the heritable bond and disposition in security into an absolute conveyance; that the obligation to convey did not qualify the right of the heir so as to affect his creditors; and that being a personal obligation to convey, and not a direct conveyance on which infeftment could be taken, the trustees' adjudication was preferable. *Miller* v. *Drummond*, 1820, Hume 662.

75. Reduction of Lease in fraudem of Heritable Creditor.—Circumstances under which a reduction by a heritable creditor of a lease granted by the proprietor, on the

allegation that it was granted fraudulently, at an inadequate rent, to his prejudice, was *dismissed*, there being no proof of fraud. *Hart* v. *Ross*, 1828, 6 S. 1110.

76. Removing — Competency — Creditor with Decree of Maills and Duties.—A heritable creditor infeft on a bond and disposition in security, containing power to output and input tenants, had obtained decree in an action of maills and duties, and had levied the rents under it. *Held* that he was entitled to pursue a summary process of removing. *Forsyth* v. *Aird*, 1853, 16 D. 197; 26 J. 97.

77. Removing — Competency — Forum.—A creditor under a bond and disposition in security, containing power to output "possessors," is not entitled, after requisition, to eject a landlord in possession by a summary process of removing before the sheriff. *M'Farlane* v. *Campbell*, 1857, 19 D. 623; 29 J. 290.

78. Removing—Competency—Heritable Creditor — Tenant-at-Will. — A heritable creditor *held* entitled, without a decree of maills and duties, to obtain decree of removing against a party who was in possession as a tenant-at-will, with no obligation to pay rent. *Query*, whether a heritable creditor without a decree of maills and duties can obtain a removing against the proprietor in actual possession. *Blair* v. *Galloway*, 1853, 16 D. 291; 26 J. 136.

79. Removing—Competency.—A creditor infeft under a bond and disposition in security, raised a process of removing of the debtor from a part of the subjects occupied by himself, in respect that an arrear of interest was due; and, in default of caution for violent profits, decree of removing was pronounced. Bill of suspension *passed* without caution. *M'Niel* v. *Blair*, 1834, 13 S. 37; 10 Fac. 25.

80. Requisition—Schedule of Intimation — Mistake in Designation of Party. — An objection to a schedule of intimation and requisition served in terms of an heritable bond, that the proprietrix of the lands was designed Mrs. Anne, in place of Mrs. Helen Guthrie or Conacher, or Conacher Hagart, *repelled*, she being correctly designed "spouse of Peter Conacher, or Conacher Hagart, residing at Glenisla House," where the schedule was delivered to her personally, and the instrument of intimation being in every respect correct. *Hagart* v. *Robertson*, 1834, 13 S. 234.

81. Rent — Arrestment — Preference — Heritable Creditor—Personal Creditor.—A heritable creditor on an entailed estate *held* preferable on rents arrested by the personal creditors of the heir in possession for the interest of the principal sum, but not for the principal sum itself, he refusing to assign his heritable security to an amount equal to that part of the principal claimed out of these rents. *Hawkins* v. *Taylor*, 28 May 1800, F. C.; M. "Competition" App. No. 1.

82. Sale — Adjournment — Advertisement.—A meeting for sale of lands, under powers in a heritable bond, was adjourned to a future day specified; but a new series of advertisements was commenced for a sale on that day, as for an original exposure. *Held* that the sale then effected was not liable to objection from some irregularity in the advertisements prior to the first exposure. *Dickson* v. *Mags. of Dumfries*, 1831, 9 S. 282; 6 Fac. 189.

83. Sale—Advertisement.—An advertisement in a mere advertising paper is sufficient compliance with a provision in a heritable bond requiring advertisement in a "newspaper." *Dickson* v. *Mags. of Dumfries*, 1831, 9 S. 282; 6 Fac. 189.

84. Sale—Articles of Roup—Assignation of Debt.—Heritable subjects, burdened with debt, were exposed to sale under articles of roup, on the narrative that they were consented to by the creditor, and that, before payment of the price, an assignation to the debt was to be granted by the creditor. The purchaser paid the price to the exposer without obtaining an assignation. *Held* that although the creditor attended and offered at the sale, the debt still remained a burden on the property. *Crawford* v. *Walker*, 1827, 5 S. 259.

85. Sale by Heritable Creditor—Competency—Postponed Creditor.—A party who had a heritable bond of annuity over a property, with a power of sale, and was infeft, proceeded to sell. A subsequent creditor, under a similar bond, raised an action of ranking and sale, and suspended on the ground that as there was doubt as to the validity of powers of sale, where the debtor was bankrupt, whereas a decree of sale was an exceptional title, a sale under the power would be prejudicial to a secondary creditor. *Held* that there was no ground for such a doubt, and the sale allowed to proceed. *Dunlop* v. *Marshall*, 19 Jan. 1821, F. C.; Hume 666.

86. Sale by Heritable Creditor—Postponed Creditor's Rights.—A creditor having a power of sale in a disposition in security, cannot sell with a reckless disregard of the interests of the postponed creditors, as by exposing the property to sale at an insufficient upset price; and the court have an equitable right of control over the exercise of such powers of sale. *Kerr* v. *M'Arthur's Trs.*, 1848, 11 D. 301; 21 J. 89.

87. Sale—Heritable Creditor—Purchase of Security Subjects.—*Held* that it is illegal for a heritable creditor to become purchaser of subjects sold by him under his bond. *Taylor* v. *Watson*, 1846, 8 D. 400; 18 J. 180. Cf. *Maxwell* v. *Drummond's Trs.*, 1823, 2 S. 130.

88. Sale—Plea in Bar—Heritable Creditor's Right.—A heritable creditor with a power of sale cannot be interpelled from selling the subjects, by the allegation that the law agent of the debtor holds the title deeds hypothecated for his account, and refuses to produce them, whereby the price to be

realised at the sale may be diminished. *Bell* v. *Gordon*, 1838, 16 S. 657; 13 Fac. 526.

89. Sale—Postponed Heritable Creditor's Right to Balance of Price.—A purchaser from a creditor infeft, with power to sell, subject to a declaration that the purchaser should not have any concern with the application of the price, *held* not entitled, after paying the creditor's debt, to pay the balance to the debtor, where there was a posterior heritable creditor unpaid. *Steven*, 19 Feb. 1811, F. C.

90. Sale—Power to Sell—Bar—Ranking and Sale Instituted by another Heritable Creditor.—The institution of a process of ranking and sale by one creditor does not bar another heritable creditor from proceeding to sell under the power of sale contained in his bond. *Bell* v. *Gordon*, 1838, 16 S. 657; 13 Fac. 526.

91. Sale—Power to Sell—Cautioner Purchasing—Interest—Deductions.—A creditor holding a bond and disposition in security, sold the subjects, and a party who was cautioner for payment of the interest, purchased them at a sum below that in the bond. Having objected to the sufficiency of the titles, he consigned the price, and entered into possession. *Held* that he was not entitled to deduct from the interest of the sum in the bond the interest of the purchase money, but that the creditor was entitled to interest on the whole debt, until payment of the purchase money. *Campbell* v. *Cullen*, 1849, 11 D. 1354; 21 J. 522.

92. Sale—Power to Sell—Condition.—A power of sale in a heritable bond and disposition in security, to be carried into effect if the debt was not paid after three months' premonition, and "upon previous advertisement through the town of M. by beat of drum once every fortnight, for six weeks at least," *sustained*. *Ogilvy* v. *Crombie*, 1804, Hume 657.

93. Sale—Power to Sell—Condition—Advertisement.—Power of sale was given in a bond and disposition in security, "on previous advertisement in the Kelso and Berwick newspapers . . . for at least one month weekly." *Held* that the sale was inept, there having been a period of seven days without any advertisement, and no week in which there were advertisements in both Berwick and Kelso newspapers. *Nisbet* v. *Cairns*, 1864, 2 M. 863; 36 J. 423.

94. Sale—Power to Sell—Condition—Process—Competency.—Under a power of sale in a heritable bond, to be carried into execution "upon intimating a demand of payment even by letter to me or my foresaids, and the same not being complied with within six months thereafter, and without any legal authority to that effect to sell" the subjects, *held* that, after the stipulated provisions had been complied with, a petition to the sheriff for warrant to advertise and sell them, in terms of the power in the bond, was competent, although unnecessary. *Robertson* v. *Paton*, 1815, Hume 658.

95. Sale—Power to Sell—Construction—Procedure.—Although a heritable bond did not specially require that any demand of payment of the money should be made before exercising the power of sale, but only required that certain advertisements should be made, yet *held* irregular to sell without such a demand on the heir of the debtor, who had in the meantime died. *Morison* v. *Miller*, 1818, Hume 720.

96. Sale—Power to Sell—Debt—Constitution.—Powers of sale under a bond for a specified sum, or such part thereof as shall be due on a current account, cannot be exercised without a previous constitution of the amount due, there being no provision for its liquidation in the bond. *Brown* v. *Bedwell*, 1830, 9 S. 136; 6 Fac. 99.

97. Sale—Power to Sell—Heritable Bond—Title Deeds not Delivered to Creditor.—A heritable bond contained a clause of delivery of the title deeds. *Held* that notwithstanding the creditor had not received delivery of them, he might proceed to sell the property, although the titles were in the possession of a party who happened to be his agent, but who held them in another character, and although the debtor offered to pay the debt on delivery of the titles. *Robertson* v. *Blackwood's Trs.*, 1852, 1 Stuart 1014.

98. Sale—Power to Sell—Intimation—Mora.—The holder of a heritable bond, with power of sale, on six months' intimation, *held* entitled to sell, notwithstanding the lapse of three years from the intimation, without a new intimation, no caution being offered by the debtor in a bill of suspension and interdict presented by him. *Glas* v. *Stewart*, 1830, 8 S. 843.

99. Sale—Power to Sell—Obligation to Pay Insurance Premiums.—A creditor was found entitled to sell policies of insurance which had been effected on the life of his debtor, who had conveyed them in security of a loan of money, and who had also granted an obligation to pay the premiums. *Held* that the creditor was also entitled to bring to sale the obligation to pay the premiums. *Wood* v. *Anstruther*, 1843, 6 D. 291; 16 J. 159.

100. Sale—Power to Sell—Pawnbrokers Act—Amount of Loan—Fraud.—The court *passed* a bill of suspension and interdict, presented by the trustee on a bankrupt estate, against the sale of goods impledged with a pawnbroker by the bankrupt with the view of defrauding his creditors—the money lent on them having been advanced, although on tickets of £10 each, in sums to a much larger amount on single pledges. *Ross* v. *Equitable Loan Co. of Scotland*, 1826, 5 S. 192.

101. Sale—Power to Sell—Prior Heritable Creditor—Postponed Heritable Creditor's Rights—Purchaser's Title—Payment.—A heritable creditor infeft, with a power of sale,

sold the lands for a price which was insufficient, after satisfying his debt, to pay the debt of a postponed heritable creditor, also infeft. The purchaser refused to pay the price on being offered a disposition by the seller unless the postponed heritable creditor also concurred, or his bond was discharged. *Held* by the Lord Ordinary, and acquiesced in (1) that the sale was a good sale to the purchaser, he paying to the parties *in titulo* the price stipulated to be paid; (2) that the postponed creditor was not entitled, in competition with the purchaser, to enforce his security to any larger effect than might be necessary to enable him to obtain payment of the balance of the price (if any), after meeting the lawful demands of the prior creditor; (3) that the purchaser was entitled, before payment, to a decree declaring the subjects disencumbered, and to have the decree recorded in the Register of Sasines, and that after recording, the purchaser, upon being infeft under the disposition tendered by the seller (whether it was or was not concurred in by the postponed creditor), was in safety to pay the price to the parties entitled to receive the same; and (4) that the prior creditor, as seller, was not entitled to insist that the whole price should be paid to him, but was only entitled to payment of his debt, with interest and expenses. *Wilson* v. *Stirling*, 1843, 8 D. 1261.

102. Sale—Power to Sell—Railway.—A railway company, by virtue of powers in their Act of Parliament, borrowed a sum of money, and granted in security to the creditor an assignment of the undertaking and rates arising therefrom. The company having become unable to pay interest upon the loan, *held*, in an action for the purpose of bringing the railway, and property connected with it, to sale, that there was no power to that effect in the Act of Parliament or in the assignment. *Dundee Union Bank* v. *Dundee & Newtyle Rly. Co.*, 1844, 6 D. 521; 16 J. 237.

103. Sale—Power to Sell—Title.—Interdict, till a title was made up, *granted* against a tutor for children who claimed right by a deed of settlement to a heritable bond, containing a power of sale, and who had intimated his intention to sell. *M'Dowal* v. *Milligan*, 1825, 4 S. 182.

104. Sale — Power to Sell — Title Deeds —Intimation—Mora.—*Questions*, whether a debtor is entitled to object that the titles of a heritable creditor are not complete; whether it is a sufficient objection against a sale, that the schedule of intimation is not dated, intimation not being denied; and whether the creditor is affected by *mora* in carrying the sale into effect. *Moffat* v. *Calderhead*, 1825, 4 S. 96.

105. Sale — Power to Sell—Refusal of Payment.—Heritable creditors *held* not entitled to proceed with the sale of the property under their bond, while they refused to accept payment on granting an assignation to a third party. *Austin* v. *Grant*, 1827, 5 S. 701.

106. Sale — Power to Sell — Trustees' Powers—Upset Price.—Trustees on an estate, over which there were heritable bonds to the extent of £9000, with power of sale, having paid them to the amount of £7000, and taken assignations, *found* entitled, after the lands had successively been exposed for sale at £14,900 and £12,500, to offer them at £10,950. *Calder* v. *Gray*, 1823, 2 S. 582.

107. Sale — Ranking and Sale — Prior Possession by Heritable Creditor.—A heritable creditor for £2000, with powers of sale engrossed in his infeftment, entered into possession of the burdened subject (valued at £1900), under an action of maills and duties, and was *in cursu* of bringing the subject to sale, when the heir of the debtor instituted a process of ranking and sale of the whole heritage, including the subject burdened, and applied for sequestration of the heritage. Petition *refused*, so far as it embraced that subject. *Hutchinson* v. *Gordon*, 1833, 11 S. 395.

108. Sale under Burden of Price—Interest—Husband and Wife—Competition.—A party sold an estate under burden of the price; and on the death of the seller, the purchaser's wife, as one of three co-heiresses, acquired right to one-third part of the price. Thereafter the purchaser contracted other debt, and his wife, along with him, conveyed her third share of the price in security to the creditor. The husband having failed to pay the price, the lands were judicially sold, and the proceeds were insufficient to pay the price. *Held* that the interest accruing on the wife's third during the marriage fell under the *jus mariti*, and was due to the other two co-heiresses preferably to the creditor, so long as any part of the price remained unpaid. *Goldie* v. *Napier*, 1835, 2 S. & M'L. 374. Affg. 11 S. 707.

109. Sale—Validity—Heritable Creditor Acting as Auctioneer and Purchasing.—A sale made by a heritable creditor under a power of sale, who acted as auctioneer, and caused the subjects to be bought for his own behoof, *held* unlawful. *Jeffrey* v. *Aiken*, 1826, 4 S. 722; 1 Fac. 693.

110. Subsequent Debt — Retention. — A creditor who had received from his debtor a vendition of a ship *ex facie* absolute, but at the same time granted a missive, obliging himself to reconvey on payment of a specific debt, *found* entitled to retain in security of another debt afterwards contracted. *Balleny* v. *Raeburn & Co.*, 7 June 1808, F. C.; M. "Compensation" App. No. 5.

111. Title—Completion—Assignation of Bond and Disposition in Security by Proprietor Infeft but with Seisin Unrecorded.—A party infeft upon a bond and disposition in security, granted by a proprietor who was infeft (but whose seisin was not recorded), executed an assignation of the bond; and the assignee completed his title by taking up, by virtue of the assignation to writs and title deeds, an unexecuted precept of sasine for an

irredeemable infeftment contained in a prior disposition of the subjects, and infeft himself in security, in terms of the bond and disposition and assignation thereof. *Held* that this was a valid title. *Melvin* v. *Dakers*, 1843, 5 D. 1217; 15 J. 498.

112. Title—Completion of—Declaratory Adjudication.—When the *curator bonis* of a lunatic has invested his ward's moveable estate in an heritable bond taken in name of the ward, *question*, whether declaratory adjudication is a *habile* mode for the next-of-kin making up a title to the security. *M. of Ailsa* v. *Jeffray*, 1859, 21 D. 492; 31 J. 265.

113. Title of Debtor—Creditor's Title.—*Held* in a question with a heritable creditor, that the borrower having been infeft on a disposition from his father, *ex facie* of the *plenum dominium*, it was irrelevant for the heir of the father to allege that it appeared from intrinsic deeds that the borrower had right only to the *dominium directum*. *Anderson* v. *Bank of Scotland*, 1842, 4 D. 1374.

114. Title Deeds—Delivery—Heritable Creditor.—A creditor in a heritable bond, with a postponed term of payment, who did not allege that the title deeds were in any danger, or the debtor's circumstances altered, *held* not entitled to have the title deeds "delivered over to him" for inspection. *Hamilton* v. *Brown*, 1839, 1 D. 725; 14 Fac. 798. Cf. *M'Neill* v. *Blair*, 1835, 14 S. 14; 11 Fac. 8.

115. Title to Sue—Heritable Creditor—Rent.—An heritable creditor, infeft, *held* not entitled to apply for sequestration of effects, as liable to hypothec for rent. *Railton* v. *Muirhead*, 1834, 12 S. 757; 9 Fac. 401.

116. Title to Sue—Redemption—Declarator of—Wadset.—A party having wadsetted his lands, created annuities in favour of five daughters, real burdens on the reversion. On the death of each, the annuity payable to her was to be paid to her children. The children of one of the daughters who had died brought against the holder of the wadset (who was in possession) a declarator of redemption, on the allegation that their share of the annuities was not paid, and that the original debt was extinguished through his intromissions. *Held* that the annuities being real burdens on the reversion, they were entitled to bring the action without going against the reverser's heir, who admittedly received nothing from the estate. *Wright* v. *Turner*, 1855, 17 D. 629; 27 J. 262.

117. Title to Sue—Reduction—Heritable Creditor—Lease Granted by Debtor at Low Rent.—A creditor infeft on a heritable bond *held* entitled to reduce a lease of the lands for thirty-eight years, granted by the debtor to his daughter at a low rent, which, although prejudicial to his security, yet did not appear to render the lands immediately unequal to the discharge of the debt. *Mitchell* v. *Little*, 1820, Hume 661.

118. Title to Sue—Reversion—Superior and Vassal.—In the dispositive clause of a disposition, with an *a me vel de me* holding, the granter sold, alienated, and disponed a right of mid-superiority, "under redemption by payment making of the aforesaid sums of money in manner under written." It appeared from the narrative and other clauses of the deed, that it was granted in further security of a debt for which a personal bond had formerly been granted. In the precept of sasine it was declared that the subjects should be redeemable by payment of the debt. The representative of the disponee, after entry with the disponer's superior, raised a declarator of irritancy *ob non solutum canonem* against the sub-vassal. *Held* that the deed was *ex facie* a disposition in security, and did not divest the granter of the mid-superiority. *Campbell* v. *Bertram*, 1865, 4 M. 23; 38 J. 22.

119. Validity—Bond—Omission of Dispositive Words.—A bond for an annualrent payable out of lands, and precept to infeft therein, constitutes a good security, though there be no dispositive words in the bond. *Campbell* v. *M'Donald's Trs.*, 1829, 7 S. 826; 4 Fac. 1127.

120. Validity—Bond and Disposition in Security—Future Advances—Indefinite Amount.—A heritable security granted for future advances, is of no force for sums advanced after the date of infeftment; and such a security is of no effect for sums advanced before the date of infeftment, as it would be a security for an indefinite amount. *Newnham & Co.* v. *Stein's Crs.*, 1791 and 1794, 3 Pat. 345.

121. Validity—Bond by Wife over Separate Estate for Husband's Behoof.—A heritable bond by a wife over her separate estate, though in security of advances to be made to her husband, is effectual. *Brown* v. *Bedwall*, 1830, 9 S. 136; 6 Fac. 99.

122. Validity—Bond for Contingent Claim—Competition.—A heritable bond for a specific sum, but truly for a claim which was chiefly future, contingent, and indefinite, *found* ineffectual in competition, except to the extent of the debt actually due at its date. *Bruce* v. *Hughson's Crs.*, 1835, 13 S. 1011; 10 Fac. 785.

123. Validity—Bond Granted for Indefinite Sum.—A heritable bond was conveyed in security of five acceptances, which were specified by their dates, but not by their amount. *Held* that the conveyance was not effectual as a real security, being granted for an indefinite sum. *Tod* v. *Dunlop*, 1838, 1 D. 231; 14 Fac. 221.

124. Validity—Sasine—Act 54 Geo. III. c. 137—Omission.—A sasine on a heritable bond for £5000, and three years' interest thereon, in security of advances, to be made by a banker on a cash-credit for £5000, without specifying the *cumulo* sum of principal and interest, *held* effectual. *Morton* v.

Hunters & Co., 1830, 4 W. & S. 379. Affg. 7 S. 172 ; 4 Fac. 1204.

125. Wadset — Constitution. — Terms of contract of wadset whereby the proprietor, in consideration of a price, disponed lands (partly property and partly superiority) for twenty-one years, with a power of redemption thereafter on payment of the price, which *held* to constitute a proper wadset, and confer a title for voting. *Stirling* v. *Campbell*, 1754, 1 Pat. 583. Affg. M. 2439.

126. Wadset — Reinvestiture. — *Opinion*, that a proper wadset, in which the granter "sold, analzied, impignorat, and disponed" certain lands "under reversion," was merely a burden upon the granter's right of fee, so that a recorded renunciation of the wadset was sufficient to reinvest the granter in the full right of the lands. *Chisholm* v. *Chisholm-Batten*, 1864, 3 M. 202 ; 37 J. 97.

127. Wadset—Right of Reversion—Redemption. — The right of reversion in a security of the nature of a wadset *held* not to have expired by the mere lapse of the period of redemption, although it was declared in the agreement that the right of reversion "should cease on the running thereof." *Home* v. *Home*, 1739, 1 Pat. 260. See contra (as to absolute disposition with back bond) *Boyd* v. *Steel*, 1775, 2 Pat. 368. Affg. M. 7221.

128. Wadset Right — Kindly Tenant — Validity.—A written deed called a wadset right, granted by one of the kindly tenants of Lochmaben, impignorating his right as such to a mailing in security of debt, with a notarial instrument of possession, by delivery of "earth and stone of and upon the ground of the said mailing of land, as use is in giving possession in kindly tenant right lands," *sustained*, though there was no recording, nor intimation to the landlord. *Mounsey* v. *Kennedy*, 30 Nov. 1808, F. C.

ROADS AND STREETS

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1. Accommodation Roads—Canal Company—Superfluous Lands.—A canal company, by their Acts, were empowered to purchase land for their works, and bound to make certain accommodation roads ; and they were bound to reconvey to the original proprietor any ground that for five years they ceased to use. Many years after paying the price of certain lands of which they took possession for their works, they raised an action to force a conveyance. *Held* that the proprietor was not entitled to resist the action in so far as regarded the slopes of the roads, on the allegation that these were not used for the purposes of the canal, and that the defender would therefore be entitled to a reconveyance. *Question*, whether the company was entitled to the conveyance of the *solum* of land used for accommodation roads. *Edinburgh & Glasgow Union Canal* v. *E. of Hopetoun*, 1856, 18 D. 655 ; 28 J. 281.

2. Assessment—Liability—Road Repair. —Proprietors of houses in Inverness *held* not liable in payment of an assessment for the repair of the parliamentary roads. *Mackay* v. *M'Intosh*, 1824, 3 S. 17.

3. Assessment — Liability — Railway Company—Statute Labour.—*Held*, under the statutes, that the road assessments of the parish, being a poll tax, were competently abolished by the trustees ; that the defenders, a railway company, were liable to be assessed on their real rental within the parish, and were not exempted by having no stations or buildings within the parish and no servants there liable to statute labour services. *Kilmalcolm Road Trs.* v. *Caledonian Rly. Co.*, 1865, 3 M. (H. L.) 84 ; 4 Macq. 937 ; 37 J. 513.

4. Assessment—Liability of Manse and Glebe.—A local Road Act authorised assessments to be levied on "proprietors" and "occupiers" as defined by the Lands Valuation Act. *Held* that a parish minister was subject to assessment as "proprietor" and "occupier" of his manse and glebe in the sense of the Valuation Act. *Cowan* v. *Gordon*, 1868, 6 M. 1018 ; 40 J. 597.

5. Assessment — Road Repair — Method of Assessment.—*Held* that the military and parliamentary road repair assessment for the county of Inverness was, in terms of the Act 59 Geo. III. c. 135, properly laid upon the amount of rents and profits as assessed to the property tax in the year 1814. *Thomson* v. *Gordon*, 1843, 6 D. 230 ; 16 J. 148.

6. Assessment—Road Trustees—Forms of Procedure.—*Held* that proceedings and assessments by road trustees were not reducible at the instance of a party holding the property qualification, and assessed, on the ground either that the meetings, to which only trustees named in the Act and acting were summoned, had not been duly called, or that one of the assessments was made at an adjourned meeting, without any fresh notice to the parties to be charged. *Kerr* v. *Wilkie*, 1860, 22 D. (H. L.) 1 ; 32 J. 292.

7. Assessment — Statute Labour Conversion—Feu-Duties.—By a Statute Labour Conversion Act for the county of Roxburgh, feu-duties and teinds, though entered in valuation rolls *in cumulo* with lands, are not liable to assessment. *Curle* v. *Roxburgh*, 1831, 9 S. 801 ; 6 Fac. 515.

8. Assessment—Statute Labour—Water-Works.—*Held* that the Glasgow Water-Works Commissioners were liable to assessment for statute labour roads on all heritable subjects belonging to or possessed by them, including the ground in the streets, etc., used and occupied by their aqueducts, works, and water-pipes. *Barony Parish Road Trs.* v. *Glasgow Water-Works Commrs.*, 1868, 7 M. 106 ; 41 J. 66.

9. Bridge — General Road Act. — The General Road Act does not extend to a local statute for erecting a bridge and establishing a pontage duty. *Armstrong* v. *Hobbs*, 1830, 8 S. 980 ; 5 Fac. 802.

10. Bridge — Reconstruction — Cost — Local Act.—Where an engineer had reported of a suspension bridge that immediate repair was indispensable, and where the eventual cost of the alterations amounted to a considerable sum, *held* that the alterations amounted to a reconstruction of the bridge, the cost of which fell to be defrayed by a special assessment under the Banffshire Roads Act, 1866, s. 62. *Steuart* v. *Souter*, 1873, 10 S. L. R. 294.

11. Carriage Road—Drove Road—Extension of Use.—Where carts and carriages had been recently introduced into a district where the court held that there existed "a public road for the passage of horses with or without burdens, of cattle, sheep, and foot passengers," but which road was incapable, without engineering operations, of being traversed by carts from one end to the other, *held* that that road was "not a public road for the passage of carts and carriages." *Mackenzie* v. *Bankes*, 1868, 6 M. 936 ; 40 J. 535.

12. Construction of Road — Contributions by Proprietors—Liability of Representatives. — Certain proprietors undertook the formation of a road through a district in which their lands lay, and communicated the schemes to a non-resident proprietor of an entailed estate, who intimated a general approval, and signed the first of a series of bonds granted for money borrowed to complete the undertaking, but died before the date of the second. *Held*, in a question with the other proprietors, that his representatives were not bound beyond the extent of his share of the bond which he had subscribed. *E. of Traquair* v. *Williamson's Exrs.*, 1837, 15 S. 475 ; 12 Fac. 432.

13. Construction of Road — Power of Heir of Entail to Bind Substitute Heirs.—*Held* (1) that the General and Local (Perthshire) Road Acts, while they enable an heir of entail in possession, acting as trustee under them, to bind the substitute heirs for sums borrowed to make or repair roads, do not invert the order of liability existing at common law among the various classes of heirs ; (2) that obligations for money so borrowed and laid out, whereby the heir of entail bound himself "not only as trustee, but as an individual, and his heirs, as well of line as his heirs-male and of taillie, conquest, and provision, and all others, his heirs, executors, and successors whomsoever, renouncing the benefit of discussing," did not make the heir of entail primarily liable. *Breadalbane's Trs.* v. *Breadalbane*, 1846, 8 D. 1062 ; 18 J. 483.

14. Construction of Street — Cost Leviable from Frontagers — Street with one Side only.—By the Edinburgh Roads and Streets Act, 1862, the expense of constructing private streets is laid upon "the owners of lands and heritages according and in proportion to the lineal frontage of the same." *Held* that the owners of lands and heritages on one side of a street consisting of a single row of villas, the other side not being available for building purposes, were liable for the whole expense of making-up, constructing, and causewaying such street. *Duncan* v. *Cousin, etc.*, 1872, 10 M. 824 ; 44 J. 468.

15. Crossings—Right of Adjacent Villa Proprietors. — A company, in virtue of an Act of Parliament, purchased ground to form a road, under condition of its being a public road. The road was formed, and certain parties thereafter erected villas on the side of the road. *Held* that they were not entitled, without the consent of the company, to make crossing-paths from one side of the road to the other. *Monkland Canal Co.* v. *Graham*, 1828, 6 S. 544.

16. Disposal of Surface Water—Powers of Road Trustees.—Road trustees being empowered by statute to conduct surface water from the roads to adjoining land, constructed a watercourse from a road into a disused quarry. This channel having been used for upwards of sixty years, mineral tenants of the lands, who found that the water got into their workings, obstructed it. *Held* that they were not entitled to do so. *Baird* v. *Stratton*, 1873, 11 S. L. R. 22.

17. Diversion—Road Trustees—Damages —Liability.—In an action of damages by a proprietor of an estate against road trustees for deviating from a line of road prescribed by an Act of Parliament, and injuring his property, the Court of Session *dismissed* the action, in respect the deviation was very small ; but

the House of Lords, holding any deviation to be objectionable, but being of opinion that there had been none, *remitted* with a declaration to that effect. *Goldie* v. *Oswald*, 1814, 2 Dow 534.

18. Diversion—Road Trustees—Powers.—Road trustees under 44 Geo. III. c. 52, *held* entitled to make a slight diversion on the Johnstone road. *Hamilton* v. *Napier*, 1823, 2 S. 237.

19. Diversion—Interdict.—Where a road was altered under a decree of the justices, and a party applied for interdict without complaining of the decree, the court *refused* the interdict. *Mags. of Kilrenny* v. *Johnstone*, 1824, 2 S. 746.

20. Diversion—Title to Object.—*Opinion*, that a proprietor through whose land a road passes, and who is interested in the use of it, has a title to object that a railway company have not power to divert that road, although the road trustees (the scheduled proprietors) do not make objection. *Christie* v. *Caledonian Rly. Co.*, 1847, 10 D. 312; 20 J. 106.

21. Diversion—Authority of Justices.—A decree by two justices, authorising a line of road to be altered, was brought under suspension, after the new piece of road was made. Circumstances in which interim interdict against interfering with the old road *recalled* on caution. *Wilson* v. *Gilbert, etc.*, 1863, 1 M. 663; 35 J. 382.

22. Diversion—Declarator of Substituted Road—Period of Possession.—In a declarator of public road, *held* (1) that householders in a burgh were not entitled to an issue on alleged contract between the magistrates and defender's predecessor, by which the alleged public roads were substituted for others to be shut up; (2) that the only issue must be one of use and possession as public roads for forty years prior to the action being raised and of their having been wrongfully shut up. *Davidson* v. *Fife*, 1863, 1 M. 874; 35 J. 531.

23. Diversion — Actings of Railway Company—Trustees' Rights in Old Road.—A railway company cut through a public road, and substituted for the part of the road obstructed by their operations a diverted route. *Held* that a portion of the old road between the point of intersection of the diverted route and the old road and the point at which the railway company's operations cut the old road was not entirely superseded as a public road, and that it remained vested in the road trustees and could not be shut. *Campbell* v. *Walker*, 1863, 1 M. 825; 35 J. 502.

24. Diversion—Powers of Heritors—Act, 1661, c. 41.—The Act, 1661, c. 41, empowers "heritors at the sight of the justices to cast about the highways to suit their convenience." Two streets of a village ran parallel to each other. A heritor proposed to shut up a portion in the middle of the lower street, and a lane connecting the streets, and to connect the extremities of the portion of the lower street so shut up with the upper by means of two new roads at right angles to the streets. *Held* that the proposed alterations were not such as were contemplated by the Act, and the warrant of the justices authorising the alterations *reduced* as incompetent. *Hempseed* v. *Colville* (O. H.), 1866, 2 S. L. R. 52.

25. Diversion — Substituted Road — Agreement with Proprietor—Compensation—Assessment of Claim.—In 1853 A obtained the consent of B's author to carry a road through B's lands in lieu of an existing statute labour road, undertaking to pay the amount of compensation and damage to be found due by the Commutation Road Trustees. The road was made, but was never formally adopted by the trustees; and no steps having been taken before them to ascertain the damage, B, in 1864, erected a fence across the road, and also raised an action against A for a certain sum as the amount of compensation to be paid. *Held* that B having merely erected the fence with the view of enforcing payment of compensation, had not relinquished the agreement of 1853; but the court, being of opinion that the road trustees were the proper parties to assess compensation, stayed proceedings to allow A to take steps for that purpose. *Donald* v. *Nicol*, 1866, 5 M. 146; 39 J. 79.

26. Diversion—Power of Road Trustees—Local Act—Effects of Prescription.—By a local Act the trustees were empowered to alter portions of the road and shut up and sell to the adjacent proprietors the *solum* of the unused portions. *Held* (1) that the right was *res meræ facultatis*, and could not be lost by the operation of the negative prescription; (2) that the public, though permitted to use the old road for forty years subsequent to the formation of the new road, did not acquire a new right by the positive prescription, their title being merely that of the trustees in whom the old road remained vested; and (3) that the possession of the public did not entitle them to a possessory judgment. *Shearer* v. *Hamilton*, 1871, 9 M. 456; 43 J. 218.

27. Level Crossing — Rights of Proprietor—Local Act.—It was provided by a Railway Act, that nothing therein contained should be construed to prevent any owner of lands through which the railway might pass from carrying a railway or other road across the main railway. *Held* that a proprietor of lands was entitled to carry a private railroad across it through his own lands into the lands of an adjoining proprietor. *Dixon* v. *Monkland Rly. Co.*, 1842, 1 Bell 347. Affg. 2 D. 1470; 15 Fac. 1573.

28. Limitation of Actions — Scope.—Although a road statute provided that all actions for penalties and forfeitures, "or for any wrong done or injury suffered in any matter relative thereto," should be commenced within a year, *held* that this provision did not apply to an action for the value of ground illegally taken possession of by the road trustees. *Orr* v. *Hill*, 1841, 3 D. 1235; 16 Fac. 1308.

29. Local or Private Act.—*Held*, under the clause of a county Road Act, that a piece of road, locally situated within the adjoining county, was included in that Act, and subject to the powers conferred on the trustees in relation to the erection of toll-bars. *Threshie* v. *Gordon*, 1841, 3 D. 450; 16 Fac. 443.

30. Obstruction—Cutting Ditch Across Road—Interdict.—A party was interdicted from cutting a ditch across a road to which he claimed right, and thereafter brought a declarator and an advocation of the interdict. The court *sisted* the advocation, in respect the party interdicting had a possessory right till the issue of the declarator. *Learmonth* v. *Baird*, 1824, 2 S. 729.

31. Obstruction—Laying Stones on Road—Interdict.—The trustees under the Glasgow and Shotts Road Act, 54 Geo. III., *interdicted* from laying stones or any other obstruction on the roadside, except at the specified places; and *held* that this Act is not superseded by the Carlisle Road Act, 56 Geo. III. *Cubie* v. *Pollock*, 1822, 1 S. 462.

32. Obstruction—Rails Crossing Turnpike Road — Acquiescence of Road Trustees.—The proprietor of lands intersected by a turnpike road, formed at various times railways on his property, crossing the surface of the turnpike road in different places, and extended one of these so as to form a new level crossing, which, by sufferance of the road trustees, he used for several years. The use of this railway having been discontinued, and the rails having become covered up with road metal, he, after a considerable time, raised and relaid the rails, so as to fit them for being worked by locomotive power, instead of horse power as formerly; and the road trustees having objected to the use of the crossing being resumed, *held* that there was no room for any plea of acquiescence on the part of the trustees, and interdict granted. *Hill* v. *Dixon*, 1849, 11 D. 551; 21 J. 159; 1850, 12 D. 808; 22 J. 348.

33. Obstruction—Rails on Streets—Title to Sue.—*Held* that the Greenock Harbour Trustees had no right, even with permission from the police commissioners as custodiers of the streets, to lay down rails along the streets of Greenock, and that feuars with a right of ish and entry by these streets had a right to have this declared. *Stewart* v. *Greenock Harbour Trs.*, 1864, 2 M. 1155; 36 J. 579.

34. Obstruction — Relief against Person Causing.—A party who laid stones on a road, by which a coach was overturned and a passenger injured, *found* liable in relief to road trustees. *Sharp* v. *Waddell*, 1820, 2 Mur. 211.

35. Obstruction—Removal—Title to Sue.—Action for the removal of obstructions erected across a road alleged to be a public road, *sustained* at the instance of two proprietors in the parish, designing themselves by their estates, and as "two and a committee of the trustees for the parish, etc., under the Statute Labour Act for the county." *Oswald* v. *Lawrie*, 1827, 5 S. 381; 2 Fac. 226; 5 Mur. 6.

36. Obstruction—Removal brevi manu.—Unwarranted obstructions placed by trustees to shut up a public road may be removed *brevi manu* by parties having interest, if done *de recenti*, but not so after a lapse of time. *Trs. of Glasgow & Carlisle Road* v. *Whyte*, 1825, 4 S. 303.

37. Obstruction—Removal brevi manu—Expenses.—Trustees having shut up part of a road not turnpike, for the purpose of bringing persons travelling along it into the turnpike road, in order to make them pay toll, parties removing the obstructions not allowed their expenses, in respect of having removed the obstructions *brevi manu*, instead of applying for redress by law. *Trs. of Glasgow & Carlisle Road* v. *Whyte*, 1828, 7 S. 115.

38. Obstruction — Tramway — Title of Individual to Sue—Local Act.—By the Edinburgh Tramways Act it is provided that where in any road in which a double line of rails is laid there shall be less width between the footpath and the nearest rail than 9 feet 6 inches the company shall construct a passing place. *Held* (1) that two private individuals were entitled to complain of a breach of this obligation, and that the local authorities referred to in the Act were not the only parties entitled to do so. *Adamson* v. *Edinburgh Street Tramways Co.*, 1872, 10 M. 533; 44 J. 279.

39. Power to Take Material—Holyrood Park.—Road trustees *interdicted* from quarrying stones within the Royal Park of Holyrood for the use of roads. *Haddington* v. *Duff*, 1826, 4 S. 830.

40. Power to Take Paving Material—Statutory Notice — Interdict. — Interdict *granted* against road trustees taking stones from a quarry, with regard to which they had not given the proprietor the requisite statutory notice, and of which they had not any regular possession for the purpose of taking materials. *Opinion*, that when the proprietor was in the practice of selling the stone, this was a private use in the meaning of the statute. *Graham* v. *Renfrewshire Road Trs.*, 1849, 11 D. 682; 21 J. 194.

41. Power to Take Paving Material—Notice to Proprietor—General Turnpike Act—Local Acts.—By the 80th section of the General Turnpike Act, road trustees are empowered to take materials for repairing roads from the lands of proprietors, provided that before taking materials from land from which the same was not previously taken, fourteen days' notice in writing shall be given to the proprietor and occupier. Prior to the passing of this Act, road trustees had been taking stones from a quarry, while two other Acts were in force authorising this to be done on notice being given to the proprietor or occupier of the ground. *Held*, in a sus-

pension and interdict by a singular successor in the lands, that in order to be freed from giving notice in terms of the General Act, it was not necessary to prove that the previous use had been preceded by notice in terms of the prior statutes, but that it was sufficient to prove that the use had been with the knowledge and sanction of the occupier, and without hindrance from the proprietor of the ground. *Graham* v. *Renfrewshire Road Trs.*, 1851, 13 D. 1012; 23 J. 466.

42. Power to Take Paving Material—General Turnpike Act.—*Held* that road trustees had power, under s. 80 of the General Turnpike Act, 1 and 2 Will. IV. c. 43, to take without payment, for the purpose of repairing roads, chips of stone which had been produced in quarrying blocks, and which had been allowed to accumulate in large heaps; the court being of opinion that, in the circumstances of the case, these chips were not "required for the private use of the owner or occupier" of the land in the sense of the statute. *Yeats* v. *Taylor, etc.*, 1863, 1 M. 221; 35 J. 164.

43. Private or Public Road?—*Question*, whether a road was public or private. *Kerr* v. *Hamilton*, 1823, 2 S. 149.

44. Private or Public Road?—The tenant of a farm *held*, on evidence, bound to keep open a road through his farm as a parish road. *Erskine* v. *Miller*, 1824, 2 S. 659.

45. Private or Public Road?—A road *found* to be public falling under the management of road trustees. *Wilson* v. *Jameson*, 1827, 4 Mur. 364.

46. Private or Public Road?—Road Connecting Burgh with Harbour—Right of Adjacent Proprietor.—*Held* that where there are no specialities from statute or otherwise, a road from a burgh to its harbour is a public road; and that a party, whose property was bounded by the road, had a right to use it for himself and his tenants, and to open a communication with it (across a footpath which bounded it), provided that such communication was made in the manner least prejudicial to the public. *Sir T. Moncreiffe* v. *Perth Harbour Trs.*, 1842, 5 D. 298; 15 J. 117. See 5 Bell 333; 18 J. 631.

47. Private or Public Street?—Laid Out by Proprietor—General Police Act.—In the case of a burgh which had adopted the Police Act, 1862, *held* that a piece of ground which had been laid out by the proprietor as a street, and had been used as a public thoroughfare for foot passengers and carts, and had not been well or sufficiently paved before the adoption of the Act, and had never been maintained as a public street, was a "private street," as defined by the Act. *Campbell* v. *Leith Police Commrs.*, 1866, 4 M. 853; 38 J. 445.

48. Private or Public Street?—*Question* as to what constituted a "private street" within the meaning of the General Police and Improvement Act, 1862. *Millar's Trs.* v. *Leith Police Commrs.*, 1873, 11 M. 932; 45 J. 578. Cf. *Campbell* v. *Leith Police Commrs.*, 1870, 8 M. (H. L.) 31; 42 J. 310; L. R. 2 Sc. App. 1.

49. Private Road—"Avenue"—General Turnpike Act.—Road trustees for some years prior to 1868 used for the transport of materials a private road which formed the approach to A's mansion-house, and over which a neighbouring proprietor and others had a servitude of passage. In 1868 A obtained a renunciation of the servitude, and then shut up the road on the ground that it was an "avenue" in the sense of the Act 1 and 2 Will. IV. c. 43 (General Turnpike Act), s. 80. *Held*, in an application at the instance of the road trustees, that he was not entitled to do so at his own hand, the court being of opinion that prior to 1868 the road was not an "avenue" in the sense of the 80th section of the Act. *Meldrum* v. *Horsbrugh*, 1870, 8 M. 912; 42 J. 537.

50. Private Road—Agreement by Road Trustees to Take Over—Statutory Requirements.—A proprietor made a road through his estate. In an action at the instance of the proprietor against the road trustees for payment of the cost of making the road, founded on an alleged agreement by the trustees to the effect that they were to take over the road and refund the cost, and adopt the road as one of the roads under their trust, *held* that even if the trustees had power to make such an agreement, the pursuer had failed to prove it, the proceedings founded on not having been in terms of the statute, and being therefore insufficient to bind the trust. *Mackenzie* v. *Ross & Cromarty Road Trs.*, 1865, 3 M. 462; 37 J. 248.

51. Private Road — Effect of Decree-Arbitral.—Circumstances in which the court *refused* to interpret a decree-arbitral pronounced 100 years ago by inserting words giving the pursuers exclusive right to the use of a road, they having failed to prove either a right of property or of exclusive possession under the decree. *Begbie's Trs.* v. *Thomson*, 1871, 9 S. L. R. 156.

52. Private Road—Estate Road—Use by Mineral Tenants.—Mineral tenants acquired right from a proprietor to use a road which was the only access to his mansionhouse. *Held* that the mineral tenants were not entitled to use the road in a manner inconsistent with its use as the access to the mansionhouse, and therefore that they were not entitled to lay down iron plates or rails along the road. *Galbraith's Tr.* v. *Eglinton Iron Co., etc.*, 1868, 7 M. 167; 41 J. 93.

53. Private Road—Right of Property.—The proprietor of a farm having been found by an arbiter, in 1763, entitled to the use of a road, and his successor having thereafter become proprietor of an adjoining farm—*held* that the latter, under the decree-arbitral, had a right of property in, and not merely a servitude over the road, and was entitled to use it for the purposes of both

farms. *Farquharson* v. *Byres* (H. L.), 1866, 1 S. L. R. 268.

54. Public Green—Power of Magistrates to Take for Road.—Note *passed* to try the question whether magistrates were entitled to convert a part of a public green into part of a public road, and interim interdict *granted*. *Adams* v. *Mags. of Glasgow*, 1868, 5 S. L. R. 591.

55. Public Road.—Circumstances in which it was *held* that ground had not been converted into a public street and that the public had acquired no right in it. *Carson* v. *Miller*, 1863, 1 M. 604; 35 J. 357.

56. Right of Way—Access to Titles.—In a declarator of right of way or footpath, the court *allowed* the pursuers access to the defenders' titles, to the effect of getting extracts, at the sight of a commissioner, of such portions as related to the footpath, although there was no averment on record that they contained any reference to it, and also to correspondence and specifications relative to the erection of a march wall between two estates across the footpath, but *refused* access to the titles of an estate adjoining, through which the alleged footpath ran, from which it was separated only by a stream. *Riggs* v. *Drummond*, 1861, 23 D. 1251; 33 J. 628.

57. Right of Way—Title of Inhabitants of Certain Towns.—Under a verdict finding a public footpath in virtue of immemorial usage, it is competent to decern in terms of a summons libelling a right acquired by the inhabitants of certain towns and places in the neighbourhood. *Rodgers* v. *Harvie*, 1829, 7 S. 287.

58. Right of Way—Title to Sue—Prescription.—An action *sustained* at the instance of an advocate in Aberdeen, a writer to the signet in Edinburgh, and a merchant in Perth, claiming right to a public road through Glentilt to Braemar, founded on prescriptive possession. *Torrie* v. *D. of Atholl*, 1852, 24 J. 478; 1 Stuart 830; 1 Macq. 61. Affg. 12 D. 328; 22 J. 86.

59. Right of Way—Title to Sue.—In a declarator of right of footpath, raised by five individuals, *held* that, after the death of two of the pursuers, the three survivors were entitled to insist in the action, without the representatives of the others being made parties to the process. *Hay* v. *E. of Morton*, 1861, 24 D. 116; 34 J. 61.

60. Right of Way—Declarator—Form of Issue.—In a declarator of a right of footpath, it was averred that the pursuer and others, inhabitants of a certain village, and their predecessors, had for time immemorial exercised the right of passing along the path without challenge, or lawful or admitted interruption, but that the proprietor through whose grounds it led had recently obstructed the pursuer and the others in the exercise of their right. An issue having been granted—whether for forty years, or for time immemorial, immediately preceding the interruption in question, the pursuer and his predecessors and others were in possession of the footpath, etc.—the word "immediately" *ordered* to be struck out of the issue. *Mercer* v. *Reid & Rutherford*, 1840, 2 D. 520 and 616; 15 Fac. 548.

61. Right of Way — Declarator.—Averments *held* relevant to entitle pursuers of an action of declarator of a public right of road to an issue. *Ferguson* v. *Hoyle, etc.*, 1858, 20 D. 843; 30 J. 485.

62. Right of Way—Declarator—Onus—Lead at Proof. — A proprietor brought a declarator that he had exclusive right to a road through his lands. The defender as one of the public claimed a right to use it. The defender *appointed* to lead at the trial. *Bates & Baring* v. *M'Queen*, 1853, 15 D. 455; 25 J. 273.

63. Right of Way — Reduction of Declarator—Onus.—Pursuers of a right of way sought reduction of a warrant of the Justices under the Act, 1661, c. 41, and declarator of right of way. *Held*, in accordance with the general rule, while reserving the question of onus, that the pursuers must lead in the proof, notwithstanding a defence that the road, shut up under the warrant and now claimed by the pursuers, was merely a private access to houses on the defender's property. *Anderson* v. *Colville*, 1868, 6 S. L. R. 24.

64. Right of Way — Interdict Pending Declarator — Caution — Inspection of Ground. — The pursuer of a declarator of right of road, pending the action, presented an application for interdict against the defender erecting fences or other obstructions to the use of the road, or interfering with the suspender and the public in their use and enjoyment thereof; but as no caution was offered, the court *refused* the interdict. As he alleged, however, that the effect of the operations would be to deprive him of the evidence in favour of his claim afforded by the existing state of the road, the court of consent allowed him to have the ground inspected, and a plan representing its existing appearance drawn out. *Anderson* v. *E. of Morton*, 1846, 8 D. 1085; 18 J. 538.

65. Right of Way — Interdict by Proprietor Pending Declarator — Title — Seashore.—A proprietor, pending a declarator of public right of way through certain footpaths in his grounds, applied for an interdict against parties trespassing upon them, or pulling down the walls or fences; and the Lord Ordinary having granted the interdict, the court, in respect that he had produced no title instructing a *prima facie* right to the seashore (which was included in the interdict sought), *recalled* the interdict, in so far as it might apply to prevent persons passing along the beach, but continued it *quoad ultra*. *E. of Morton* v. *Anderson*, 1846, 8 D. 1249; 18 J. 593.

66. Right of Way—Extinction—Substitution — Interdict against Destroying Gates.—A right of way was claimed by the public through the private park of a proprietor, who admitted that at one time it had

existed, but averred that the road had been shut up by authority and a new one substituted, the old one thereafter existing only by tolerance. There had always been gates at each entrance, but such as easily to permit ingress and egress. For these the proprietor substituted locked gates, and the public destroyed them; whereupon he applied to the sheriff for interdict, and for authority to restore the gates to the state they were in prior to their destruction. *Held* that he was entitled to restore them pending an action of declarator at his instance, but not so as to obstruct access by the public to the roadway claimed by them; and interdict *granted* against all interference with the gates. *Kirkpatrick* v. *Murray*, 1856, 19 D. 91; 29 J. 43.

67. Right of Way—Interdict—Possession.—A petition by a tenant for interdict against a neighbour from using a road across his farm, which he alleged was a private road, *dismissed* on the respondent proving that the road had been used as a public road for more than seven years preceding the date of the petition. *Calder* v. *Adam*, 1870, 8 M. 645; 42 J. 319.

68. Right of Way — Route — Duty of Proprietor. — A road along the banks of a river having been in use to be enjoyed without any precisely defined line, *held* that when a line was marked out and enclosed, whereby the passengers could no longer avoid any wet part which might become difficult of passage, the proprietor of the ground was not obliged to execute drains to keep every part dry, nor to permit access through his lands to those entitled to the servitude to keep it in repair; but right reserved to them to repair it without encroaching on his exclusive property, and the expense of surveying and laying out a precise line laid equally on both parties. *Rodgers* v. *Harvie*, 1830, 8 S. 611. See 3 W. & S. 251.

69. Right of Way—Route—Two Alternative Roads — Shutting up One.— Circumstances in which the court intimated an opinion that a party was entitled to shut up one of two short roads, leading from a highway to a ford, and leaving the highway about 180 yards distant from each other; and a remit made before answer to a surveyor to report on the line of communication most convenient for all concerned. *Macdonald* v. *Farquharson*, 1832, 10 S. 236; 6 J. 100.

70. Right of Way — Route — Course of Footpath.—A verdict having established that a footroad through the defender's property had been wrongfully shut up by him, *held*, in application of the verdict, that the footroad must again be opened through the defender's lands, and could not be limited in any part of the way to a passage along the top of a sea-wall. *Berry* v. *Wilson*, 1841, 4 D. 139.

71. Right of Way—Route—Path Marked on Plan of Consent — Obstructions — Removal of Gates.—In a declarator of public right of footpath, a line was, of consent of parties, laid off by an engineer, and a plan approved of by the court. After the lapse of five years, the pursuers moved the court to have certain gates removed as obstructions, which the plan showed had existed at its date. Motion *refused*. *Hay, etc.* v. *E. of Morton's Trs.*, 1861, 24 D. 116; 34 J. 61.

72. Right of Way—Route—Petition to Define—Sequel to Declarator.—A petition to the Inner House for transmission of a plan, and remit to qualified persons to lay off on the ground the direction and position of certain rights of way to which the public had vindicated their right in a declarator, after the verdict had been applied and the decree extracted, *dismissed* as incompetent. *Home Drummond, etc.* (*Petitioners*), 1868, 6 M. 896; 40 J. 503.

73. Right of Way—Public Footpath—Diversion—Local Act.—The proprietor of grounds through which a public footpath ran presented a petition under a local Act to the road trustees for permission to alter the course of the path, and on the new path being completed to shut up the old path. Having received their authority, the proprietor tried to exclude the public from the old road, but with only partial and varying success. In an action of declarator of right of way by the public, *held* that the footpath was not legally shut up, because (1) the local Act gave the trustees no power to shut up a footpath; (2) assuming that such a power was given, the necessary intimation and procedure had not been given and followed. *Murray* v. *Arbuthnot* 1870, 9 M. 198; 43 J. 98.

74. Right of Way—Unenclosed Land—Definition of Route—Process.—Parties describing themselves as "residing in and inhabitants of" a village not incorporated, raised a declarator of right to the free use of a muir, and of holding markets on it, and also of a right of way. The court *held* that they had stated a relevant claim of right of way, but that the first two claims were irrelevant. The description of the direction of the right of way, however, was erroneous in the condescendence; and the court declined to allow an amendment, as the main part of the action was dismissed, and the pursuers had still right to bring a separate action as to the right of way. *Henderson* v. *E. of Minto*, 1860, 22 D. 1126; 32 J. 519.

75. Right of Way—Unenclosed Land—Definite Route.—In order to establish a right of public way across unenclosed ground it must be shown that the public have from time immemorial made use of a definite and ascertained track across it from one public place to another. *Mackintosh* v. *Moir*, 1871, 9 M. 574; 43 J. 402; 1872, 10 M. 517; 44 J. 278.

76. Right of Way—Terminus at Public Place—Prescription.—In a question of public road or not, the rule is, that it must be from one public place to another; and where a public road is proved to have existed for forty years, the possession must have been effectually interrupted to cut off the right of the public. *Rodgers* v. *Harvie*, 1826, 4 Mur. 29 and 35.

77. Right of Way—Terminus at Public Place—Form of Issue.—In a declarator of right of way from time immemorial through the defender's lands, from the burgh of B to S and A, he admitted that A had been a public place from time immemorial, but he denied that S had been so prior to 1827. *Held* (1) that under an issue, whether for forty years prior to 1827 there existed a public right of way through the defender's lands to the western extremity thereof, from whence there was a public right of way to S and to A, the parties could prove the state of possession since 1827. (2) An objection to the issue, that while the summons merely named S as one of the places through which the road passed, the issue made it the *terminus*, and it was not admitted that at the period set forth in the issue S was a place of public resort, sustained to the effect that the issue should contain the words, "leading through the defender's lands to the western extremity thereof, and thence proceeding to S and to A." (3) An objection being made that the road claimed was not a beaten track, but a mere right of passage for foot passengers along the seashore, the court *ordered* it to be described in the issue as "a public right of way for foot passengers." *Cuthbertson* v. *Young*, 1854, 17 D. (H. L.) 2; 26 J. 310; 1 Macq. 455.

78. Right of Way—Terminus at Public Place—Possession by Tolerance—Unenclosed Lands.—A public right of way must be between two public *termini*; and the averment and proof of possession of a road, in order to resist a petition for interdict against trespassing, must be such as to exclude the idea that the enjoyment has been by tolerance. *Observations*, per Lord President, as to acquisition of rights of way over unenclosed lands. *Burt* v. *Barclay, etc.*, 1861, 24 D. 218.

79. Right of Way—Terminus at Public Place.—In a declarator of right of way the pursuer must put in issue not merely its course through the defender's lands, but also its course after leaving these lands till it reaches a public place. *Wilson* v. *Hagart*, 1862, 24 D. 1086; 34 J. 545.

80. Right of Way—Terminus at Public Place—Seashore.—In a declarator of right of way over a road leading to the seashore, *held* that the pursuer's averments were not relevant to sustain the action, in respect that they contained no sufficient allegation that the *terminus* at the seashore was a public place. *Opinion*, that although the seashore may be a public place used by the public for purposes of business or recreation, it is not enough, when libelling a right of way, to aver that it terminates on the seashore. *Darrie, etc.* v. *Drummond*, 1865, 3 M. 496; 37 J. 245.

81. Right of Way—Terminus at Public Place—Seashore—Issue.—Form of issue in an action of right of way, where it was disputed that one of the *termini* which was at the seashore was a public place. *Scott* v. *Drummond*, 1866, 4 M. 819; 38 J. 433.

82. Right of Way—Terminus at Public Place—Natural Harbour.—A small natural harbour, resorted to and used by the public as a harbour, *held* to be a public place in the sense of forming the *terminus* to a road over which a public right of way was claimed. *Scott* v. *Drummond*, 1867, 5 M. 771; 39 J. 395.

83. Right of Way—Terminus at Public Place—Seashore.—In an action relative to an alleged public footpath, *held*, setting aside the verdict of a jury, and granting a new trial (1) that a remarkable rock upon the seashore was not, and could not be, a public place, so as to form a terminus to the footpath; (2) that evidence of mere occasional use by fishermen and others of a small natural harbour was insufficient proof of its being a public place. *Duncan* v. *Lees, etc.*, 1870, 9 M. 274; 43 J. 107.

84. Right of Way—Road made by Proprietor for Own Use.—Where a road had been originally made by the proprietor of the land as a private approach for his own use, *held* that the use of it by the public for forty years as a footpath did not, in the circumstances, establish a right of way along it for foot passengers. *Napier's Trs.* v. *Morison*, 1851, 13 D. 1404; 23 J. 656.

85. Right of Way—Road Constructed by Proprietor.—Direction to a jury that a right of way may be acquired over a road originally constructed by a proprietor at his own expense and for his own use. *Lyell* v. *Gardyne*, 1866, 2 S. L. R. 251. New trial *granted*, 1867, 3 S. L. R. 299.

86. Right of Way—Bank of Stream—Use for Fishing—Evidence.—In a question of right of road along the banks of a stream, *observed* that evidence of the mere passage of persons along a road for the purpose of fishing was not evidence of a public footpath. *Sheriff* v. *Ferguson*, 1844, 6 D. 530; 16 J. 244. See also 6 D. 1363; 16 J. 580.

87. Right of Way—Canal Towing-Path.—A right to a navigable canal includes a right to a towing-path as a necessary appendage to it. *Swan's Trs.* v. *Muirkirk Iron Co.*, 1850, 12 D. 622; 22 J. 205.

88. Right of Way—Tow-Path—Title of Burgesses—Private Act—Terminus in a Public Place.—*Held* (1) that a provision in a private Act for improving the navigation of a river, under which a towing-path along the margin of the river was fenced, did not extinguish a right of footpath over the property adjacent to the fence; (2) that the pursuers were not entitled to issues to try whether the burgesses of a royal burgh had a right of footpath which did not belong to the public, under an averment that such a right had been acquired by the public, and particularly the burgesses; (3) that the pursuers were entitled to an issue to try whether there was a right of way to a place not itself a public place, but on the way to one. *Question*: Can a right of way exist which does not lead to a public place? *Campbell* v. *Lang*, 1853, 1 Macq. 451; 15 D. (H. L.) 41; 25 J. 393; 2 Stuart 76.

89. Right of Way — Roadway along Canal.—*Observed*, that a roadway along the bank of a canal, at the canal harbour, though open to the public, and a place of general resort, is not a thoroughfare. *Balfour* v. *Baird & Brown*, 1857, 20 D. 238; 30 J. 124.

90. Right of Way — Carrying Peats — Cart-Road or Horse-Road.—A deed conferred a right of "road" or "way" for carrying peats from a moss. *Held* that this means a cart-road, and not simply a horse-road. *Dingwall* v. *Farquharson*, 1797, 3 Pat. 564.

91. Right of Way—Carriage Road or Footpath.—A road on which there were two flights of stairs *held* not a horse and carriage road, but only a footpath. *Mitchell* v. *Brown*, 1826, 5 S. 56.

92. Right of Way—Carriage or Bridle-Path.—A public road having been used for upwards of forty years for the purpose of conveying burdens, etc., on horseback, according to the usage of the district, and for carts and carriages since their introduction, which was not, however, forty years, *held* that it was subject to be used as a cart and carriage road. *Forbes* v. *Forbes*, 1829, 7 S. 441; 4 Fac. 563.

93. Right of Way — Drove-Road — Pursuers not Possessing Property in Vicinity—Public Highway.—In an action as to whether a right had been acquired by prescription to a drove-road, and to drove-stances (or places for resting and feeding cattle) as accessories, an averment that the proprietors and tenants of lands, and the public generally, had for time immemorial used and enjoyed the drove-road, and the drove-stances as accessories of the road, *held* relevant, notwithstanding that none of the parties claiming the road and stances possessed property in the vicinity, that a public highway had been for upwards of a century superinduced on the drove-road, and that a fixed rate of charge had been always paid for the use of the stances. *M. of Breadalbane* v. *M'Gregor*, 1846, 9 D. 210; 19 J. 65. *Reversed* as to the stances, 1850, 7 Bell 43.

94. Right of Way—Drove-Road—Available for Carriages.—A public road which has been used from time immemorial for all purposes useful to the public, though it has only been used for the passage of horses, cattle, and passengers, may, on the introduction of carts and carriages into the district, be used as a public road for carts, etc., provided only that it be capable of being so used from one end to the other. *Mackenzie* v. *Bankes*, 1868, 6 M. 936; 40 J. 535.

95. Right of Way—Obstruction—Erecting Arch.—Circumstances in which a servitude of footpath was acquired by immemorial usage by the inhabitants of Rutherglen, etc.; and the proprietor of the land held not entitled to erect an arch over the footpath so as to obstruct it or render it a low, dark, dirty passage. *Allans* v. *Mags. of Rutherglen*, 1801, 4 Pat. 269.

96. Right of Way — Obstruction — Removal.—A footpath having been unduly shut up, the court *refused* to delay ordering the obstructions to be removed until the precise line of the path should be marked out. *Rodgers* v. *Harvie*, 1829, 7 S. 287.

97. Right of Way — Obstruction — Removal.—A party who had a possessory right to the use of a road, entitled *de recenti* to remove *via facti* a wall built across it. *Macdonald* v. *Watson*, 1830, 8 S. 584.

98. Right of Way — Obstruction — Removal after Thirty Years.—An averment that a party had been allowed, without challenge or dispute, to erect a wall on ground through which there was found to be a public road upwards of thirty years ago, *held* not relevant to prevent its removal. *Cuthbertson* v. *Young*, 1854, 17 D. (H. L.) 2; 26 J. 310; 1 Macq. 455.

99. Right of Way — Prescription. — If evidence is brought of possession of a road as long as human memory can go, and there is no evidence or tradition to the contrary, it is a fair question for the jury whether there is an immemorial right of way. *Rodgers* v. *Harvie*, 1828, 3 W. & S. 251. Affg. 4 Mur. 36; 5 S. 917; 2 Fac. 628.

100. Right of Way — Prescription — Minority of Proprietor.—In an action of declarator that the public had acquired, by prescriptive possession for forty years, a right of road through the lands of the defender and other proprietors, who were not called as parties, *held* that acts of possession by the public during the defender's minority could not be founded on to his prejudice, and that the years of prescription must be counted back from the date of his immediate predecessor's death. *Crauford* v. *Menzies*, 1849, 11 D. 1127; 21 J. 446.

101. Right of Way—Prescription—Footpath over Bridge.—Under an issue whether, for time immemorial, the pursuer and his predecessors "possessed a footpath through the lands of the defender," the presiding judge declined to direct the jury (as being unnecessary), that possession of the footpath along a bridge, which was afterwards taken down, was sufficient possession, if proved, to sustain the right claimed by the pursuer during the time the bridge was in existence; that the issue raised a question, not as to possession of a public or parish road, but as to the possession of a servitude road, and that it was possession of a road of the latter kind that required to be proved. *M'Ghie* v. *M'Kirdy*, 1850, 12 D. 442.

102. Right of Way—Possession—Prescription—Interruption.—For a long period the public had been in possession of a road or access for foot passengers through a farm leading to a bridge (maintained by public subscription) across a river. This footpath had been used as a kirk and market road, and otherwise, without challenge or interruption, beyond the memory of man. Latterly, during

a period of five years, the tenant of the farm challenged passengers for using the road, placed gates and other obstructions across the line of road, and ploughed up the road itself. *Held* that these challenges were not sufficient to deprive a member of the public, who along with his family had been in the habit of using the road, from obtaining a possessory judgment; and interdict against the farmer interfering with his use of the road. *Wilson* v. *Henderson*, 1855, 17 D. 534; 27 J. 228.

103. Right of Way — Prescription — Evidence—Interruption.—In an action of declarator of right of way, in respect of possession for forty years prior to a certain date, or for time immemorial, in which the jury had given a verdict for the pursuers, a new trial *granted*,—the court being of opinion that interruption of the pursuers' possession was proved to have taken place in 1835; that the pursuers had adduced no evidence extending farther back than 1798; and that, assuming the jury to have rightly held the evidence between those dates to have proved possession by the pursuers, any presumption that the previous possession had been of the same character was excluded by positive testimony adduced by the defender, and uncontradicted, that for several years prior to 1798 the public had not possessed a right of way. *Mags. of Elgin* v. *Robertson*, 1862, 24 D. 301; 34 J. 149.

104. Right of Way — Possession — Carriage Road or Footpath. — In an action raised in 1864, concluding for declarator that a certain road was a public road, on an issue whether, for forty years, or for time immemorial, the road had been used as a public road, the jury found that for time immemorial prior to 1806 it had been used as a public road for all purposes, but that since that year it had not been used for horses, carts, or cattle, but as a public road for foot passengers only. *Held* that this was a verdict for the pursuers in so far as regarded a public footpath or road for foot passengers, and a verdict for the defenders in so far as regarded a road for horses, carts, or cattle; and verdict applied accordingly. *Macfarlane* v. *Morrison, etc.*, 1865, 4 M. 257.

105. Right of Way — Possession — How, and by whom, Used.—To establish a public right of way, it is not sufficient to prove that the road claimed was resorted to by parties strolling on it for a certain distance for pleasure, or that it was used by the tenants and workpeople on the property, or by anglers, or that parties have been seen walking on the road, it not being proved how they came there, and what they were doing there: the evidence must show that the road was used by the public in passing on their ordinary avocations between the two *termini*. *Question* as to the effect of a divergence of several yards between the line of road claimed in the summons and that proved at the trial. *Jenkins, etc.* v. *Murray*, 1866, 4 M. 1046; 38 J. 532.

106. Right of Way—Road through Lands other than Defender's—Issue.—In a declaration of a right of road, an objection to an issue, whether the road proceeded from a point named through the lands of certain proprietors who were not parties to the action, and thence through the defender's lands to a point named, that it concerned the rights of persons who were not parties to the action, and whose rights the defender could not be called on to defend,—*repelled*. *Craufurd* v. *Menzies*, 1849, 11 D. 1127; 21 J. 446.

107. Right of Way — Road Partly on Defender's Property — Uninterrupted Possession.—In an action concluding for declarator of a right of road, partly through the defender's property, between the village of B and a royal burgh (1) the pursuers were allowed an issue whether the public had enjoyed a road, etc., from B to a point within the property of the defender; (2) *held* that the pursuers were not bound to take an issue to prove uninterrupted possession. *Ferguson* v. *Hoyle*, 1859, 21 D. 430; 31 J. 242.

108. Right of Way—Distinguished from Servitude Road.—*Held*, on a construction of a summons in the sheriff court, that its conclusions had reference solely to a right to a servitude road; and therefore that an interlocutor finding that the road in question was a public road, and that the pursuer was entitled to a possessory judgment, was incompetent. *Observations* on the difference between a public and a servitude road. *Thomson* v. *Murdoch, etc.*, 1862, 24 D. 975; 34 J. 482.

109. Right to Minerals — Solum. — *Held*, under a certain Road Act, 1792, that the road trustees had no right of property in the *solum*, and had no right to interdict the proprietors of lands through which the road passed, or their tenants, from working the minerals under the road, so long as it was not injured by their operations. *Observed*, that the right of highway is simply a right to use the surface for the purposes of locomotion, vested in the Crown for behoof of the community. *Waddell* v. *E. of Buchan*, 1868, 6 M. 690; 40 J. 357.

110. Road Trustees — Qualification — Penalty. — Circumstances in which the court *dismissed* a complaint, concluding for statutory penalties against a party for acting as a road trustee, without being vested in the full qualification of £100 of valuation, as required by the Road Act. *Hamilton* v. *Brown*, 1835, 13 S. 830; 10 Fac. 591.

111. Road Trustees — Qualification — Action by Unqualified Trustees. — In an action by two statute labour trustees against the representative of a party who had intromitted with statute labour funds, for payment of a balance, an offer to prove by a reference to the pursuer's oath, as an objection to their title, that they had not been in possession of lands rated in the county cess-books at £100 Scots (this constituting the qualification of statute labour trustees), *sustained*. *Moore* v. *Young*, 1843, 5 D. 494; 15 J. 115.

112. Road Trustees — Qualification — Quorum — Interdict. — An interdict against road trustees carrying into effect resolutions of a meeting composed of a bare quorum, on the ground that one of the trustees present did not possess the statutory qualification, *refused*, in respect that, till convicted under a petition and complaint in terms of the General Road Act, 1 and 2 Will. IV. c. 43, s. 4, his qualification was to be presumed. *Henderson* v. *M'Luckie*, 1850, 12 D. 1070 ; 22 J. 471.

113. Road Trustees—Lady—Repayment of Advances.—A lady qualified to be a road trustee, *found* not entitled to a preference over the other trustees as to the tolls of a road in payment of advances made by her on the road. *Crawfurd* v. *Ceres Road Trs.*, 1822, 1 S. 321.

114. Road Trustees—Meetings—Notice —Local Act. — A local Road Act provided that a special general meeting of trustees might at any time be called on a notice signed by two trustees, and duly advertised. A meeting so called was held, and an adjournment resolved upon. *Held* that although the notice calling the adjourned meeting was subscribed only by the preses of the meeting, it was competently called. *Henderson* v. *M'Luckie*, 1850, 12 D. 1070; 22 J. 471.

115. Road Trustees—Meetings—Notice —Local Act.—By the Lanarkshire Road Act (47 Geo. III. c. 45) notice of meetings of statute labour road trustees must be given by advertisements on the door of the Parish Church "on a Sunday at least ten days before such meeting." *Held* that advertisements made on two consecutive Sundays of a meeting to be held on the Tuesday following the second Sunday were insufficient, and a resolution of trustees at such meeting *held* to be invalid. *Shearer* v. *Hamilton*, 1871, 9 M. 456 ; 43 J. 218.

116. Road Trustees—Meetings—Validity of Minute.—*Held* that the non-observance of certain provisions as to calling of meetings of trustees and recording minutes, did not render null a minute passed at a meeting admitted to have taken place. *Henderson* v. *Williamson*, 1854, 16 D. 982 ; 26 J. 515.

117. Road Trustees—Minutes.—Minutes of road trustees for one district of a county *held* to be in the possession of the trustees for the county. *Wilson* v. *Jamieson*, 1827, 4 Mur. 366.

118. Road Trustees — Forms of Procedure.—Proceedings of road trustees *held* null, in respect of deviation from the forms prescribed by the statute under which they acted. *Calder* v. *Learmonth*, 1831, 9 S. 343.

119. Road Trustees—Personal Liability —Powers of Majority.—*Question*, whether the mere presence *per se* at meetings of road trustees at which it was resolved to enter into contracts inferred personal liability on the part of the trustees, without their having bound themselves individually; and whether a majority of trustees becoming bound individually could also bind other trustees who, though present at the meeting, did not become bound individually. *Cunninghame, etc.* v. *Higgins*, 1802, 4 Pat. 401.

120. Road Trustees—Personal Liability —Presence at Meetings.—*Held* that road trustees who signed contracts were bound personally to implement them, although there were no trust funds, seeing that it was their duty to be satisfied that there were funds before signing them, but that mere presence at meetings did not infer personal liability. *Higgins* v. *Livingstone*, 1816, 4 Dow 341; 6 Pat. 243. Cf. *Condie* v. *Stewart*, 1829, 7 S. 368 ; 4 Fac. 464.

121. Road Trustees—Convener—Personal Liability.—A road trustee alleged to have acted as convener of road trustees, and sued personally to account for advances made by other road trustees, *assoilzied*, there being no averment to infer personal liability. *Ochil Turnpike Road Trs.* v. *Horn*, 1822, 1 S. 513.

122. Road Trustees—Personal Guarantees—Acknowledgment by the Trust—Repayment.—Road trustees obtained advances upon an obligation by various parties to repay the amount, each party specifying the extent of his subscription. When called upon, some of them paid only a part of their subscriptions. The trust having become prosperous, the trustees resolved to grant acknowledgments of debt to those who had paid their subscriptions in full, and to pay interest. One who had paid in part petitioned the sheriff to ordain the trustees to grant him an acknowledgment for what he had paid, and to interdict them from paying away the funds. He afterwards brought an action in the Court of Session with similar conclusions. *Held* (1) that the conclusion for the granting of an acknowledgment was incompetent in both processes; (2) that the other conclusion was competent, the road trustees, as regarded the creditors, being mere debtors bound to pay equally all round. *Kerr* v. *Donald*, 1854, 16 D. 614 ; 26 J. 282.

123. Road Trustees—Relief of Liability inter se.—In a question of relief among the trustees under a local Road Act, *held* that the obligations and interests of the parties were to be regulated by an agreement which had been entered into by their predecessors about forty years before, and had been acted upon and acquiesced in for several years subsequent to its date, but had thereafter been neglected to be enforced. *Montrose* v. *Edmonstone*, 1842, 4 D. 152.

124. Road Trustees—Relief of Liability inter se — Construction of Agreement. — The tolls of a road having been found insufficient to pay the interest of the debt upon it, and certain of the road trustees who were liable for the debt being less interested in the road than the others, it was agreed that "a loss of about £130 per annum" should be made up by these other trustees paying their several proportions thereof according

to their respective valuations. *Held* (1) that this agreement did not import an obligation to pay an average loss of £130 per annum in a series of years, but only an obligation to pay the loss not exceeding that sum in each year as it occurred; (2) that the obligants not being liable *singuli in solidum*, were not liable for the loss occasioned by the insolvency of one of their number; (3) that one of the obligants having sold his property, was not thereby relieved of his obligation. *Montrose* v. *Edmonstone*, 1845, 7 D. 759; 17 J. 402.

125. Road Trustees—Committee—Title to Sue.—A committee of trustees under a local statute *held* entitled to pursue an action. *Low* v. *Lord Arbuthnot*, 1826, 4 S. 651.

126. Road Trustees — Clerk. — *Opinion*, that an appointment of two persons to be joint clerks under the provisions of the General Road Act is not incompetent. *Erskine* v. *Kerr*, 1857, 20 D. 277; 30 J. 140.

127. Road Trustees — Clerk — Criminal Complaint — Instance. — The clerk and treasurer of road trustees has no title to pursue a criminal complaint, concluding for punishment of persons alleged to have injured individuals employed by the trustees, and obstructed the execution of their orders; and the concourse of the procurator-fiscal will not support such a complaint as at his instance. *Wingate* v. *Brown*, 17 Feb. 1809, F. C.

128. Road Trustees — Clerk — Title to Sue.—The provision in the Turnpike Act, that the road trustees may legally sue or be sued in name of their clerk, is not applicable to district clerks, but only to the clerk under the general trust. *Williamson* v. *Goldie*, 1832, 10 S. 413.

129. Road Trustees — Clerk — Title to Sue.—The clerk of a committee of district road trustees *held* entitled to pursue a cautioner for the balance due by the treasurer, having received special authority for that purpose by a minute of the trustees; but *question* whether, without such authority, he would have been entitled so to sue. *Creighton* v. *Rankin*, 1838, 16 S. 447; 13 Fac. 381. *Affirmed* as to clerk, independent of the special authority, and doubted if such authority *per se* would have been good. 1840, 1 Robin. 99.

130. Road Trustees—Clerk—Acting as Treasurer—Penalty.—A party subjected in the penalty imposed by the General Road Act for acting both as clerk and treasurer, though nominally holding only one of the offices. *Muckarsie* v. *Walker*, 1831, 9 S. 804; 6 Fac. 517.

131. Road Trustees—Clerk—Expense of Repairs—Bill Granted by Trustees—Power to Borrow.—Statute labour trustees granted a bill to their clerk for money expended by him in repairing roads prior to his appointment. *Held* that the transaction did not fall within a statutory prohibition (47 Geo. III. c 45) against borrowing, and defence *repelled* that such a bill was voidable as a document of debt against the trustees in their official capacity. *Wink* v. *Hamilton*, 1861, 23 D. 535; 33 J. 270.

132. Road Trustees — Clerk — Liability for Expenses.—*Held* that a clerk to road trustees was not personally liable in the expenses incurred by those who successfully opposed an application to the justices by the road trustees to shut up a road. *Love* v. *Lang*, 1869, 7 M. 448; 41 J. 239.

133. Road Trustees—Land Taken for Road—Compensation—Function of Jury.—A jury empanelled under a Road Act to assess the value of land taken from a party for the purposes of the Act, and the damages, having, in place of doing so, returned a verdict finding him not entitled to any, in respect of his property being materially benefited instead of injured, *held* that they had exceeded their powers, and therefore the verdict and consequent judgment set aside, although declared to be final. *Fraser* v. *Barnet*, 1806, Hume 256.

134. Road Trustees — Land Taken — Damages — Mode of Assessment. — Road trustees having, without observing the provisions of the statute under which they acted, taken possession of ground in 1802, *held* that they were liable in damages; and that having departed from the Act they could not claim that the damages fell to be assessed by the jurisdiction created by the Act; and that the damages fell to be estimated according to the report of a valuation in 1807, at the then value of the ground, although it was alleged that in 1802 the value was not so great. *Burnet* v. *Knowles*, 1815, 3 Dow 280.

135. Road Trustees — Land Taken—Compensation.—Road trustees having made a new road in the line of an old one (as to the breadth of which there was no evidence), *held* that, in remunerating the proprietor, they were entitled to assume the old road to have been twenty feet broad, and estimate the value accordingly, and *held* liable to interest from the date of occupation. *Wallace* v. *Oswald*, 1825, 3 S. 525.

136. Road Trustees—Land Taken for Road—Owner's Right to Compensation—Interdict Incompetent.—A party whose land had been taken by road trustees without compensation, and formed into a public road, which was used as such for twenty-four years, *held* not entitled by suspension and interdict to prevent them from erecting a toll on it, reserving to him to establish, in an action of declarator, his right to resume the ground, or to claim its value and the toll-duties levied. *Dickson* v. *Lanark & Dumbarton Road Trs.*, 1848, 11 D. 115; 21 J. 17.

137. Road Trustees—Land Taken for Road—Compensation—Delay.—A in 1853 took land from B for the formation of a new road, on an agreement to pay the compensation that might be found due by the road trustees. The road was constructed, but through the delay of A the compensation was not ascer-

tained till 1867. In 1867 the road trustees took over the new road, and paid £50 to B for the ground taken. B claimed interest from A from 1853, and an annual sum for failure to fence the ground. Claim *sustained*. *Donald* v. *Nicol*, 1867, 5 S. L. R. 97.

138. Road Trustees—Liability—Repayment of Advance.—Statute labour trustees having bound themselves to repay an advance as soon after the lapse of five years as funds would admit of it, *held* that they were bound to pay the claim, although without trust funds, if they might have been in funds, had they not incurred expenses which they were not obliged to do, and paid debts not preferable to this claim. *Aitken* v. *Reid*, 1829, 7 S. 390.

139. Road Trustees—Liability—Loan—Statute.—A party who lends money to road trustees is entitled to rely on the terms of the bond granted to him, and of the statute under which they act; and he is not affected by previous resolutions of the trustees which were not communicated to him. *Threshie* v. *Hyslop*, 1833, 12 S. 105; 9 Fac. 94.

If road trustees act beyond the powers of a statute they are not within its protection. *Grant* v. *Gordon*, 1833, 12 S. 167; 9 Fac. 116.

140. Shutting up Road—Bargain by Road Trustees—Property in solum.—Where, by a transaction with road trustees and a private party, a road was shut up, *held* that the road had not been shut up by any competent authority, and that the *solum* was not legally vested in the private party. *Walker* v. *Weir*, 1817, 6 Pat. 281.

141. Shutting up Road—Power of Road Trustees.—*Held* incompetent for a committee appointed by a district meeting of road trustees to shut up a road, the statute under which they acted having been repealed after their appointment, and a new one passed authorising roads to be shut up only by order of a general meeting. *Lockhart* v. *M'Neill*, 1821, 1 S. 205.

142. Shutting up Road—Road Trustees' Violation of Agreement.—A party is not entitled *brevi manu* to shut up a road, in respect (as he alleged) of a violation by the road trustees of an agreement under which it had been made. *Graham* v. *Sharpe*, 1823, 2 S. 540.

143. Shutting up Road—Power of Road Trustees.—On a verdict that a road was both a servitude and a public road, trustees *held* entitled to shut it up as being a public road. *Smiths* v. *Knowles*, 1825, 3 S. 652.

144. Shutting up Road—Decree of Quarter Sessions—Reduction.—An *ex facie* regular decree of the quarter sessions ordering a road to be shut up, must be set aside before the party against whom that decree has been pronounced is entitled to insist in a declarator of right to the road. *Stafford* v. *Mackenzie*, 1827, 5 S. 839.

145. Shutting up Road—Title to Sue—Householders.—An action of reduction of a decree of the justices of the peace ordering a road to be shut up, and of declarator of right to it, was brought, among others, by several parties describing themselves as servants. *Held* that, unless they were householders, they had no title to pursue. *Tait* v. *Lauderdale*, 1827, 5 S. 330.

146. Shutting up Road.—Circumstances where a road *held* to be a servitude road and therefore might not be closed by the Commissioners of Supply. *Hart* v. *Carruthers*, 1830, 8 S. 356.

147. Shutting up Road—Reduction of Order by Trustees.—A reduction of an order by road trustees for shutting up a road, which had not been advertised so as in terms of their road statute to make it effectual, at the instance of a party interdicted by the sheriff from using the road (but whose interdict was recalled), *held* premature, as by the recall of the interdict he was entitled to use the road, and to resist execution of the order by application to the sheriff for protection. *Murray* v. *Stewart*, 1839, 2 D. 12.

148. Shutting up Road—Notice—Statutory Provisions.—In a question as to whether a public road had been shut up, *held*, in the absence of direct proof to that effect, that there was no legal presumption that the statutory notices had been given, or the road duly shut up in terms of the statute. *Forbes* v. *Morison*, 1851, 14 D. 134; 24 J. 52; 1 Stuart 100.

149. Shutting up Road—Local Act—Interdict.—Construction of a local Road Act, under which, *held* that the road had been duly shut up by the trustees in the exercise of their statutory powers; and interdict *granted* against the continued use of the road, certain acts of the respondents in removing obstructions being held illegal, and incapable of being pleaded as constituting possession. *Glasgow & Carlisle Road Trs.* v. *Tennant*, 1854, 16 D. 521; 26 J. 216.

150. Shutting up Road—Local Act—Footpath.—*Held*, on a construction of the word "roads," as used in a local Act, giving the commissioners of supply power "to shut up superfluous or useless roads," that it did not include public footpaths on which statute labour or conversion money has never been applied. *Pollock* v. *Thomson*, 1858, 21 D. 173; 31 J. 101.

151. Shutting up Road—Footpath—Local Act.—*Question* whether s. 21 of the Edinburgh County Road Act, 1803, gave the road trustees power to shut up a public footpath, and whether, assuming such a power was given by s. 22, the necessary intimation and procedure had been given and followed. *Murray* v. *Arbuthnot*, 1870, 9 M. 198; 43 J. 98.

152. Statute Labour—Liability of Apprentices.—The justices of peace have a discretionary power as to the description of persons to be called on to perform statute labour on the roads; and as there is no special exemption, apprentices to artificers in a town may be required to perform this duty.

Mackay v. *Justices of Peace of Ross*, 27 Nov. 1807, F. C.; M. "Apprentice" App. No. 2.

153. Statute Labour — Liability of Collector.—Circumstances in which a collector of statute labour money *held* responsible for the proceedings of an officer employed under him. *Cleland* v. *Weir*, 1835, 13 S. 1143; 10 Fac. 101.

154. Statute Labour—Commutation—Suspending the Charge. — Circumstances in which the court *held* a bill of suspension of diligence for levying an assessment of statute labour conversion money an incompetent proceeding; and accordingly *refused* the bill. *Ewing* v. *Stirlingshire Road Trs.*, 1837, 15 S. 419; 12 Fac. 363.

155. Statute Labour — Liability. — *Held*, on a construction of the Act for the regulation of statute labour in the county of Linlithgow, that carters who were both occupiers of heritable subjects of the yearly value of £2, and owners of horses and carts not used for the purposes of husbandry, are liable to perform statute service, or pay the corresponding conversion money. *Meikle* v. *Walker*, 1858, 20 D. 965; 30 J. 577.

156. Statute Labour—Liability—Water-Works.—*Held* that the Glasgow Water-Works Commissioners were liable to assessment for statute labour roads on all land, buildings, and other heritable subjects belonging to or possessed by them, including the ground in the streets, etc., used and occupied by their aqueducts, works, and water pipes. *Barony Parish Road Trs.* v. *Glasgow Water-Works Commrs.*, 1868, 7 M. 106; 41 J. 66.

157. Statute Labour—Canal Company—Statutory Exemption.—*Held*, on a special Act, that a canal company was exempt from statute labour assessment in respect of lands purchased by the company for the purposes of the navigation of the canal. *Barony Parish Road Trs.* v. *Caledonian Rly. Co.*, 1868, 7 M. 197; 41 J. 127.

158. Street — Crossings — Right of Adjacent Property Owner. — A party having a property immediately adjacent to Leith Walk, *held* entitled to form crossings over the footpath; but not compellable to do so in a more expensive form than others originally made by the trustees across other parts of the footpath. *Leith Walk Trs.* v. *Home*, 1828, 7 S. 39.

159. Street—Lane Made by Proprietor—Police and Improvement Act, 1850. — Circumstances in which *held* that a lane in a burgh, which had been originally made by a proprietor for the use of his feuars, was to be regarded as a "street" in the sense of the Police and Improvement Act, 1850 (13 and 14 Vict. c. 33), and as subject to the jurisdiction of the commissioners of police. *Cargill* v. *Mags. of Portobello*, 1863, 2 M. 244; 36 J. 126.

160. Street—Level—Altering Level of Pavement without Authority.—A party who, without proper authority, lifted part of the foot pavement in Princes Street, Edinburgh, opposite to his property, and formed it on a different level, *ordained* to restore it to its original state, failing which, warrant granted to the procurator-fiscal to do so at his expense. *Hunter* v. *Turnbull*, 1824, 2 S. 786.

161. Street — Level — Compensation — Local Act.—A local Act of Parliament authorised certain improvements in the city of Edinburgh, and *inter alia* to level a street, by an operation in which the pavement was lowered in front of one of the shops. *Held* that a claim for damages by the proprietor of the shop was competent against the commissioners, although there was no provision for compensation in such a case. *Strachan* v. *Edinburgh Improvement Commrs.*, 1837, 15 S. 637; 12 Fac. 602.

162. Street — Obstruction — Projecting Building—Removal.—*Held* that the trustees under a local Act had proceeded regularly in pulling down and removing a new erection by the side of a thoroughfare, which projected several feet beyond the foundation of the previous building at that place. Though the party alleged that the whole area, covered by the new building, was his private property, yet the trustees were not bound to delay until a declarator of the right of property should be discussed. *Wilson* v. *Wilson*, 1832, 11 S. 178.

163. Street—Obstruction—Public Wells—Powers of Magistrates.—A purchaser of a property in a town *held* not entitled to insist on the removal of a well erected in the street by the magistrates for the public convenience, except in so far as it encroached on his property, it having stood without objection for thirty-five years. *Allan* v. *Swan*, 1827, 5 S. 261.

The trustees on a road, the line of which passed through the principal street of a burgh, *held* not entitled to close up a public well encroaching on the carriage-way of the street, from which the inhabitants of the neighbouring houses had been in use to take water by a pump; but the pump ordered to be so placed as not to encroach on the carriage-way. *Maclean* v. *Donald*, 1840, 2 D. 528.

164. Street — Paving — Powers of Police Commissioners.—The Perth Local Police Act (2 Vict. c. 43) empowers the police commissioners to appoint committees "for carrying the purposes of the Act into execution," and for that purpose to delegate their powers to them. *Held*, upon a construction of the statute, that a paving committee had no power to order proprietors to repave a street, but only to see to the execution of decrees pronounced by the commissioners. *Thomas* v. *Elgin*, 1856, 18 D. 1204; 28 J. 590.

165. Street—Paving—Powers of Police Commissioners — Sheriff's Jurisdiction.—Terms of a local Act *held* to authorise the magistrates of a burgh to compel proprietors of buildings in a street to form a foot pavement in front thereof. *Carstairs* v. *Kilmarnock Police Commrs.*, 1867, 3 S. L. R. 262.

Held that, under the Edinburgh Police Act, it is competent for the sheriff, on an application by the superintendent of police for an order on a party to form a foot-pavement opposite to his property, to decide whether it is necessary that it be constructed. *Stuart* v. *Spottiswoode*, 1842, 4 D. 1463; 14 J. 548.

166. Street — Paving — Footpath — The Crown.—*Held* that the Crown, not having expressly been made liable by a local Act, was exempt from the burden of maintaining a foot pavement opposite its property. *Lord Advocate & Barbour* v. *Lang*, 1866, 5 M. 84; 39 J. 49.

167. Street — Possession of Ground Forming Street. — Parties who had the management of the streets in a town, *held* to have a title to acquire a possessory right to ground which had been used as a public street. *Richmond* v. *Inglis*, 1842, 4 D. 769.

168. Street — Private — Paving — Improvement — Assessment. — *Held* that the paving of a private street by the commissioners of police was an improvement for which they were entitled to charge "private improvement assessment," and of which they were bound to give notice under the 397th section of the Act. *Campbell* v. *Leith Police Commrs.*, 1870, 8 M. (H. L.) 31; 42 J. 310; L. R. 2 Sc. App. 1.

169. Street — Private — Paving — Local Act.—By the Edinburgh Roads and Streets Act the expense of making up, constructing, and causewaying private streets is laid upon "the owners of lands and heritages according and in proportion to the lineal frontage of the same," the proportion so leviable from the owners of buildings being "assessed on them as among themselves, according and in proportion to the annual rent or value of such buildings." *Held* that the owners of lands and heritages on one side of a street, which consisted of a single row of villas, the other side not being available for building purposes, were liable for the whole expense of making up, constructing, and causewaying such street. *Duncan* v. *Cousin, etc.*, 1872, 10 M. 824; 44 J. 468.

170. Street—Private—Paving.—Circumstances in which *held* that a piece of ground within burgh, intended for the continuation of a street but never thrown open as a public thoroughfare, having been paved by the Police Commissioners, was a private street. *Millar's Trs.* v. *Leith Police Commrs.*, 1873, 11 M. 932; 45 J. 578.

171. Street—Property in solum—Right to Lay Gas-Pipes.—The superior of a village, of which the *solum* belonged to him, granted building feu-contracts, declaring the boundaries to be the streets. *Held* that although the streets had been public ways for more than forty years, and under the administration of the road trustees, the superior was still proprietor of the *solum* of the streets, and as such entitled to prevent the vassals from opening up and laying down gas-pipes in the streets. *Galbreath* v. *Armour*, 1845, 4 Bell 374.

172. Street—Pipes under Streets—Gas Concession.—*Held* that the circumstance of a gas company having obtained a statute, with the concurrence of the magistrates, to supply a burgh with gas, implied no exclusive privilege to carry their pipes through the streets, but that the magistrates could permit a new company to do so. *Dundee Gas Co.* v. *Mags. of Dundee*, 1847, 9 D. 1084; 19 J. 457.

173. Toll — Abolition within Burgh — Assessment in Lieu—Exemptions.—By a local Road Act, the trustees were required to remove their tollbars within the burgh, and an assessment was leviable from persons whose houses were situated within the boundary. A person whose premises were situated beyond the boundary but within 100 yards of a tollbar, as removed, claimed exemption from tolls, on the ground that in passing through the bar he did not travel 100 yards along a road for the use of which toll was leviable, in terms of the exemption in the General Turnpike Act to this effect. *Held* (1) that the removal of the tollbars was merely a privilege conferred upon the inhabitants within the boundary, not changing the character of the roads within the boundary as roads for the use of which toll was leviable; and therefore (2) that the exemption was inapplicable. *Tytler* v. *Reid & Cox*, 1864, 2 M. 1256; 36 J. 629.

174. Toll—Action by Tacksman—Limitation of Time.—The tacksman of toll-dues raised an action against the road trustees, concluding partly for repetition of rent paid, and partly for damages, in respect of alleged non-implement of obligations undertaken by the trustees in the articles of roup under which he had become tacksman. *Held* that the stat. 1 and 2 Will. IV. c. 43, s. 118, did not reach such action, and that the right to insist was not cut off, although more than six months had elapsed from the date of the wrong. *Sommerville* v. *Gordon*, 1842, 5 D. 383; 15 J. 171.

175. Toll—Agreement by Tollkeeper to take Reduced Toll — Not Enforceable.—A tollkeeper is not bound by an agreement to accept less than full toll (this being contrary to the Road Act), but may charge full tolls, though the party with whom it was made alleged he had a choice of two roads, and had been induced to use one for a year, on the faith of the agreement. *Balfour* v. *Sharp*, 1833, 11 S. 784.

176. Toll—Assignation of Toll-Duties—Implied Liability for Upkeep.—An assignation of toll-duties made by road trustees in security of money borrowed, is under the implied condition that the expenses of keeping the road in repair shall be first defrayed. *Guild* v. *Scott*, 21 Dec. 1809, F. C.

177. Toll on Bridge—Condition—Local Act.—A statute empowered a proprietor to erect a bridge and to collect pontage for a certain time, provided he lodged accounts

thereof with the justices and commissioners of supply annually. *Held* that the clause as to the lodging of the accounts was not an imperative enactment, but was merely directory, and that the failure to comply with it did not infer a forfeiture of the right to levy pontage-duties. *Campbell* v. *D. of Athole*, 1869, 8 M. 308 ; 42 J. 142.

178. Toll on Bridge—Charters—Usage.—A right to levy bridge customs under ancient charters, and an Act of the Scottish Parliament confirming the same, "as it has been in use to be exacted," *held* to be qualified by usage, and restricted by prescription. *Maxwell* v. *Provost, etc., of Dumfries*, 1866, 4 M. 764.

179. Toll on Bridge — Exemption — Carrier's Cart.—A cart belonging to a carrier and itinerant dealer in groceries, and in which, besides his own goods, he carries goods and parcels belonging to others for money, is to be considered as let out for hire, and therefore not exempted from pontage on passing a bridge a second time within the same day. *Armstrong* v. *Stobbs*, 1830, 8 S. 980 ; 5 Fac. 802.

180. Toll on Bridge—Exemptions—Interpretation. — Under the Glasgow Bridge Act, authorising tolls to be levied on carriages, and declaring those returning and repassing the same day to be exempt except in case they should "pass the New Bridge with a new loading a second time, or more times in the same day," *held* that it was not a "new loading" in the sense of the Act, where brewers' carts carrying ale and spirits in casks and bottles from a cellar to a retail shop, returned the same day with a different set of empty casks and bottles, which had been taken full a day or two before. *Hossack & Co.* v. *Gardner*, 1839, 2 D. 129 ; 15 Fac. 141.

181. Toll on Bridge—Exemption to Churchgoers. — *Held* (1) that the exemption from toll in favour of persons going to church contained in the General Turnpike Act applied to pontage exigible at a bridge constructed under a local Turnpike Act, notwithstanding a provision in the local Act that the pontage should be liable to none of the exemptions that applied to ordinary tolls ; (2) that hired horses passing between their stables and the house of a person whom they were going to take to church, were exempt from pontage. *Spottiswoode* v. *Laing*, 1855, 18 D. 302 ; 28 J. 126.

182. Toll — Check-Bars — Interdict.—Interdict *granted* against the trustees of one sub-district of roads, from erecting three check-bars which would intercept and injure the tolls of another sub-district. *Moncrieffe* v. *Henderson*, 1836, 14 S. 1131.

183. Toll — Claims of Creditors — Road Trusts Conjoined. — Circumstances under which creditors under a statute applicable to one road, and creditors under another relative to another road, *held*, under a statute conjoining the trusts of both roads, to be joint creditors on both roads, and so to be ranked *pari passu* on the tolls. *Graham* v. *Cambuslang Road Trs.*, 1852 1 Stuart 324.

184. Toll—Evasion—Petition and Complaint—Title to Sue.—A justice of peace depute clerk, who was also clerk to the road trustees of his district, raised, in the latter capacity, an action before the justices of the peace of his district against two parties, accusing them of evasion of toll, and concluding for penalties ; but one of the parties only was cited, and decree pronounced against him. *Held*, in a petition and complaint presented by both these parties against the clerk, that the party not cited had no title to pursue, but that the other had. *MacFarlane* v. *A. B.*, 1830, 4 W. & S. 123. Affg. 5 S. 537.

185. Toll — Evasion — Making Private Road.—A party purchased ground, and made a road to enable him to pass from a turnpike road at the extremity of one trust, to a parish road, without passing through a tollbar within the next trust. *Held* an evasion of that toll, not protected by the exception in the General Road Act in favour of the proprietors passing along their own private roads. *Merry* v. *Dallas*, 1828, 7 S. 90 ; 4 Fac. 82.

186. Toll — Evasion — Use of Canal Tow-Path—Jurisdiction of Court of Session.—Proprietors of a canal may not use the towing-path as a road for carriages or carts conveying passengers who had come by their boats, so as to avoid a turnpike road on which they must have paid toll, the Road Act prohibiting the use of any private passage or way whereby the payment of toll might be avoided. *Mitchell* v. *Morrison*, 1827, 5 S. 909.

Remitted by the House of Lords to inquire whether, where a party accused of evading a tollbar has been assoilzied by the justices of the peace from a demand for statutory penalties, the Court of Session has jurisdiction in an advocation to find him guilty and award the penalties. 1830, 4 W. & S. 162. *Found* in the negative, 1832, 10 S. 230 ; 7 Fac. 180.

187. Toll—Evasion by Erecting Railway — Acquiescence by Road Trustees. — A company who held, on different leases, the coal-fields on two different estates, through which a turnpike road passed, formed a railway in 1806 through both these estates to a neighbouring harbour,—the railway running parallel to the turnpike road on its west side, and being for about a quarter of a mile in immediate contact with it. In 1824 the company, by means of a slip of railway laid across the road, carried their railway into the part of their coal-field on the east of the road. By using this railway they avoided a tollbar erected between their coal-field and the harbour. No objection was made by the road trustees till 1845. *Held* that they were barred by acquiescence from objecting to the use of the railway. *Moir* v. *Alloa Coal Co.*, 1849, 12 D. 77 ; 21 J. 450.

188. Toll — Evasion — Making Private Road.—The construction of a private road to avoid a part of a public road, which from its

steepness was impassable for carts, is not an evasion of the tolls. *Renfrewshire Road Trs.* v. *Reid*, 1861, 23 D. 539 ; 33 J. 272.

189. Toll—Evidence of Duty—Paying Carriage—Tollbooks with Oath of Tollkeeper.—Tollbooks made up daily, of the number and weight of carts passing the bar, from jottings taken as each cart passed, *held*, with the oath of the tollkeeper in supplement, to prove the amount of carriage on which toll-dues had been incurred during the year. *Balfour* v. *Sharp*, 1833, 11 S. 784.

190. Toll—Exemption—Construction of Statute.—An exemption from payment of toll in a local Road Act is not derogated from or repealed by a general exemption of a more limited nature introduced into the subsequent General Road Act, and not inconsistent with the exemption in the local Act. *M'Callum* v. *Spears*, 1827, 5 S. 541.

191. Toll — Exemption — Jurisdiction — Sheriff. — The question, what carriages are, under the General Road Act, entitled to exemption, is a matter committed to the sheriff by the statute, and his judgment thereon is final and conclusive. *Simpson* v. *Harley*, 1830, 8 S. 977 ; 5 Fac. 803.

192. Toll — Exemption — Statute. — Circumstances in which an exemption from tolls granted by the turnpike road trustees was abolished by Act of Parliament, and was not included in the "contracts and agreements" reserved by the Act. *Henderson* v. *Williamson*, 1854, 16 D. 982 ; 26 J. 515.

193. Tolls—Exemption of Mail Coaches.—The proprietors of the Defiance coach, running daily between Aberdeen and Inverness, and carrying passengers, contracted to convey the mails from Aberdeen to Inverness. This exempted them from toll-duties for that journey ; but *held* that the exemption did not apply to the return journey from Inverness to Aberdeen. *Commrs. of Highland Roads, etc.* v. *Machray, Croall, & Co.*, 1858, 20 D. 1165 ; 30 J. 699.

194. Toll — Exemption — Post Office. — Under a Post Office Act, 1837, which provides exemption from tolls for two-wheeled carriages bearing only the mail and the driver, *held* that the exemption did not apply to a carriage bearing passengers also, although at the time of passing the toll it carried nothing but mails and drivers. *Atholl* v. *Postmaster-General*, 1870, 8 S. L. R. 66.

195. Toll—Liability—Turnpike Road.—Part of an old parish road, intersected by a new turnpike road, was assumed and kept in repair by the trustees of the turnpike road, in virtue of their powers under a local Act. *Held* to be turnpike, to the effect that carriages, etc., going 100 yards along it, and merely crossing the turnpike road, may be subjected in toll, notwithstanding the clause of exemption in the General Road Act, in the same way as if they had travelled along the turnpike road itself. *Dixon* v. *Fleming*, 1826, 4 S. 759.

196. Toll — Omnibuses — Tacksman's Agreement with Trustees. — A tacksman obtained right to tolls under articles of roup, by which the road trustees reserved right to the tolls payable for omnibuses carrying passengers, and to make compositions for these tolls, which compositions they assigned to the tacksman. Subsequently, the trustees having fixed the tolls to be paid by an omnibus for a period of several months previous, during which it had run at a modified rate of toll, *held*, in an action by the tacksman against the proprietors of the omnibus for the full rate of tolls, that the 53rd section of the Act 1 and 2 Will. IV. c. 43 did not make it incompetent for the trustees to do this, and that the tacksman was not entitled to recover the full tolls. *Macdonald* v. *Philips & Barr*, 1847, 9 D. 1300 ; 19 J. 558.

197. Toll — Penalties — Title to Sue. — *Held*, under the provisions of the Stirlingshire Road Act, that a tollkeeper had no title to pursue for penalties incurred by evading the tollbar, although the trustees let to him "the whole tolls and duties and penalties for evading the same." *Mitchell* v. *Morrison*, 1839, 1 D. 1115 ; 14 Fac. 1151.

198. Toll—Powers of Road Trustees—Local Act — Tollhouses. — Under a local Road Act authorising trustees to purchase ground for the erection of tollhouses, and if the proprietor should refuse to sell, empowering the quarter sessions to compel him to do so, *found* that the trustees were not entitled to build a tollhouse before the purchase was made. *Crawfurd* v. *Martin*, 1822, 1 S. 414.

Held that a road was included in a County Road Act and subject to the powers conferred as to the erection of tollbars. *Threshie* v. *Gordon*, 1841, 3 D. 450 ; 16 Fac. 443.

199. Toll — Rates Determined by Trustees—Action by Creditor of Trust.—In an action by a creditor on a turnpike road trust, concluding that the trustees should be ordained to raise the tolls to the maximum rate authorised by their statute, in order that a surplus fund might be obtained from which the pursuer's debt might be liquidated, *held* that the propriety of raising or diminishing the tolls was a matter entirely within the discretion of the trustees, and that the court would not interfere unless a case of gross abuse were made out. *Farquharson* v. *Burnett*, 1851, 13 D. 586 ; 23 J. 269.

200. Toll—Rent of Tollbar—Attached by Subscriber.—An original subscriber to a road is not entitled to attach the rents of tollbars while there is no surplus, after applying them to the purposes provided by the Acts of Parliament, and the payment of the interest of money borrowed on the security of the tolls. *Fairie* v. *Muir's Exrs.*, 1827, 5 S. 878.

201. Toll—Revenue—Ranking of Creditors.—Special case, involving *inter alia* the order in which a certain road trustee should be ranked, in competition with certain other

road trustees, on the revenue of the tolls of a district of roads, in respect of disbursement by him. *Ferrier* v. *Hay*, 1835, 13 S. 489.

202. Toll—Seizure of Horse.—Circumstances in which *held* that a tollman had not "seized," in the sense of the General Turnpike Act, the horse of a man who drove past the tollbar without paying. *Roberts* v. *Wilson*, 1869, 6 S. L. R. 269.

203. Toll—Width of Cart Wheels—Title to Sue. — *Questions*, whether the tacksman of the tolls on a road is entitled to exact as much toll on carts with broad as with narrow wheels; and whether the clerk of the road trustees has a title to interdict him from doing so. *Dykes* v. *Hill*, 1827, 6 S. 123.

204. Tollbar—Erection without Authority—Jurisdiction.—Under the General Road Act, which provides, that if trustees "shall erect" a tollbar without authority in any Act of Parliament, it shall be lawful to complain to the sheriff or justices of the peace, who shall be final, it is incompetent to apply to the Court of Session for interdict against the erection of such bar, and equally incompetent, though the bar have not been erected, but merely a warrant granted to erect it. *Wilson* v. *Leith Walk Trs.*, 1831, 9 S. 725.

205. Tollbar—Removal—Local Statutes.—Under a temporary Road Act allowing certain parties, by payment of a sum of money, to contract for the removal of a tollbar, the money having been paid and the bar removed at the commencement of the period of the Act, *held* that this contract was not limited to the endurance of the statute, but was permanent and obligatory on the trustees under subsequent Acts, though containing no provision for renewing it. *Donald* v. *Mags. of Anderston*, 1832, 11 S. 119.

206. Tollbar—Removal—Judgment of Sheriff—Advocation.—An application under 4 Geo. IV. c. 49, for the removal of a tollbar, and to interdict the levying of toll there, having been presented to the sheriff, within six months after a table of rates was put up, and posts with a chain thrown across the road, and the sheriff having pronounced judgment in terms thereof, an advocation *held* incompetent. *Lang* v. *Gourlay & Co.*, 1834, 12 S. 719; 9 Fac. 371.

207. Tollbar — Rent — Retention. — A tacksman of tolls is not entitled to retain rent on the allegation that, by the operations of the road trustees, a part of the road was rendered impassable; and bill of suspension of a charge therefore *refused* to be passed, even on consignation. *Hill* v. *Gordon*, 1834, 13 S. 88.

208. Tollbar—Road Closed by Trustees—Damages to Tacksman.—In an action of damages by the tacksman of a tollbar, against the road trustees, for wrongfully shutting up one of four roads, after letting the toll-duties thereon to him, verdict for the pursuer, and damages assessed at £30. *Murray* v. *Douglas*, 1837, 15 S. 890.

209. Tollbar — Road Trustees' Rights within Burgh.—Road trustees having right to manage a road from a certain point to "the city of Glasgow," *held* entitled to maintain tollbars within the bounds of the royalty, provided they were beyond the buildings constituting the actual city. *Aitken* v. *Trs. of Shotts & Airdrie Road*, 1826, 5 S. 135.

210. Tollbar — Tacksman — Eviction—Action against Trustees.—A party took a lease of a tollbar advertised to be let by the general road trustees of a county, but of which the lease was granted by those of the district in which the tollbar was placed; and the tolls were evicted by the erection of checkbars in another district. *Held* competent for the tacksman to insist in an action against the general trustees and the district trustees, by whom the lease was granted, for reparation for the loss suffered by the eviction. *Fairlie* v. *Gibson*, 1829, 7 S. 637.

211. Tollbar — Tacksman — Table of Rates.—A tacksman of a tollbar, who had never complained of the omission to put up a table of rates, and had never asked for a copy, *held* not entitled, at the end of the year, to refuse payment of his rent on account of the want of it. *Parlane* v. *Hamilton*, 1828, 6 S. 977.

212. Tollbar — Within Five Miles — Exemptions.—By a Road Act passed in 1819, it was provided that if toll-gates were erected at less distance from each other than five miles, a party who paid toll at one should not in the same day pay at any other toll on the same road, within five miles of that at which he had paid, excepting where gates had been already erected within five miles, at which tolls were to continue to be collected. One of the gates had been erected prior to 1819; but subsequently an alteration had been made in its position of from 300 to 400 yards. *Held* (1) that this gate was not to be considered as the same with the one erected prior to 1819; and (2) in respect that there were cross roads which joined the main road in the intervening space between the new and the old site, and the shifting of the position altered the levy of toll as applicable to these roads, that this gate did not fall within the exception in the above provision. *Cambuslang & Muirkirk Road Trs.* v. *Graham*, 1846, 8 D. 744.

213. Upkeep—Duty of Road Trustees—Title to Sue.—An action concluding against road trustees, to put a road between Dundee and Ferryden in repair, or to remove the tollbars, *sustained* at the instance of the magistrates and inhabitants of Dundee, Arbroath, and Montrose, and farmers in the neighbourhood. *Guild* v. *Scott*, 21 Dec. 1809, F. C.

214. Upkeep — Statutory Provisions. — The provisions as to repairing, etc., the turnpike roads contained in certain local Turnpike Acts for the county of Edinburgh, were

extended by another Turnpike Act to the great and cross roads within the tollbars round the city of Edinburgh. *Held* that, after the passing of the General Road Act (4 Geo. IV. c. 49), these previous Acts must be read as if the provisions in the General Act were engrossed in them, with reference to the great and cross roads within the bars, equally as to regular turnpike roads. *Menzies* v. *Duff*, 1827, 5 S. 884; 1828, 6 S. 845; 3 Fac. 904.

215. Upkeep — Road within Burgh — Liability of Magistrates.—A public road, described in the local Road Act as "the great road from Dumfries by Annan to the river Sark," entered the High Street of the burgh of Annan at the one end, and issued again at the other. *Held*, in a question with the road trustees, that the magistrates were bound to maintain the street in repair out of the funds of the burgh. *Threshie* v. *Mags. of Annan*, 1845, 8 D. 276; 18 J. 124.

216. Upkeep—Complaint by Proprietor—Procedure.—A petition and complaint was presented by a proprietor interested, setting forth that a road was badly kept, and almost impassable. Form of inquiry directed by the court. *Aiton* v. *Aberdeen County Road Trs.*, 1872, 9 S. L. R. 618.

217. Width of Street—Local Act.—A clause in the General Road Act prohibiting buildings within twenty-five feet of the centre of the road, *held* not to repeal or supersede a prohibition in a local Act against buildings within thirty feet from the centre. *Baillie* v. *Mackenzie*, 1824, 3 S. 217; 1826, 4 S. 834.

218. Width of Street — Building Restriction—Title to Enforce.—Under a Police Act, allowing the commissioners of police to line buildings in streets for the benefit of the public, neighbouring proprietors are not entitled to insist that a party who has pulled down his house shall, in erecting a new one, line back his wall, so as to widen the street. *Dougall* v. *Hutchison*, 1827, 5 S. 224.

219. Width of Street — Building Restriction. — The Police Act for a burgh provided that when any building in a street which projected beyond the adjacent houses was taken down in order to be rebuilt, the dean of guild court might, on application by the procurator-fiscal, order the new building to be erected in a line with those adjacent. After warrant granted by that court to take down a house and rebuild it, and part had been taken down, the procurator-fiscal applied for interdict to have it rebuilt in a line with adjacent houses beyond which it projected. The house was separated from those adjacent by a lane, and was so situated at the junction of two streets, that if it were lined back as proposed, part of the front to the other street would be taken away to the extent of twenty feet. Under these circumstances the court *refused* the interdict. *Burnet* v. *Bush*, 1849, 12 D. 44; 21 J. 600.

220. Width of Street—Projecting Buildings—Local Act.—Under the Aberdeen Police and Water-Works Act, 1862, s. 338, the commissioners *held* entitled, within reasonable limits, to allow proprietors to build beyond the limits of their property on the *solum* of the street. *Michie's Trs.* v. *Grant, etc.*, 1872, 11 M. 51; 45 J. 39.

221. Width of Street — Removal of House — Powers of Commissioners. — A police statute *held* not to authorise commissioners of police to cause a house to be removed for the purpose of widening the entrance to a street. *Newall* v. *Dumfries Commrs. of Police*, 1830, 4 W. & S. 137. Revg. 6 S. 884.

222. Width of Road—Local Act.—A clause in a local Road Act prohibiting the erection within twenty feet of the centre of the road, of "any dwelling-house or other building," *held* not to apply to an ordinary stone and lime wall erected as a fence. *Haig* v. *Henderson*, 1830, 8 S. 912.

223. Width of Road—Application to Sheriff—Statutory Procedure.—An application to the sheriff to authorise road trustees to make an operation, which implied a widening of the road beyond the legal standard, *dismissed* as incompetent, in respect the mode of procedure pointed out by the Road Act had not been complied with. *Bauchope* v. *Cox*, 1832, 11 S. 175.

224. Width of Road—Turnpike—Users' Title to Insist on Statutory Width—Acquiescence.—Road trustees, immediately after the passing of a local Act, by a resolution "assumed and rendered turnpike, in terms of the powers contained in the Act of Parliament," the roads mentioned in the Act, and erected tollbars, at which they levied tolls; but they did not make the roads of the breadth of twenty feet, as provided by the General Turnpike Act. *Held* that parties who for six years made use of the roads were barred by acquiescence from objecting that the trustees had not done so, could not do so, and that they were not entitled to levy tolls. *Macintosh* v. *Stirlingshire Road Trs.*, 1849, 12 D. 85; 22 J. 14.

225. Width of Road — Statutory Provision.—A statutory provision empowering trustees to make a road of a certain width, being for the public advantage, is imperative, and not merely permissive. *Walkinshaw* v. *Orr*, 1860, 22 D. 627; 32 J. 237.

226. Width of Road—Petition and Complaint—Repair—Flooding.—A district Road Act described a road as "the road from K. to S. Bridge, and from thence to M. Bridge." In a petition and complaint, under the General Turnpike Act, averring that the road was not of the legal width, and was not kept in repair, being annually flooded, *held* that an alteration of the level, which would be necessary to prevent flooding, did not fall within the terms "repair" or "maintenance"; and that the liability of the trustees to widen the "bridges" was not competently raised in the petition. *Question*, whether, under the de-

scription of the road in the Act of Parliament, the bridges were included. *Reid* v. *Knox*, 1861, 23 D. 1095; 33 J. 552.

227. Width of Road—Statutory Minimum—Application to old Buildings.—A local Act, s. 31, enacted that "no person shall make or erect any house or other building within 20 feet of the centre of any road." *Held* that this provision did not apply to the rebuilding of old houses which had been taken down in order to be rebuilt. *Cochrane* v. *Mason* (O. H.), 1866, 1 S. L. R. 200.

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1. Auction—Conditions of Sale—Articles—Public Roup.—The dictionary called the *Encyclopædia Perthensis*, during its publication in parts, was exposed to sale by public roup, but no person offered. Sometime thereafter the appellants offered "for the entire stock as lately exposed for sale in Edinburgh." This

offer was accepted. Thereafter the defenders declined to grant bills for the price, on the ground that the sellers had not conveyed the published parts, lying in the hands of the booksellers. *Held* (*aff.* C. of S.) that the articles of roup must govern the sale; and that, in these articles nothing was mentioned about conveying the parts consigned in the hands of the booksellers, but that it was a purchase of "all and whole the copies or parts, perfect or imperfect, remaining unsold, *conformably to inventory*"; and the whole that was contained in the inventory, it was admitted, had been delivered. *Doig, etc.* v. *Sangster*, 1817, 6 Pat. 265.

2. Auction—Conditions of Sale—Horse.—A party purchased horses at an auction, one of the conditions of which was, that should the purchase money not be paid within twenty-four hours, the disposer was to be at liberty to resell, with or without notice to the purchaser, who should be debtor to the disposer for any loss arising out of the non-fulfilment of the bargain, including commission on the resale, keep, and all other charges. The purchaser having failed to pay the price, the auctioneer resold the horses. *Held*, in an action at the instance of the sellers, that the sale must be held to have taken place under the conditions of sale; that it was not necessary for the sellers to prove that these conditions had been read or publicly exhibited at the sale; and that they were entitled to charge the purchaser with the difference between the price at which the horses were bought by him and those realised at the subsequent sale, the expense of keeping them, commission on the resale, and other charges caused by his non-fulfilment of the bargain. *Laing & Sons* v. *Hain*, 1853, 15 D. 667; 25 J. 405.

3. Auction—Conditions of Sale—Sale by List—Obligation of Exposer.—At a public sale of stoneware, under condition that the purchasers should satisfy themselves of the quantity and quality before bidding, a set was sold by list. *Held* that the exposer was not relieved thereby from furnishing all the articles in the list. *Galletly* v. *Child*, 1824, 3 S. 142.

4. Auction—Conditions of Sale—Whether Auctioneer Bound after Sale to Disclose Owner.—*Held* by Lord Moncreiff (Ordinary), that an auctioneer is not bound, on the demand of a purchaser, after a sale, to disclose the name of his employer, the owner. *Dowell* v. *Allan*, 1836, 8 J. 225.

5. Auction—Lot—Separate Transaction.—At a sale by auction the sale of each lot forms a separate transaction. *Couston, Thomson, & Co.* v. *Chapman*, 1872, 10 M. (H. L.) 74; 44 J. 402; L. R. 2 Sc. App. 250.

6. Auction—Right of Auctioneer to Bid—Legality of Sale—Ship—Damages.—A ship was exposed to sale "at the pleasure of the company," and a person offered £260, whereupon the auctioneer bid £300 and knocked it down, and the ship was exposed a second time and sold to a third party for £325. *Held* that the auctioneer was not entitled to buy in the ship, and that the offerer was entitled to damages for non-implement of the sale. *Cree* v. *Durie*, 1 Dec. 1810, F. C.

7. Conditions — Conditional Sale — Essence of Contract — Time — Seller's Failure to Fulfil Condition.—A contract of sale of iron was entered into in Glasgow. The purchaser had a place of business in London, the seller had not. The terms of payment were, "Cash in London on 23rd November, in exchange for storekeeper's warrants." On 22nd November the seller despatched from Glasgow, by a post which arrived in London during business hours on the 23rd, storekeeper's warrants and drafts for the price on the purchasers, and intimated to the purchasers by same post that they would be presented through one or other of two banks. The drafts were presented early on the morning of the 24th, along with the storekeeper's warrants. The purchasers refused to receive delivery of the storekeeper's warrants, or to honour the drafts. *Held* that time was of the essence of the contract, and that presentment not having been made on the 23rd November, the contract was not binding after that date; and action for breach of contract *dismissed*. *Colvin* v. *Short & Co.*, 1857, 19 D. 890; 29 J. 423.

8. Conditions—Conditional Sale—Horse—Seller Bound to Take Horse Back if "in like Condition"—Agreement of Parties.—*Question* as to the sale of a pony subject to a stipulation to return it at a fixed period. *Graham* v. *Wilson*, 1836, 14 S. 866.

9. Conditions—Implied Condition—Bankruptcy of Buyer—Fulfilment Impossible—Rights of Seller.—Where a party purchased kelp at £8 per ton, and a compromise was afterwards entered into, and he became bankrupt, whereby he was unable to implement the terms of the compromise, the seller *found* entitled to rank in virtue of the original contract. *D. of Argyll* v. *Johnston*, 1825, 4 S. 32.

10. Conditions—Suspensive Condition—Acceptance to be Sent in Course of Post.—A seller, in transmitting a bill of lading of goods to the buyer, said, "Please send your acceptance for the price in course of post." *Held* that this formed a condition of the sale, and imported that an acceptance should be sent by the next post after receipt of the letter; and this not being done, the seller was entitled to keep the goods. *Brodie* v. *Todd & Co.*, 20 May 1814, F. C.

11. Conditions—Suspensive Condition—Sale of Moveable Machinery—Lease—Bankruptcy of Tenant.—A party let a paper-mill, and declared that at the expiry of the lease, "and upon all the rents hereby contracted to be paid, and which may then be due, being fully paid up and discharged, the said whole moveable machinery shall be held to be the absolute property" of the tenant, who, in the meanwhile,

was to pay a sum annually, "as remuneration for the free use and benefit of the moveable machinery." The tenant became bankrupt during the currency of the lease. *Held* that this was a suspensive sale; and the condition not being complied with, the machinery remained the property of the landlord. *Cowan* v. *Spence*, 1824, 3 S. 42.

12. Conditions—Suspensive Condition—Sale of Utensils—Bankruptcy of Buyer—Non-Fulfilment.—A party let a distillery, and granted a missive assigning the utensils to the tenant at a certain value, and stipulating for 8 per cent. on the amount while he possessed them; and declaring that it is "understood that you are to be obliged to take the said utensils, betwixt and the term of Martinmas 1824, at the amount of what I paid for the same, at which period the payment of 8 per cent. will cease upon said amount." The tenant became bankrupt subsequent to that time, without payment of the price. *Held*, in a question with his creditors, that this was a suspensive sale; and the condition not being fulfilled, the utensils were the property of the landlord. *Wight* v. *Forman*, 1828, 7 S. 175; 4 Fac. 211.

13. Credit—Period of Credit—Custom of Trade—Proof—Expenses.—A wholesale dealer raised an action against a retail dealer for the price of goods, within six months from the date of the invoice, and the defender pleaded that he was entitled, by invariable custom of the trade, to a longer credit, and proved a usual, but not an invariable custom. *Held* (the price having been paid pending process) that he was entitled to expenses, subject to modification. *Burbidge* v. *Sturrock*, 1832, 10 S. 520.

14. Credit (Sale on)—Period of Credit—Tradesman's Account—Custom.—If a party purchase clothes from a tailor on current account, the credit runs from the date of the first, and not of each separate item; and if he fail, after the expiry of the usual period of credit, to pay the account, he may be compelled forthwith to pay for subsequent furnishings, deducting discount. *Keay* v. *Crawford*, 1823, 2 S. 492.

15. Credit (Sale on)—Rendering of Account—Discount—Interest.—A goldsmith agreed to sell articles to a party on six months' credit, or 5 per cent. discount for cash; and articles were furnished continuously for twelve months, during which period partial payments were made; and the account was rendered at the end of that time. *Held* (1) that the party was entitled to discount on all payments made prior to the account being rendered, and within a month after being rendered; and (2) that he was liable in interest at 5 per cent. on the balances, from six months after the account was rendered. *MacLellan* v. *Gray*, 1848, 21 J. 33.

16. Delivery—Certain Goods not Delivered—Acceptance without Objection—Payment.—A party granted a bill at six months as the price of the materials of a house, of which he immediately took delivery, and did not object during the currency that he had not received everything truly included in his bargain, but asked further indulgence. *Held* not entitled to resist payment of the price, on the ground that certain parts of materials not delivered were included in his purchase. *Campbell* v. *Paul*, 1832, 10 S. 229.

17. Delivery—Completed Delivery—Bankruptcy of Buyer—Rejection by Insolvent Buyer—Transfer of Property.—A merchant in Glasgow purchased a quantity of goods for transmission to his agent in Canada. The goods were shipped at Liverpool, and the bill of lading, which bore that the purchaser was the consignor, and his agent in Canada the consignee, was transmitted to the purchaser, and by him to his agent. The purchaser's affairs having become embarrassed, the seller obtained from him a delivery-order addressed to his agent in Canada, from whom he thereafter got delivery of the goods. In an action against the seller by the trustee on the purchaser's sequestrated estate, the seller pleading that the purchaser had validly rejected the goods in contemplation of bankruptcy, *held* that the delivery of the goods to the purchaser was complete before they left the country, and that the purchaser had no power thereafter to reject them. *Wright* v. *Mitchell*, 1871, 9 M. 516; 43 J. 235.

18. Delivery—Completed Delivery of Cattle to Buyer—Possession Resumed by Seller—Damages.—*Ruled*, that delivery of cattle had taken place, if the seller allowed them to be driven off by the servant of the purchaser, and induced both him and his master to believe that delivery had been made, although private instructions had been given to the seller's servants, who assisted in driving, to keep charge of the cattle until the price should be paid; and the seller *found* liable in damages for resuming possession of the cattle after having so delivered them to the purchaser. *Henry* v. *Dunlop & Co.*, 1842, 5 D. 3.

19. Delivery—Constructive Delivery—Cattle Bought by Public Roup in Custody of Seller—Bankruptcy of Seller—Transfer of Property.—Cattle, specifically distinguished, were bought on the seller's premises by public roup; and by the articles the seller was bound to keep them for a certain period after the sale. Bills were granted for the whole price, and retired. Part of the cattle were carried away from the seller's parks by the buyer, who lived at a distance; and after the seller had called a meeting of his creditors, and while they were *in cursu* of rendering him bankrupt, the buyer (within the period during which the seller was bound to keep the cattle) sent a servant to take delivery of the rest of them. This being resisted, he applied to the sheriff for an order of delivery, which was opposed by the creditors; and during the discussion the estates of the seller were sequestrated under the Bankrupt Act. *Held* (after

the whole court had been equally divided) that the buyer had right to the cattle preferably to the trustee; but ordained to find caution to repeat the value, in the event of reversal on appeal. *Lang* v. *Bruce*, 1832, 10 S. 777; 7 Fac. 594.

20. Delivery — Constructive Delivery — Goods in Bonded Cellar—Bankruptcy of Buyer — Transfer of Property. — A party bought rum lying in a bonded cellar in the joint custody of the owner of the cellar and the revenue officer, for which he granted his bill, and thereupon got an order of delivery from the vender, which he intimated to the owner of the cellar, who marked the name of the vendee as the proprietor. The vendee became bankrupt without paying his bill. *Held*, in a question with the vender, that the vendee's creditors were entitled to the remainder of the rum. *Mathie's Tr.* v. *Auchie, Ure, & Co.*, 16 Mar. 1810, F. C.; 5 Pat. 291. Revg. 23 Nov. 1804, F. C.; M. 14226.

21. Delivery — Constructive Delivery — Goods in Bonded Warehouse — Resale — Sales not Intimated—Liability for Price—Transfer of Property.—A party who had deposited imported goods in a bonded warehouse, of which the bills of lading were retained by his importing agent at Greenock, sold them to A, and sent an order of delivery to his agent. A sold them to B, and intimated this to the agent; but the agent did not notify these sales to the keeper of the bonded warehouse, who, on being informed by the original seller that he had sold them to A, delivered them to A on payment of the duties; and the agent having been found liable in payment of the value to B, *held* that the agent had no claim against the keeper, although he alleged that, by the usage of Greenock, goods in bond were never delivered without the order coming through the importing agent. *M'Eachern* v. *Ewing & Co.*, 1824, 2 S. 724.

22. Delivery — Constructive Delivery — Goods in Store—Intimated Delivery-Order —Suspensive Condition — Bankruptcy of Buyer—Retention—Transfer of Property.— A sold to B the seconds, thirds, and bran, to be obtained from 2000 bolls wheat (then lying in M's store), it being stipulated that the seller should get the stuff turned over into the purchaser's bags and delivered free. A gave B a delivery-order which was intimated to M, who entered the transfer in his books. Part of the wheat was ground and delivered to B. B sold the remainder to C, who intimated a delivery order to M. B died bankrupt when the remainder of the stuff was ready to be put into bags for delivery, having part of price due by him to A unpaid. In a petition by A against M to prevent delivery, on the ground that A had a right of retention as against C, *held* that the intimation of the delivery order by B to M operated constructive delivery to B and his assignee of the stuff as the same came into separate existence, and that the stipulation as to stuff being turned over into the purchaser's bags was not sufficient to suspend delivery. *Black* v. *Incorporation of Bakers, Glasgow, etc.*, 1867, 6 M. 136; 40 J. 77.

23. Delivery — Constructive Delivery — Goods Shipped by Seller—Risk—Title to Sue — Transfer of Property.—*Held* that a puncheon of spirits, shipped by the seller on board a vessel at Leith for the purchaser at Newcastle, and alleged to have been improperly lost by the shippers, was to be regarded as delivered to the purchaser; and therefore the seller had no title to pursue for the value of it, although he had given the purchaser another puncheon in place of it. *Dunlop* v. *Lambert*, 1837, 15 S. 1232; 12 Fac. 1136.

24. Delivery — Constructive Delivery — Grain Purchased but Stored in Seller's Storehouse—Bankruptcy of Seller—Transfer of Property.—A sold grain to B. The grain was stored in A's storehouse and he gave to B a delivery-order on the storekeeper for the grain purchased. B intimated the order to the storekeeper, paid him for looking after the grain, and took delivery of a part; but there was no appropriation to B of his quantity out of the larger mass in the store. *Held*, in a question between A's trustee in bankruptcy and B that the grain purchased belonged to B. *Broughton* v. *Aitchison*, 15 Nov. 1809, F. C.

25. Delivery — Constructive Delivery — Hides Sold while in hands of Tanner—Sale not Intimated—Competition between Buyer and Creditor of Seller—Transfer of Property.—The owner of hides, which were in the hands of the tanner for the purpose of tanning, sold them to another; and while they were in the hands of the tanner, and before any intimation of the sale to him, a creditor of the seller poinded them. *Held* that he was preferable to the buyer. *Eadie* v. *Mackinlay*, 7 Feb. 1815, F. C.

26. Delivery — Constructive—Ineffectual Delivery—Goods in Bonded Store of Seller —Delivery Order not Intimated—Bankruptcy of Buyer—Transfer of Property.—A, the owner of a bonded store (which was supervised by the revenue officers), sold pipes of wine lying there to B, and gave him a delivery order on the revenue officer. No intimation of the delivery order was made to the officer. *Held* that A could stop the goods as *in transitu* against B's trustee in bankruptcy. *Auld* v. *Hall & Co.*, 12 June 1811, F. C.

27. Delivery—Constructive—Ineffectual Delivery—Spirits Sold but Left in Bonded Warehouse of Seller—Bankruptcy of Seller —Transfer of Property.—Six puncheons of spirits having been sold, they were allowed to remain in the bonded warehouse of the seller. The sale was entered in the books of the seller, but there was no other appropriation of the puncheons to the buyer. *Held* that the puncheons belonged to the seller's trustee in bankruptcy and not to the buyer. *Mathison* v. *Alison*, 1854, 17 D. 274; 27 J. 111.

28. Delivery—Constructive—Ineffectual Delivery—Delivery to Storekeeper, Servant of Seller—Bankruptcy of Seller—Transfer of Property.—A. & Son, a firm of grain merchants in Glasgow—who by means of a foreman, C. D., carried on a separate business as public storekeepers—sent to their storekeeper, C. D., a delivery order for a parcel of grain belonging to themselves, in favour of M. & Co. C. D. entered the grain in a new account for M. & Co., and delivered to his principals a note of transfer in favour of M. & Co., acknowledging that he now held the grain for them. This transfer-note was subsequently sent to M. & Co., in security of an advance. In a question between M. & Co. and the trustee on A. & Son's sequestrated estate, *held* that C. D. being a servant of A. & Son, the possession of the grain remained with them, and that the transfer in the storekeeper's books did not operate delivery, the understanding and practice of the trade in Glasgow to the contrary being disregarded. *Anderson* v. *M'Call*, 1866, 4 M. 765; 38 J. 405.

29. Delivery—Constructive—Ineffectual Delivery—Goods in Bonded Warehouse—Intimation to Custodier—Transfer of Property.—A merchant sold sugar lying in a bonded warehouse, in the books of which it was entered in the name of his importing agent, and gave a delivery order addressed to him. The purchaser intimated the order to the importing agent, but not to the keeper of the bonded warehouse. *Held* that, in order to transfer the property of the sugar, intimation ought to have been made to the keeper of the warehouse, who was the actual custodier. *Melrose & Co.* v. *Hastie & Co.*, 1850, 12 D. 665; 22 J. 207, 252.

30. Delivery—Constructive—Ineffectual Delivery—Goods in Bonded Warehouse—Notice to Custodier—Resale—Insolvent Buyer—Lien—Transfer of Property.—Hastie & Co., who had sugars lying in a bonded warehouse, entered in the name of his importing agent, sold part of them to Bowie & Co., who paid the price, and obtained an order of delivery on the agent. Bowie having sold to Melrose, who paid the price, endorsed the order to Melrose, who intimated it to the agent, but not to the keeper of the warehouse, and got partial delivery. In the meantime Hastie had sold another parcel of the sugars to Bowie, who having become bankrupt without paying the price of this parcel, Hastie stopped delivery of the sugars sold to Melrose. *Held* that there was no delivery, actual or constructive; and that the payment of the price of the first parcel did not bar Hastie from retaining these sugars for the price of the second parcel. *Melrose & Co.* v. *Hastie & Co.*, 1851, 13 D. 880; 23 J. 398. Verdict *applied*, 14 D. 268; 24 J. 120; 1 Stuart 219. Cf. *Macnaughton* v. *Baird & Co.*, 1852, 24 J. 623; 1 Stuart 1051.

31. Delivery—Constructive—Incomplete Delivery—Bankruptcy of Buyer—Transfer of Property.—Goods which had been ordered by a merchant were sent to him by a carrier, but on being offered at his warehouse, his son and a clerk, in his absence, knowing him to be on the eve of bankruptcy, refused to receive them, and directed them to be put into the warehouse of his son-in-law, which was done. *Held* that the delivery was not complete, and that the seller was entitled to stop as *in transitu*; and *observed*, that the goods would have remained the property of the seller even if they had been taken into the warehouse of the merchant, if this were for custody only. *Mitchell & Gowans* v. *Phin*, 12 Jan. 1813, F. C.

32. Delivery—Delivery Concurring with Payment of Price—Ready-Money Transaction.—A sale of goods on a written contract, for a fixed price, making no mention of a term of payment, implies a ready-money bargain, under which the seller cannot demand the price without offering delivery; and where the subject sold is of such bulk that delivery can only be made in parcels, the seller is entitled, on delivery of each parcel, to payment of a proportionate part of the price. *Hall & Sons* v. *Scott*, 1860, 22 D. 413; 32 J. 182.

33. Delivery—Delivery Concurring with Payment of Price—Ready-Money Transaction.—In an action for delivery of nine stacks of corn, being the remainder of twelve stacks, sold without any special stipulation as to the time of payment or delivery, and the rest of which had been delivered without payment of the price, *held* that the purchaser was not entitled to delivery without payment of the price of each stack as delivered; but a defence that the purchaser, by refusing to pay the price of the three delivered stacks, and grant bills for the balance within a specified time, had put it in the power of the seller to hold the contract at an end, *repelled*. *Linn* v. *Shields*, 1863, 2 M. 88; 36 J. 42.

34. Delivery—Delivery of Part of Machine—Transfer of Property.—*Question*, whether delivery of part of a machine which a manufacturer was employed to make, and for which a bill was granted, transferred the property of the part. *Girdwood & Co.* v. *Pollock & Co.*, 1827, 5 S. 507.

35. Delivery—Delivery of Wrong Quantity—Question as to Port of Delivery—Timber—Measurement.—*Circumstances* in which, where a British merchant ordering wood from Rotterdam was charged for a given number of cubic feet of timber, as per invoice, and the number of feet so invoiced was very considerably greater than the truth, but was brought out by the application of "calliper measure," which is universal in Holland, though deficient in accuracy, especially as applied to round wood, *held* that he was liable for the whole quantity expressed in the invoice. *Schuurmans & Son* v. *Stephen & Sons*, 1832, 10 S. 839.

36. Delivery—Delivery of Wrong Quantity—Rejection.—A party in Liverpool who

received an order from a merchant in Glasgow to purchase for him a certain quantity of oil of a particular description, made a purchase, and advised the Glasgow merchant that he had secured for him the quantity required; but thereafter intimated that he found one-half was not conform to quality, whereas it turned out that he had got the whole quantity, but had applied one-half to satisfy a previous order, which, as well as the name of the seller of the oil, he concealed from the Glasgow merchant. *Held* that the latter was not bound to take the other half. *Richardson* v. *Roscoe*, 1837, 15 S. 952; 12 Fac. 883.

37. Delivery—Delivery to Agent of Buyer — Insolvent Buyer — Retention by Agent — Stoppage in transitu. — A son who, as agent for his father, purchased goods, and became cautioner for the price, and got possession of them, *held* to have no right to retain them, in a question with the creditors of his father, on the footing of stopping *in transitu*. *Louson* v. *Craik*, 1842, 4 D. 1452.

38. Delivery — Delivery to Carrier — Transfer of Property.—Delivery of goods to a carrier *held* to be delivery to the party. *Dicksons & Co.* v. *Ponton*, 1824, 3 Mur. 440.

39. Delivery—Delivery by Warehouseman (Bonded Warehouse) to Buyer without Authority — Damages. — When a distiller sends spirits to a bonded warehouse, although the name of a purchaser be marked on the cask, the contract is one of deposit between the distiller and warehouseman; and the latter is not entitled in the general case to deliver on the order of the purchaser without authority from the distiller. *Smith* v. *Allan & Poynter*, 1859, 22 D. 208; 32 J. 85.

40. Delivery—Fraud—Buyer's Concealment of Bankruptcy—Transfer of Property. —A party purchased whisky to be paid for on delivery, and at the delivery he induced the seller to take a part of the price, promising to pay the balance in a few days, but concealed the fact that he was then taking steps for sequestration under the Bankrupt Act, which was shortly afterwards awarded. *Held*, in a question between the seller and the trustee, that the delivery did not pass the property. *Watt* v. *Findlay & Hendrie*, 1846, 8 D. 529; 18 J. 252. See *Richmond* v. *Railton*, 1854, 16 D. 403; 20 J. 191.

And if a purchaser who knows that he is insolvent represents that his credit is good the sale is void. *Campbell, Robertson, & Co.* v. *Shepherd*, 1776, 2 Pat. 399.

41. Delivery — Incomplete Delivery — Certain Goods (after Delivery) Rejected by Buyer as Disconform to Sample—Bankruptcy of Buyer—Transfer of Property.— A quantity of wool was sold by sample. On delivery the purchaser laid aside four bales as not according to sample, and so entered them in his books. A transaction for resale, to avoid disputes, was entered into; but before the goods were removed, the purchaser became bankrupt. In a question between his creditors and the seller, *held* that the property of the four bags had not passed to the purchaser. *Jowitt* v. *Stead*, 1860, 22 D. 1400; 32 J. 637.

42. Delivery — Incomplete Delivery — Goods in Buyer's Custody—Bankruptcy of Buyer—Transfer of Property.—A purchaser finding himself bankrupt at the time of the arrival of goods which he had ordered but not paid for, wrote to the seller offering them back and meantime deposited them in his cellar. *Held* that the purchaser having taken them into his warehouse *custodiæ causa* they belonged to the seller and not to the buyer's creditors. *Stein* v. *Hutchison*, 16 Nov. 1810, F. C.

43. Delivery — Incomplete Delivery — Goods Sold under Levy Warrant—Owner not Divested—Transfer of Property.—A sale under a levy warrant for excise duties does not *per se* divest the owner and transfer goods to the purchaser; and goods, after such a sale, remaining in the possession of the owner are liable to be attached by his heritable creditor in a poinding of the ground. *M'Arthur* v. *Brown*, 1858, 20 D. 1232; 30 J. 729.

44. Delivery — Incomplete Delivery — Hides Purchased but Left in Possession of Seller—Insolvency of Seller—Transfer of Property. — A party purchased from a tanner hides which were undergoing the process of tanning, and were lying in pits apart from the rest of the stock, and otherwise distinguishable from it. Part were taken from the pits to be examined by the purchaser, and again replaced; and he granted a bill for the greater part of the price, the balance being to be ascertained after the tanning was completed. After the sale he gave directions as to how the hides were to be treated, but put no mark upon them, nor was there any entry in the tanner's books to indicate that they had become the purchaser's property. Thereafter, while the hides were still in the pit, and some months before the tanning was completed, the tanner became insolvent. *Held* that there had been no delivery of the hides to the purchaser, and that they were liable to be attached by the creditors of the tanner. *Boag & Greig* v. *Meggat & Symington*, 1844, 6 D. 662; 16 J. 305.

45. Delivery—Incomplete Delivery—Insolvent Buyer — Transfer of Property.— Goods were bought by a firm on the eve of bankruptcy, and a portion delivered; but the bills for the price were not granted. The sellers, hearing of the insolvent state of the buyers, succeeded in getting the goods returned, while they retained the remainder undelivered. *Held*, in a question with the buyer's creditors, that the sellers were entitled to retain possession of the whole. *Hill* v. *Buchanans*, 1785. Aff. 3 Pat. 47.

46. Delivery—Incomplete Delivery—Insolvent Buyer—Transfer of Property.—A merchant in Glasgow, according to an order, sent a puncheon of rum to a dealer in Forfar,

for the price of which he drew a bill, and the puncheon arrived on the 4th December, but was not taken into the buyer's cellar till the 5th; and he then was, and had been for some time, insolvent. A few days afterwards his estates were sequestrated, and he did not accept the bill, and it rather appeared that he intended, when he ordered the puncheon, forthwith to raise money by selling it. *Held*, in a question with the trustee for his creditors, that the seller was entitled to the puncheon. *Carnegie & Co.* v. *Hutchison*, 1815, Hume 704.

47. Delivery—Incomplete Delivery—Insolvent Buyer—Transfer of Property.—A farmer who was in insolvent circumstances, but had not openly declared his bankruptcy, bought cattle, which, in his absence, were delivered to his servants, who put them into his fields; and having also bought sheep, they were a few days afterwards driven by the seller to the farm, and there being nobody to receive them, he put them into the fields; and on the following day the farmer having declared his bankruptcy, restored the whole to the seller. *Held*, in a question with the trustee on his estate, that there had been no proper and completed delivery, and the seller found entitled to retain them. *Observed* by the reporter, that the case was clear as to the sheep, but as to the cattle, "the case was more open to difference of opinion." *Brown* v. *Watson*, 1816, Hume 709.

48. Delivery—Incomplete Delivery—Insolvent Buyer — Rejection — Transfer of Property. — A party ordered goods, which were about to be delivered, but he refused to receive them, as he then considered himself insolvent, and they were sent to a third party to be kept for behoof of the seller. *Held* that there was a proper and final rejection of the goods, which could not be recalled or rendered null by certain subsequent proceedings. *Inglis* v. *Port Eglinton Spinning Co.*, 1842, 4 D. 478.

49. Delivery — Incomplete Delivery — Purchase of Trees in Plantation—Contract Abandoned—Transfer of Property.—*Held* that a creditor of the purchaser of trees, which were to be paid for on measurement in the plantation, was not entitled to poind a quantity of them as being his property, although the trees were cut and drawn by his servants to saw-pits in the plantation, where he manufactured them into railroad sleepers, and these were then driven to a harbour for shipment—the purchaser, after proceeding some time with the contract, having abandoned it, and the trees being unpaid for. *Anderson* v. *Ford*, 1844, 6 D. 1315; 16 J. 577.

50. Delivery—Insufficient Evidence of Delivery—Cask of Spirits.—*Circumstances* in which (rev. C. of S.), in an action for the price of a cask of whisky, it was *held* that no lawful evidence had been produced of delivery; and, in particular, that a certificate of entries in excise books, without production of the books themselves, was not good evidence. *Dunbar* v. *Harvie*, 1820, 2 Bligh 351.

51. Delivery—Merc. Law Amend. Act, s. 1—Goods Sold Left in Seller's Possession—Bankruptcy of Seller—Reputed Ownership—Transfer of Property.—A sold certain bathing machines, etc., in 1847, to B, who sold them in 1849 to C. A, however, remained in uncontrolled possession of them. He was sequestrated in 1848, but was discharged in 1855. During that time he remained in uncontrolled possession, and he continued so until his death in 1867. *Held*, in a question between a person alleging right derived from C, and the trustee in a second sequestration of A's estates after his death, that the property was, at the date of A's death, liable to be attached by the diligence of his creditors, and was carried by the second sequestration.

Question as to application of Merc. Law Amend. (Scot.) Act, 1856, s. 1, *ibid.* *Edmond* v. *Mowat*, 1868, 7 M. 59; 41 J. 32.

52. Delivery—Merc. Law Amend. Act, s. 1—Goods Sold Left in Seller's Possession—Sale of Stock-in-Trade by Tenant to Landlord—Bankruptcy of Tenant—Reputed Ownership—Transfer of Property.—The proprietor of premises let as a printing-office bought the plant, types, etc., from his tenant. He then granted to him a new lease of the premises, with the use of the plant, types, etc., and the tenant continued in possession. After some years the tenant became bankrupt. In a question between the landlord and the tenant's trustee, *held* that the *bona fides* of the transaction having been established, the possession of the plant, etc., by the bankrupt must be regarded as the landlord's possession, and that the sale was effectual. *Orr's Tr.* v. *Tullis*, 1870, 8 M. 936; 42 J. 566.

53. Delivery—Merc. Law Amend. Act, s. 1—Subject Sold Left in Possession of Seller with Use—Horse—Bankruptcy of Seller—Transfer of Property.—*Held* that the 1st section of the Merc. Law Amend. Act did not apply to a transaction or sale under which, as part of the agreement, the subject sold (a horse) remained undelivered, and the seller had not only the custody but the continued use and possession, with a power to sell; and therefore a poinding at the instance of a creditor of the seller was valid. *Sim* v. *Grant*, 1862, 24 D. 1033; 34 J. 517.

54. Delivery—Place of Delivery.—*Circumstances* in which a British merchant having ordered a cargo of timber from Rotterdam, direction given to the jury that Rotterdam was the port of delivery. *Shuurmans & Son* v. *Stephen & Sons*, 1832, 10 S. 839.

55. Delivery—Refusal to Deliver—Grain — Deterioration — Rejection. — A party bought at a public sale a lot of corn, and a dispute having occurred as to the sufficiency of a cautioner for the price, and an action brought, the purchaser consigned the price in bank, notwithstanding which the seller opposed delivery of the corn, and much litigation ensued, during

which the corn was deteriorated. *Held*, in the circumstances, that the purchaser was not bound to accept the corn, and was entitled to get back the consigned price. *Potter* v. *Greig*, 1836, 14 S. 210.

56. Delivery—Time—Delay in Accepting Delivery—Effect of—Buyer's Right to Demand Delivery. — A purchaser of oats payable on delivery, who, after various communications, delayed to take delivery for a fortnight (by which time grain had greatly increased in value), *held* not entitled to demand delivery. *Craig & Co.* v. *Hamilton*, 1823, 2 S. 347.

57. Delivery—Time—Delivery by Instalments—Locus pœnitentiæ.—A party, in October, sold 200 tons of flax of a certain quality and condition, to be delivered in July and August following (it being understood, but not stipulated, that the seller was to import it direct). One of two vessels freighted to convey this flax from Riga arrived on the 23rd August with seventy tons, of which the purchaser refused delivery, as being only a part. The seller thereupon tendered delivery of the remainder of other flax of the stipulated condition and quality, which was likewise refused. The second vessel arrived on the 29th, and the seller (in consequence of her not being able to come into the harbour for a few days, from the lowness of the tides) offered to deliver by lighters, but did not undertake to deliver the whole cargo before the expiry of the month of August; and the purchaser refused to accept delivery, unless it should be completed within that time. *Held* that sufficient implement had been offered, and that the purchaser was not entitled to be free of the contract. *Whitson* v. *Neilson & Co.*, 1828, 6 S. 579; 3 Fac. 596.

58. Delivery—Time—Failure to Deliver Timeously.—A purchaser offered to take delivery of the subject at what he said was the contract price. The seller had died, and his trustees refused the offer of the purchaser, claiming a higher price, which was entered in the books of the seller. The purchaser then wrote, declining to take the goods at any price. In an action for implement raised on their view of the price, the trustees put in a minute, tendering delivery at the price alleged by the purchaser. *Held* that the purchaser must be held to have been in the right as to his contention, and that, not having received delivery *tempestivé*, he was now entitled to annul the contract. *Anderson* v. *Wilson*, 1856, 19 D. 39; 29 J. 9.

59. Delivery—Time—Failure to Deliver within Contract Period—Late Delivery Accepted — Personal Bar — Damages.—In the case of the purchase of a vessel paid for by instalments while building, *held* that the purchaser was not barred from claiming damages for non-delivery at the date contracted for, by accepting delivery at a later date. *Sutherland* v. *Montrose Shipbuilding Co.*, 1860, 22 D. 665; 32 J. 262.

60. Delivery—Time—Failure to Deliver within Reasonable Time — Damages. — A sale of twelve puncheons of spirits distilled from molasses was concluded on 5th November 1795, and four puncheons delivered. The buyer urged the delivery of the remainder, but the sellers delayed until after an Act of Parliament was passed (18th December 1795) prohibiting distillation of spirits from molasses, and annulling contracts for the delivery of such. *Held* (rev. C. of S.) that the sellers were bound to deliver within a reasonable time, and therefore before the passing of the Act; and that, having failed to implement this obligation, they were liable in damages. *Philips* v. *Blair & Martin*, 1801, 4 Pat. 256.

61. Delivery — Time — Late Delivery — Rejection—Quantity of Oil.—A merchant, on 16th October, agreed to sell to another in the same town a quantity of oil at so much "cash," and no delivery was tendered till 9th November, when five casks were offered, but rejected in respect of the delay, and were put into neutral custody; and while there the seller sold and delivered one of them to another party. *Held* that the original buyer was not liable for the price of the other four casks. *Robb* v. *Cruickshank*, 1840, 2 D. 988.

62. Delivery — Time — Locus pœnitentiæ.—*Circumstances* in regard to the implement of an order for furnishings, not sufficient to warrant the party giving the order to resile, and refuse to accept delivery. *Drew* v. *Ogilvie & Co.*, 1833, 11 S. 342.

63. Delivery—Time—Refusal to Take Delivery—Usage of Trade.—*Circumstances* in which *held* that there had been no breach of contract in the times when certain goods were delivered or offered to be delivered, and that no usage of trade had been proved inconsistent with the manner in which the contract had been executed. Action for the price of goods delivered or offered to be delivered accordingly *sustained*. *Ismeredes* v. *Cochrane & Co.*, 1868, 5 S. L. R. 181.

64. Delivery—What Constitutes Delivery — Laying Hold of Horse by Ears — Transfer of Property—Collusive Transference.—*Held*, in a question of expenses arising out of a competition between a creditor attaching a horse in the possession of his debtor and a party claiming the property, that delivery to him, by taking hold of the horse's ears, was not sufficient to transfer the property. *Taylor* v. *Jack*, 1821, 1 S. 133.

65. Delivery—What Constitutes Delivery—Sale Combined with Letting to Hire to Seller and Receipt of Hire—Insolvency of Seller—Transfer of Property.—A carter sold two carts and horses for £40 to another, who paid the price, and thereupon agreed to let them to the seller at the rate of 12s. per week. The seller put the halters into the hands of the buyer, who gave them over to the seller, whose name was taken off the carts, and the name of the buyer substituted. The buyer got payment of the hire for about a year, during

which time the carts and horses were kept and used by the seller as formerly. *Held*, in a question with a poinding creditor of the seller, that the carts and horses were the property of the buyer. *Eadie* v. *Young*, 1815, Hume 705.

66. Delivery — Withholding Delivery until Price Secured—Buyer in Embarrassed Circumstances — Resale — Loss. — *Held* that a foreign merchant, from whom goods are commissioned, is entitled to send the bill of lading to his own agent, and to demand security from the purchaser, whose circumstances have become suspicious, that the price will be paid when due; and *question* whether, on failing to grant such security, the purchaser must answer for the loss arising from non-implement. *Arnots* v. *Boyter*, 24 Nov. 1803, F. C.; M. 14204.

67. Document of Title—Bill of Lading—Endorsement of—Exclusive Title to Goods. —A party having obtained an advance of money to pay for flax, which he shipped from Riga to Dundee, endorsed to the party advancing, the bill of lading of the flax. *Held*, in a question with the latter and the general creditors of the endorser, who had died bankrupt, that the bill of lading was the preferable and exclusive title to the flax. *Balfour* v. *Laing*, 1852, 24 J. 290; 1 Stuart 542.

68. Document of Title—Delivery Order—Factor—Powers.—Goods were consigned to a party, *ex facie* of the bill of lading, absolutely, and with power to sell, and he delivered them to a third party, who thereupon granted his acceptance for the greater part of the value. *Held*, in a question between him and the consigner (who alleged that the consignee was merely his factor, and had no power to pledge), that the third party had, to the extent of the acceptance, acquired a real right to the goods. *Colquhoun* v. *Finlay, Duff, & Co.*, 15 Nov. 1816, F. C.

69. Document of Title—Delivery Order — Endorsation — Factors Act 5 and 6 Vict. c. 39. — An iron manufacturer contracted to supply iron to A. A employed B, an ironbroker and merchant, to find a purchaser. B falsely stated that he had found a purchaser, and obtained from A a delivery order on the manufacturer in favour of B. B endorsed the delivery order to C, and obtained from him an advance on the security of the iron. C forwarded the delivery orders to the manufacturer, and after B had become bankrupt, obtained delivery of the iron. In an action by A against C for redelivery of the iron, *held* that the delivery order held by B was a document of title under the Factors Act, and that C was entitled to retain the iron in security of the advance. *Vickers* v. *Hertz*, 1871, 9 M. (H. L.) 65; 43 J. 346; L. R. 2 Sc. App. 113.

70. Formation — Completion — Correspondence — Locus pœnitentiæ. — *Circumstances* in which written correspondence in regard to a sale was *held* not to amount to a final and conclusive agreement; and that until this was executed, either party might resile. *Alexander* v. *Montgomery & Co.*, 1773, 2 Pat. 300. Affg. C. of S.

71. Formation — Completion — Goods Sent to Wrong Address by Mistake.—On 1st September A dispatched from Peterhead this telegram to B. & Co. at Liverpool—"Send on immediately fifteen twenty tons salt invoice in my name cash terms." Through the fault of the telegraph clerks the telegram delivered to B. & Co. was in the following terms:—"Send on rail immediately fifteen twenty tons salt Morice in morning name cash terms." On 2nd and 5th September B. & Co. sent salt to Peterhead addressed "Morice, Peterhead," and forwarded the invoices to the same address. On 15th September the invoices were returned through the dead-letter office, and thereafter A refused to take delivery of the salt. In an action for the price, *held* that no contract had been completed between the parties, and that A was not liable in payment thereof. *Verdin Brothers* v. *Robertson*, 1871, 10 M. 35; 44 J. 39.

72. Formation — Completion — Locus pœnitentiæ — Condition. — The pursuer offered to purchase from the defenders goods in terms implying payment on receipt of bill of lading. The defenders agreed to sell the goods, subject to the pursuer's specification being approved of by the defenders. On 25th November the pursuer sent the specification. On 26th November, the defenders, without objecting to the specification, wrote requesting the pursuers to note that payment must be made on handing invoice. *Held* that there was a completed contract of sale, and that the only condition on which it was competent to resile — namely, the specification not being approved of—had not occurred. *Jack* v. *Roberts & Gibson*, 1865, 3 M. 554; 37 J. 278.

73. Formation—Completion—Offer and Acceptance—Condition—Answer in Course—Locus pœnitentiæ.—A party wrote to a distiller for a quantity of whisky at the lowest price, and the distiller answered on 10th November, agreeing to furnish a quantity at certain prices, "expecting your answer in course"; but not having got an answer in course, the distiller sold the whisky. *Held* (rev. C. of S.) that although the party had agreed to take the whisky at the stipulated price, yet, as he had not done so "in course," the distiller was not liable in damages for non-implement. *Farries* v. *Stein*, 1800, 4 Pat. 131.

74. Formation—Completion—Offer and Acceptance—Delay in Accepting Offer—Locus pœnitentiæ.—A mercantile house in Liverpool received, on 30th January, a letter from a Glasgow house, offering 2000 tons of iron for sale at a certain price. The Liverpool house did not answer by the first Glasgow mail of that day, but posted the same evening a letter accepting the offer, and dated by mistake "31st January." It bore the Liverpool postmark of the 30th, and referred to a letter

of the 29th as "ours of yesterday." By an accidental delay in the conveyance of the mails, this letter reached the sellers in Glasgow on the afternoon of 1st February, as it would have done if posted on the date it bore. The sellers having declined to implement the bargain on the ground of undue delay to accept their offer, *held* that there was no such delay as to exempt them from liability in damages to the buyers. *Higgins & Sons* v. *Dunlop, Wilson, & Co.*, 1848, 6 Bell 195; 20 J. 279. Affg. 9 D. 1407; 19 J. 621.

75. Formation—Completion—Price to be Fixed by Buyer.—*Held* that when a person agrees to sell goods to another at a price to be fixed by the latter, the contract of sale is complete. *Lavaggi* v. *Pirie & Sons*, 1872, 10 M. 312; 44 J. 183.

76. Formation — Completion — Rise in Market—Damages for Non-Fulfilment.—*Circumstances* in which *held* that a bargain for the sale of goods was not finally completed, and the seller entitled to take advantage of a rise in the market. *Duguid* v. *M'Leish & Co.*, 1794, 3 Pat. 320. Affg C. of S.

77. Formation — Completion — Sale of Furniture in Possession of Bankrupt — Delivery of Assignation—Bona fide Purchaser—Evidence of Completed Contract.—The trustee on a bankrupt estate sold furniture, and duly executed an assignation. The purchaser paid part of the price. The trustee was then removed, but after his removal he received the balance of the price and delivered the assignation. The purchaser allowed the bankrupt to remain in possession of the furniture. *Held* that the purchaser having paid *in bona fide*, the assignation was good evidence of the contract of sale, and by its delivery the sale was completed, and the new trustee could not repudiate it. *Mitchell* v. *Major*, 1856, 19 D. 30; 29 J. 6.

78. Formation — Completion — Verbal Contract of Sale—Note by Seller Embodying Terms Unacknowledged by Buyer.—A verbal contract was entered into on 7th July for the sale of fifty tons of iron, and on the same day the sellers sent a note to the purchasers in these terms:—"We have this day sold you fifty tons iron bars at £7, 15s. per ton f. o. b. Glasgow, less 5 per cent. discount—usual extras and terms. Please acknowledge receipt of this," etc. The purchasers did not acknowledge receipt, and did not send the specification of quantities and sizes necessary to enable the seller to execute the order for six weeks thereafter. *Held* that a verbal contract of sale had been concluded, and that in the absence of evidence of any intention to cancel it, or undue delay on the part of the buyers, the contract was binding, and the buyers were entitled to damages. *Martin & Sons* v. *Robertson, Ferguson, & Co.*, 1872, 10 M. 949; 44 J. 534.

79. Formation—Construction—Actings.—On the visit of George IV. to Edinburgh in 1822, there being a great demand for gold lace, A bought the whole stock of B, and requested to have the first offer of any more which B might get. B sent an additional quantity to A in the forenoon of one day, requested an answer in the afternoon, and the lace was returned next morning. *Question*, whether A was not bound to keep and pay for the lace. *Hunter & Co.* v. *Levy & Co.*, 1825, 3 S. 605.

80. Formation — Construction — Actings —Goods Sent by Mistake and not Returned.—*Circumstances* in which it was *held* that a quantity of guano sent to a farmer by mistake for another article, and allowed to remain in his premises, but for which he could not afterwards account, though presumably used on the farm, was not proved to have been so used with the farmer's knowledge as to render him liable on the ground of adoption of an alleged sale of it. *M'Lean & Hope* v. *Thomas*, 1869, 42 J. 159.

81. Formation — Construction — Actings —Liabilities of Buyer Incurred by Conduct —Mora.—An agent intimated to G. D. & Co., his principals, a sale of goods to M. Thereupon G. D. & Co. confirmed the sale by sending a contract note to the agent, to be handed to M. The contract note bore that the goods would be delivered from time to time during three months. M. having received the contract note, returned it to the agent, denying that he had ordered the goods. The agent failed to communicate with G. D. & Co.; and about a month after, M. received the invoice of the first instalment. Though it was obvious that the agent had failed in his duty, and although M. was otherwise aware of his untrustworthy character, he was nevertheless induced by him to sign a delivery order for the goods in the agent's favour, on the representation that they would be stored by him for G. D. & Co.'s behoof. The successive cargoes, as they arrived, were dealt with in the same manner. The agent took possession of the goods without communicating with G. D. & Co., sold them, and appropriated the price. About three months after the transmission of the contract note, G. D. & Co. sent M. an account for the first two cargoes; in answer to which he wrote a letter expressing surprise, and withholding all information by which the goods could be traced. G. D. & Co. made no further claim against M. till nearly five months after the date of the last-mentioned letter, by which time the agent had become insolvent. *Held* that though M. might not have given an order for the goods, he had by his conduct incurred the liabilities of a purchaser, and that G. D. & Co.'s claim against him was not in the circumstances barred by *mora*. *Gaskell, Deacon, & Co.* v. *Mackay*, 1870, 8 S. L. R. 253.

82. Formation — Construction — Correspondence — Implied Obligation.—A merchant is held to acquiesce in a proposal made to him by a correspondent, unless he express his dissent within a reasonable time. *Serrays & Co.* v. *Watt*, 12 Feb. 1817, F. C.

83. Formation — Construction — Implied Obligation.—A merchant to whom goods had

been sent as having been purchased by him, but which he alleged had been bought by another party, not having sent notice of the alleged mistake *debito tempore*, *held* liable to pay the price. *Sharrat* v. *Turnbull*, 1827, 5 S. 361.

84. Formation — Construction — Implied Obligation—Actings.—A merchant sent a cask of gin to another, on a mistaken idea that it had been ordered, and the party to whom it was sent refused it, but received it into his cellar for the accommodation of the merchant. *Held* that, by his subsequent conduct, and particularly by his not procuring, when requested, a permit, and returning the gin, he was liable for the price, although the merchant never sent for it. *Webster* v. *Thomson*, 1830, 8 S. 528.

85. Formation — Construction — Obligation — Goods Sent to Auctioneer — Question whether Goods Sold to him qua Individual.—A party whose business was that of an auctioneer, on receiving a cargo of coals, bound himself "to pay" for them at the rate of 8s. sterling per ton. *Held*, in absence of evidence to the contrary, that this proved that the coals were sold to him, and not delivered to be sold by him as an auctioneer. *M'Gregor* v. *Turnbull*, 1848, 10 D. 1520; 20 J. 551.

86. Formation—Construction—Sale and Return — Bankruptcy of Seller — Third Party—Compensation.—L, who was in the custom of selling and also of consigning goods to H for sales and returns, sent him a parcel of goods, with an invoice, stating, "H receive from L," and a relative letter specifying the price, "at which price I trust you will take it to account." L became bankrupt, indebted to H, and the goods were claimed by a third party (who alleged that they were his property, and that L was his agent). *Held* that they had been sold to H, and that he was entitled to compensate the debt due to him by L with the price. *Gall* v. *Murdoch*, 1821, 1 S. 75.

87. Formation—Construction—Sale and Return—Proof of Allegations.—A party brought an action for the price of goods sent to another with an invoice bearing as "bought of," and signed by the party; against which the defender alleged that the goods had been sent on sale and return, that the parties had had a course of dealing on that footing, and that it was in conformity with the practice of the trade as to goods consigned for sales and returns. The court, before answer, notwithstanding the terms of the invoice, *allowed* the defender a proof of his allegations. *Woodrow* v. *Patterson & Co.*, 1845, 7 D. 385; 17 J. 195.

88. Formation — Construction — Sale Note—Condition as to Payment—Usage of Trade.—A sale note in these terms—"We have this day sold your fifty tierces Kerr's negrohead, to arrive, at 1s. 6d. per lb.; settlement 2½ discount, fourteen days. A B,"—*held* to mean that the settlement was to take place by the exchange of cash for the delivery order within fourteen days, and not that the purchaser is entitled to fourteen days' credit after delivery. *Question*, whether there was enough of ambiguity for a proof of usage of trade to be properly granted. *Athya & Co.* v. *Rowell & Co.*, 1856, 18 D. 1299; 28 J. 654.

89. Formation — Construction — Sale or Agency — Actings — Liability of Buyer.—*Circumstances* in which the court *held* a party liable for goods as purchaser, repelling his plea that the goods were sent to him for sale on commission. *Brydon* v. *Muir*, 1869, 7 M. 536; 41 J. 282.

90. Formation — Construction—Written Agreement—Delivery of Ice—Alleged Subsequent Parole Agreement.—Where a party purchased by written agreement for ten years 300 tons of ice per annum, and exercised his right of pre-emption as to all the surplus ice of that year, namely, 200 tons, *held*, on a sound construction of the agreement, that he was bound to take delivery of the whole surplus of one year within that year, and proof of an alleged verbal agreement subsequent to the written contract *refused*. *M'Allister* v. *Stevenson, M'Keelar, & Co.*, 1868, 5 S. L. R. 404.

91. Formation—Evidence of Contract.—A correspondence acknowledging the receipt of pictures, and requesting to be informed of the prices set upon them, is not sufficient evidence of a contract of sale. *Hunter* v. *Duff's Trs.*, 1832, 6 W. & S. 206. Affg. 9 S. 703.

92. Formation—Validity—Agreement to Supply Gin in "Smuggle Ankers."—A merchant in Banff sent a vessel to Norway to bring home a cargo of gin, and the master purchased a quantity from a dealer there, who agreed to furnish it in small casks, commonly called "smuggle ankers," and adapted for the contraband trade, which he did. *Held* that this circumstance was not sufficient to prove accession to the smuggling into this country of the gin, and therefore decree pronounced for the price. *Isaacson* v. *Wiseman*, 1806, Hume 714.

93. Formation — Validity — Consent — Parties Intoxicated.—A farmer who had been drinking for two days, agreed, during the evening of the second day, and when much intoxicated, to sell the whole stock of sheep on his farm to another farmer who was partially intoxicated. *Held* that although there was no evidence that the stipulated price was not a fair one, no effectual sale had been made. *Jardine* v. *Elliot*, 1803, Hume 684.

94. Formation — Validity — Consent — Parties Intoxicated.—A farmer liable to occasional fits of intemperance, while in one of these fits or "drunken rambles," made a bargain, during a drinking meeting with another, for the sale of a valuable stock of sheep on one of his farms, while he was in fact in quest of a stock for another farm. *Held* that no serious and deliberate bargain had been made so as to bind him, although

he was apparently sensible, and the terms of the bargain had been jotted down in writing by his own law agent at the time, and read over and approved of by both parties. *Hunter* v. *Stevenson*, 1804, Hume 686.

95. Formation—Validity—Construction—Weights and Measures Act 5 Geo. IV. c. 74, s. 15.—In an action for the price of potatoes, the pursuer alleged in the summons that they were purchased "at the agreed-on price of £20, 10s. per Scots acre, or £16, 18s. per imperial acre"; and in the record, that they were purchased "at the agreed-on price per acre, which, upon a strict construction, means the imperial acre," but restricted his claim to the price mentioned per Scots acre. *Held* that the bargain, as libelled, was legal under the Act 5 Geo. IV. c. 74, s. 15, but that it had not been established. *Alexander* v. *M'Gregor*, 1845, 7 D. 915; 17 J. 474.

96. Formation—Validity—Failure to Disclose Information—Buyer's Knowledge.—*Held* not relevant to vacate a sale of whisky, that the buyer was aware at the time that leave had been granted to bring in a bill into Parliament to stop the distillers in Scotland, of which the seller was ignorant, and in that ignorance agreed to sell at a lower price than what was, in consequence, the market price; and that, on a question by the seller, he did not disclose this intelligence. *Morrison* v. *Boswell*, 1801, 5 Pat. 649; Hume 679. *Paterson & Co.* v. *Allan*, 1801, Hume 681.

97. Formation—Validity—Misrepresentation—Goods not Shipped when Stated.—*Circumstances* under which it was *held* that statements made by the agent of a seller to a purchaser, relative to the shipping of certain bags of cotton wool at Liverpool to Glasgow, did not amount to such a misrepresentation as to liberate the purchaser. *M'Gavin & Co.* v. *Dunn*, 1825, 1 W. & S. 4. Affg. 2 S. 52.

98. Performance—Failure to Take Delivery—Abandonment of Contract.—*Circumstances* in which *held* that a contract for a sale of potatoes, after there had been partial delivery, had been abandoned by mutual agreement of parties, and accordingly that further implement could not be enforced. *Murray* v. *Stewart*, 1867, 3 S. L. R. 323.

99. Performance—Impossibility—Suspension of Decree for Price.—Bill of suspension *passed* of a decree for the price of whisky distilled within the Highland district, from which it could not be sent into the Lowland district, but which nevertheless had been sent under an agreement for sale between the distiller and parties residing beyond the line. *Burns* v. *Forbes*, 1807, Hume 694.

100. Performance—Mistake in Sale Note—Subject Sold—Wrong Quantity—Action for Non-Delivery.—In an action by the buyer of a lot of 1760 larch trees against the seller, for failure to deliver them, the seller alleged that, according to the true meaning of parties, the lot was only to contain 760 trees—that he had written 1760 by mistake in the note of sale—that the buyer knew this to be a mistake, and took a fraudulent advantage of it; and the seller having brought an action of reduction, which was repeated in the other action, *held*, on adjusting issues (1) that the seller should stand pursuer of the issue embodying his defence; and (2) that it was unnecessary to introduce a specific averment of fraud. *Mortimer* v. *Mitchell*, 1850, 23 J. 64.

101. Performance—Partial Acceptance—Potatoes Sold at so much per Boll "as they should be Measured"—Delay in Taking Delivery—Deterioration—Seller's Remedy.—A party by his agent sold potatoes, not in very good condition, at so much per boll, as they should be afterwards measured. The purchaser was bound to measure them and take delivery in two days; but he delayed to do so, notwithstanding being frequently urged by the seller, for two months, by which time a great proportion of the potatoes had become rotten, and he only took delivery of those which were sound; and there being no precise evidence as to the quantity which would have been sound at the period when delivery should have been taken, *held*, in an action for the price, that the seller could only recover for the quantity actually received by the purchaser. *Morland* v. *Mackay*, 1829, 8 S. 188; 5 Fac. 166.

102. Performance—Payment—Agent—Separate Transaction between Buyer and Seller's Agent.—A party, by missive of agreement, sold herrings to another, payable in cash on receipt of invoice and bill of lading, and the missive was signed by the parties and by the seller's agent. *Held* that the buyer could not be discharged of the price by a transaction with the agent not in terms of the missive, and under which the seller did not receive payment. *Hampton* v. *Adam*, 1839, 1 D. 500.

103. Price—Addition to Price—Contract for Spirits—Additional Duties Imposed before Delivery.—A distiller at Leith agreed in May to sell a quantity of spirits to a merchant at Kirkcudbright, and to deliver them free on board ship at Leith, and to be on the look out for a vessel, the price payable at three months from delivery. It was not alleged that there was any negligence in making such look out, or that there was any specific appropriation of spirits to the merchant; and the vessel was not furnished by him till the middle of July. In the meantime a statute was passed imposing additional duties on, and authorising the seller of spirits to add to the price, the additional duties where contracts had been made for sale. *Held* that the distiller was entitled to add the additional duties to the price. *Haig* v. *Napier*, 1813, 1 Dow 255. Rev. C. of S.

104. Price—Agreement as to Price—Return of Goods—Set Off.—By written memorandum of agreement A agreed to take back from B so much as remained in B's hands of a certain quantity of yarn which A had previously sold to him, and in place thereof B

ordered from A a large quantity of yarn of a more expensive kind, the difference to be paid at a certain specified rate. An action brought by B to recover from A the price of the yarn so agreed to be taken back, *dismissed* as irrelevant. *Hinshaw & Co.* v. *Fleming, Reid, & Co.*, 1868, 5 S. L. R. 655.

105. Price — Compensation — Illiquid Claim—Delay.—*Circumstances* in which an illiquid claim of damages, not brought forward till a late period of an action for payment of goods sold, *repelled* as a ground for retention of the price. *Hume & Co.* v. *Walkers & Co.*, 1826, 4 S. 383.

106. Price — Condition of Payment—Publication of Work — Stipulated Rate—Price of one Volume.—An author agreed with a bookseller for the publication of a work to be entitled *The Elements of Mechanical Philosophy*, in parts, at so much per sheet, payable either at the time of publication of each part, or after the publication of the whole, at the option of the author. After the publication of one volume, constituting in itself a complete part, the work was interrupted by the death of the author. *Held* that his representatives were entitled to the price of the volume according to the stipulated rate. *Constable & Co.* v. *Robison's Trs.*, 1 June 1808, F. C.; M. "Mutual Contract" App. No. 5.

107. Price—Discount—Memorandum on Price-List—Effect on Running Account for Furnishings.—A statement appended to a price-list of goods, that a liberal discount would be allowed for cash within three months, does not apply to an account which does not represent a definite transaction, but is a general running account for furnishings. *Cumming* v. *Hendrie*, 1861, 23 D. 1365; 33 J. 689.

108. Price—English or Dutch Weight—Local Custom.—A party agreed to sell to another all the salmon which he might catch, at the rate of 56s. per hundredweight of 112 pounds, and the purchaser paid for part of the fish according to the English pound of 16 ounces. *Found* that the price was to be regulated with reference to that weight, and not by the Dutch pound of 17½ ounces, although it was alleged that the latter, by local usage, was the uniform weight. *Horne* v. *Redpath*, 1824, 2 S. 791.

109. Price—Evidence of—Admissibility—Belief of General Agent.—In an action of damages for non-delivery of goods sold, the belief of a general agent as to current prices of similar goods, though he did not make sales at the time in question, is evidence. *Bell* v. *Leighton*, 1819, 2 Mur. 74.

110. Price — Goods Partly Returned — Extinction of Claim — Proof — Onus. — A party bought goods, and, after an action had been brought for payment, returned part of them to the trustee on the seller's sequestrated estate, to be sold by him. The *onus* of proving a condition that the price effeiring to the goods so returned was to be considered as thereby discharged, *held* to lie on the purchaser. *Hay* v. *Grant*, 1827, 5 S. 685.

111. Price — Invoice Weight — Custom of Trade.—Where it was proved to have been the custom of the trade for soap-dealers to guarantee the weight specified in the invoice of soap sold, *found* that the purchaser was not bound to accept a bill for more than the price, corresponding to the invoice weight. *Hunter* v. *Bonar*, 1823, 2 S. 554.

112. Price — "Lowest Price" — Goods Ordered at—Date of Receiving Order.—When goods are ordered or commissioned "at lowest price," they are to be charged at the price as at the date of receiving the order; but this rule not enforced where there had been neglect to answer a letter. *Champion & Kirby* v. *Milne*, 14 Jan. 1811, F. C.

113. Price—Market Price—Evidence of—Admissibility.—In a question as to the quality of goods, *held* incompetent to lead evidence as to the returns upon similar cargoes prepared by the same party, or to prove the current prices in the home market of goods purchased for exportation by evidence of what similar goods exported by the seller, brought when sold abroad. *Whealler* v. *Methven*, 1843, 5 D. 1221; 15 J. 508.

114. Price — Market Price—Where no Proof of Price.—In an action of damages for non-delivery of wine, if no proof is brought as to the price at which it was sold, the jury may take the market price. *Bertrams* v. *Fenwicks*, 1818, 1 Mur. 348.

115. Price — Misunderstanding as to Price—Proof—Market Value.—A, in pursuance of a contract or supposed contract of sale, sent cattle to B, with a letter, in which the price was stated to be £15 per head. B took delivery, but immediately wrote that the price agreed upon had been £13 per head, and that he would be glad to hear from A on the subject; but without waiting for an answer, he wrote again, sending the price at the rate of £13 per head. A then wrote pressing for the balance, "or I will be obliged to come and take them away." After some communications, B wrote that he declined all further correspondence, and that the cattle had been paid for by the sum sent as before mentioned. In an action at the instance of A for the balance of the price, *held* (1) on the evidence, that there had been a misunderstanding as to the price, the buyer supposing that the price had been fixed at £13, and the seller that it had been left unfixed, and was to depend on the quality of the cattle which were to be selected from a particular lot; (2) that, in the circumstances, and seeing that the sale had been carried into effect under this misconception, the legal result was, that the purchaser, B, must pay the market value of the cattle, which was proved to be £15 per head. *Wilson* v. *M. of Breadalbane*, 1859, 21 D. 957; 31 J. 525.

116. Price—Objection — Delay.—A purchaser of goods furnished, and accompanied

with accounts, *held* not entitled to object, after the lapse of a year, that the prices charged were above the market price at the time. *Mills* v. *Hamilton*, 1830, 9 S. 111.

117. Price — Payment—Proof.—A party sued for the price of a cow denied the purchase, and went to proof on that issue; and the sale and delivery having been proved, *held* that he was not entitled then to plead payment on the ground that the sale was made in a public market, and that payment must be presumed. *Kidd* v. *Brown*, 1828, 6 S. 825.

118. Price—Payment on Delivery—Trade Practice—Proof.—*Circumstances* in which a proof was allowed that it was the general practice of the trade between fleshers and cattle-dealers to pay for cattle on delivery. *Stewart* v. *Gordon*, 1831, 9 S. 466; 6 Fac. 329.

119. Price—Reduction—Acceptance and Use after Inspection—Perishable Goods—Timeous Objection.—A party purchased, at so much per box, certain boxes of lemons, which he saw before purchase, took delivery, broke up the boxes, and cut and squeezed the lemons. *Held* not entitled to claim a deduction, on the ground that some of the boxes were undersized. *Fraser* v. *Outram*, 1834, 13 S. 84.

120. Price—Reduction—Acceptance without Objection—Goods Used and Partly Paid for—Timeous Objection.—A party to whom furnishings were made and an account rendered, having used the articles and made a partial payment to account, and been repeatedly pressed for payment for some years, without objecting to the rates of charge, not allowed afterwards to object to them. *George* v. *Scott*, 1832, 10 S. 443.

121. Price—Reduction—Delay in Tendering Delivery — Buyer's Acceptance without Objection—Timeous Objection.—On a delay occurring in furnishing goods according to agreement, the purchaser demanded a reduction in the stipulated price; but the sellers intimated, on sending the goods, that they would not agree to any reduction; and the purchaser thereafter accepted them without objection. *Held* bound to pay at the price originally stipulated, and not entitled to found on an alleged deficiency in weight, of which he had not complained *tempestivé* as a ground for an abatement. *Harford Bros. & Co.* v. *Robertson*, 1832, 6 W. & S. 1. Revg. 9 S. 352.

122. Price—Reduction—Railway Waggons Sold Subject to Reference in Case of Dispute — Insufficiency — Defects not Latent.—The pursuer agreed to supply to the defender a certain number of railway waggons, subject to a reference in case of dispute as to material or workmanship. The waggons were delivered from time to time, and the defender, while alleging insufficiency, took delivery of and used them, without calling on the referee, until the whole had been delivered. *Held*, in an action for the contract price, that the defender could not claim a deduction therefrom, to which the referee, after the whole were delivered, stated he was entitled, on the ground of insufficiency, the defects complained of not being latent, but such as might easily have been discovered on the delivery of each waggon. *Morson & Co.* v. *Burns*, 1866, 5 M. 99; 39 J. 54.

123. Price—Repetition—Invalid Sale—Shop-Fittings—Fixtures.—A party bought shop-fittings, etc., from a trustee on a sequestrated estate. He thereafter raised an action against the trustee for repetition of part of the price, on the ground that certain of the articles sold to him were not validly sold, inasmuch as they did not belong to the trustee, but were claimed by the landlord as fixtures. *Held* that as he did not allege eviction, he was not entitled to maintain the action. *Swan* v. *Martin*, 1865, 3 M. 851; 37 J. 442.

124. Price—Sale of Patented Apparatus—Alleged Invalidity—Fraud.—A patentee supplied, under a contract, certain apparatus patented by him. The purchasers kept the apparatus, but, without averring that it was inefficient or unskilfully executed, refused to pay the contract price, on the ground that the patent was invalid; and, in defence to an action for payment, brought a counter action, in which they proposed to pay the furnisher on the principle of *quantum meruit*, asking for reduction of the patent, and of the contract as entered into on the faith of the existence of a valid patent. They challenged the validity of the patent on various grounds—allegations which *held* not to be relevant allegations of fraud; without which, a purchaser was not entitled to refuse payment. *Todd, etc.* v. *O'Reegan*, 1859, 21 D. 1320; 31 J. 725.

125. Price—Sale of Quantity of Straw—Delivery of Short Weight—Seller's Duty to Weigh.—*Circumstances* in which a party who had sold and delivered a quantity of straw to merchants who subsequently endorsed the delivery order to another firm, by whom it was weighed, had only action for the weight ascertained by the latter, on the ground that the seller should have taken steps to have the straw correctly weighed. *Nicol* v. *Allan*, 1869, 7 S. L. R. 97.

126. Price — Sale of Stacks of Grain — Deficiency in Weight—Onus probandi.—In an action for payment of the price of stacks of grain sold with a guarantee by the seller that each stack would yield a certain quantity, *held* that the burden of proving a deficiency lay with the purchaser, and that he had failed to establish this defence. *Walker* v. *Simpson*, 1865, 1 S. L. R. 51.

127. Price — Timber Resold by Sellers for Buyer—Valuation—Exchange.—A purchaser of timber being unable to implement his part of the transaction, requested the sellers to sell the timber on his account. The sellers took back the timber at a valuation. Valuation *sustained*, and *held* that the difference of exchange between the time when the timber was offered back and first sold must be taken into account along with the difference

between the valuation allowed and the price agreed to be paid by the buyers. *M'Leans* v. *Thorley, etc.*, 1798, 4 Pat. 22. Affg. C. of S.

128. Rejection—Disconformity—Appropriate Remedy—Observations upon actio quanti minoris—Where Special Agreement.—When the goods delivered to a purchaser are disconform to contract, his remedy is to return the goods at once, and to claim damages for breach of contract. He is not entitled to retain the goods and to claim an abatement of the price. *M'Cormick & Co.* v. *Rittmeyer & Co.*, 1869, 7 M. 854; 41 J. 465.

A purchaser *held* entitled to an abatement from the price of goods sold and delivered in name of damages for breach of contract, in respect of an agreement to that effect between the parties. *Ibid.*

129. Rejection—Disconformity—Buyer's Duty—Intimation—Restoration—Custody.—When goods sold are rejected by the purchaser as disconform to contract it is not absolutely necessary that they should be at once restored to the seller or placed in neutral custody, as the adoption of either of these courses may be very inconvenient or impossible, but if the purchaser, after intimating to the seller his rejection of the goods, retains them in his own custody, he is bound to keep them intact until removal. *Chapman* v. *Couston, Thomson, & Co.*, 1871, 9 M. 675; 43 J. 326.

130. Rejection — Disconformity — Commission Agent—Resale—Judicial Warrant—Foreign.—A Scots merchant instructed a foreign commission agent to send him certain goods. When the goods arrived in England they were rejected as of inferior quality, and were sold by private sale by the agent's orders at the port of discharge. *Held*, upon a proof, that the merchant was not justified in rejecting the goods, and the plea maintained by him that the agent must be held to have sold the goods as his own property repelled, in respect that it was not shown that judicial warrant was usual or necessary in England. *Sellar & Sons* v. *Gladstone & Co.*, 1868, 5 S. L. R. 417.

131. Rejection — Disconformity — Defective Bottles — Design to Suit Purchaser.—*Circumstances* in which *held* that a firm who manufactured a quantity of bottles on a new design, to suit the taste of the purchaser, were not responsible for loss occasioned to the purchaser by a large number of the bottles breaking after being filled, the firm not having guaranteed the strength of the bottles, and the purchaser being to blame in not testing their strength. *Carson, Warren, & Co.* v. *Couston, Thomson, & Co.*, 1868, 5 S. L. R. 207.

132. Rejection — Disconformity — Fair Market Price — Implied Warranty.—*Held* that a purchaser of "Ichaboe guano" was entitled to refuse implement, on the ground that the article tendered for delivery was, to a considerable extent, adulterated with foreign substances. *Observed*, that the sale of a commodity at a fair market price, implies a warranty on the part of the seller that the article is of corresponding quality. *Paterson* v. *Dickson*, 1850, 12 D. 502; 22 J. 147.

133. Rejection — Disconformity — Goods Sold by Agreement between Parties — Buyer's Liability.—Goods purchased were on delivery refused by the buyer. It was agreed between him and the seller that he should sell them on behalf of the seller for what they would bring. *Held* that the buyer was liable not for the price of the goods but only for the proceeds of the sale. *Ross* v. *Taylor & Co.*, 1823, 2 S. 173.

134. Rejection — Disconformity — Objection to Quality — Goods Used — Proof — Evidence.—In an action for the price of goods alleged to be bad, the pursuer having proved that similar articles manufactured by him were good, the defender *allowed* to prove that others were bad; but *observed*, that such evidence on both sides was irregular. *Bailey & Co.* v. *Paterson*, 1828, 4 Mur. 480.

135. Rejection — Disconformity — Objection to Quality—Unmarketable Condition.—In an action for the price of a cargo of peas, delivery of which had been rejected by the defender, *found* that he was justified in refusing to take delivery, in respect of the peas not being in a marketable condition. *Alison* v. *Gartshore*, 1839, M'F. 227.

136. Rejection — Disconformity — Objection to Quality of Flax Yarns—Warranty—Merc. Law Amend. Act, s. 5.—Yarns were sold and bought as "3-lb. flax yarns." *Held* that the provisions of the Merc. Law Amend. Act, 1856, s. 5, as to goods sold in ignorance of defect or bad quality being with all faults at the risk of the purchaser, unless there was express warranty, or unless they were sold for a specified and particular purpose, did not apply where the goods sent contained an admixture of jute, and so did not answer the description of "flax yarn." *Jaffé* v. *Ritchie*, 1860, 23 D. 242; 33 J. 107.

137. Rejection — Disconformity — Part of Goods Sold before Fault Discovered—Buyer's Duty to Restore.—A purchaser is not barred from rejecting goods as disconform to order by the mere fact of having sold part before the fault was discovered, but he must restore the value, not the contract price, of the goods returned. *M'Cormick & Co.* v. *Rittmeyer & Co.*, 1869, 7 M. 854; 41 J. 465.

138. Rejection — Disconformity — Personal Bar.—A party ordered a steam-engine boiler, with a general reference to another boiler then in the makers' hands, but without any stipulation as to the power. Afterwards, seeing the one making for him, which was longer than but not so broad as the one referred to, he objected to its length; but said it would do, on the makers' offering to take two feet off it. *Held* that although they did not explain that this would diminish its power below that of the boiler originally referred to, he was not entitled to refuse it, on the ground that it was not of the same

size and power. *Kerr & Sons* v. *M'Dowell*, 1828, 6 S. 1029.

139. Rejection—Disconformity—Rejection Subject to Condition—Bar.—A merchant ordered certain goods according to sample. On delivery, he intimated to the seller that he rejected them as disconform to sample, but at the same time refused to return them until other goods should be sent, or a claim of damages for non-fulfilment of the order paid. *Held* that if the purchaser intended to reject the goods, he was bound to return them; and that having retained them, he was liable in the contract price. *Padgett & Co.* v. *M'Nair & Brand*, 1852, 15 D. 76; 25 J. 55; 2 Stuart 41.

140. Rejection — Disconformity — Retention — Appropriation — Bar. — A party ordered a cargo of goods of a stipulated quality, and, on receiving them, intimated to the seller that they were of an inferior quality, and that they had been deposited in a bonded warehouse at his risk; but thereafter he removed the greater part of the goods from the warehouse, without warrant, and appropriated them to his own use. *Held* that he was liable for the contract price. *Ranson* v. *Mitchell*, 1845, 7 D. 813; 17 J. 423.

141. Rejection — Disconformity — Sale of Wheat by Bulk—Examination by Buyer —"Caveat emptor."—Where a sale of wheat was made by bulk, and the buyer had seen and examined part of it, and did not allege any fraud or deceit by the seller, *held* not relevant to relieve the buyer of payment of the price, to allege that it was affected with a bad smell and useless for baking. *Muil* v. *Gibb*, 1840, 2 D. 1227; 15 Fac. 1313.

142. Rejection—Disconformity—Special Warranty.—A agreed to supply kelp to B of the same kind and quality as he had supplied to him in a previous year. *Held* that this special warranty did not import that the kelp must contain an equal quantity of iodine, but merely that it was gathered on the same shore and treated in the same manner as the former cargo. *Boyle* v. *Hughes*, 1870, 7 S. L. R. 623.

143. Rejection — Disconformity — Specified Goods.—An order for corkwood specified different kinds, adding, "and a few bales of white pint corkwood at about 36s. Please send me the same parcel as sent to Mr. Kennedy of this town." No white pint corkwood at 36s. had been sent to Kennedy. The corkwood sent was objected to, part as not fit for pint bottles, the rest as of inferior quality. The sellers averred that the corkwood sent was similar to that sent to Mr. Kennedy. In an action at their instance for payment of the price, *held* that the corkwood sent was not conform to order; that as the order specified the kinds of corkwood wanted, the reference in the order to the corkwood sent to Kennedy, if it differed in kind, did not justify the manufacturers in disregarding the specifications in the order: therefore that the purchaser was entitled to reject the whole corkwood sent. *Van Oppen* v. *Arbuckle*, 1855, 18 D. 113.

144. Rejection—Rejection by Insolvent Buyer—Rescission by Seller—Stoppage in transitu—Transfer of Property.—The purchaser of a ship's cargo became aware of his insolvency after the purchase was concluded, but while the cargo still lay on the quay upon which it had been unloaded by his servants. The harbour authorities urging the removal of the cargo, he transferred a small portion to his own premises, and then intimated his insolvency to the seller, who immediately applied for interdict and for warrant to take possession of the cargo lying on the quay. The purchaser's estates being immediately thereafter sequestrated, the trustee in the sequestration opposed the petition of the seller, and claimed the cargo as part of the bankrupt's estate. *Held*, on a proof, that the portion of the cargo removed to the purchaser's premises had been so removed *custodiæ causa* merely; that the cargo was effectually rejected by the purchaser; and that the contract of sale was thereupon rescinded by the seller, and the seller found entitled to the cargo. *Question*, whether the goods, when lying on the quay, were in such a position that the seller could exercise the right of stopping *in transitu*. *Booker & Co.* v. *Milne*, 1870, 9 M. 314; 43 J. 141.

145. Rejection — Right of Rejection — Part Payment — Retention by Buyer in Security — Order for Inspection. — By a contract of sale the purchaser agreed to take goods, "all in new condition, at invoice prices." The goods were handed over to the purchaser with a list, docqueted, "Objections to any found damaged should be made before the end of the month." Part of the price was paid, and before the end of the month the purchaser stated objections to the goods, but intimated that he would hold the whole in his hands as security for the payment already made. *Held* that the delivery in the face of the docquet had not completed the transaction; that by retaining the goods in security the purchaser had not deprived himself of his right to return them; and that, on the seller refusing to take them back, it was an appropriate remedy to apply to the sheriff for an order to have them inspected. *Laing* v. *Westren*, 1858, 20 D. 519; 30 J. 275.

146. Rejection — Timeous — Acceptance without Complaint—Market Price—Misrepresentation — Compensation. — *Circumstances* in which a purchaser of tallow was *held* not entitled to object to a sale, on the ground of alleged misrepresentation as to the market price of the article at the time of the bargain; and plea of compensation *repelled*. *Mitchell* v. *Jamieson & Sons*, 1814, 6 Pat. 24. Affg. C. of S.

147. Rejection — Timeous — Buyer's Failure to Make Timeous Examination of Goods — Bar. — *Circumstances* in which the

claim of the purchaser of meal for repetition of the price, in respect of its inferior quality, was *held* barred by his failure to make timeous examination after delivery. *Smart* v. *Begg*, 1852, 14 D. 912; 24 J. 547; 1 Stuart 942.

148. Rejection—Timeous—Disconformity — Personal Bar. — A party sold grain to another by sample; and the buyer ordered the grain to be delivered at a particular place, which was done. He then objected to the grain, as not conform to sample; but afterwards intimated that he would keep it, and claim deduction from the price. *Held* that he was liable for the price. *Watt* v. *Glen*, 1829, 7 S. 372; 4 Fac. 472.

149. Rejection — Timeous — Disconformity—Rejection Subject to Condition. —*Held* that a purchaser, who intimated on receipt of goods that they were disconform to contract, but that he would not allow the sellers to remove them until they sent him other goods in their place, and did not withdraw that restriction for about a fortnight, had failed timeously to reject the goods, and was liable for the price. *Jardine* v. *Pendreigh*, 1869, 6 S. L. R. 272.

150. Rejection — Timeous — Disconformity to Instructions—Inferior Quality. —A merchant ordered goods from another, who, on the 23rd November, wrote that he had sent them, with an invoice; and the merchant received them, and made no answer till the 27th December, when he wrote that the order had not been executed conformably to instructions, that the goods were of an inferior description, and the prices high, but offering to keep them on getting 20 per cent. discount. *Held* that he was not entitled to reject them. *Vickers & Co.* v. *Sheriff & Dudgeon*, 1803, Hume 332.

151. Rejection — Timeous — Disconformity—Wine—Auction—Bar—Difference between Scots and English Law.—Several lots of wine were purchased by sample at a public sale by auction on the 19th of March, and were delivered to the buyer by the 7th of April following. On the 6th of May the buyer, without specifically objecting to any particular lot, complained that some of the wine was unsound, and the exposer offered to take back the whole. This proposal was declined, and on the 31st of May the buyer specified three lots as disconform to sample, and claimed compensation, but did not make any offer to return the objectionable lots until the 14th of June, after the seller had raised an action for the price. During all this time the wine had been in the custody of the purchaser, and several dozens had been opened and tested by him. *Held* (aff. C. of S.) that the purchaser had not timeously intimated to the seller his rejection of the lots complained of, and was therefore barred from withholding the price thereof, although these lots were proved to be disconform to sample. *Observations* (*per* Lord Chelmsford) on the difference between the law of England and the law of Scotland as regards the right of a purchaser to return the subject sold on the ground of its being disconform to sample or warranty. *Couston, Thomson, & Co.* v. *Chapman*, 1872, 10 M. (H. L.) 74; 44 J. 402; L. R. 2 Sc. App. 250.

152. Rejection—Timeous—Goods of Unmarketable Quality.—A buyer who received rum in December, and did not complain of the quality till March, when payment of the price was demanded, *held* not entitled to refuse payment of the price, although he alleged that the rum was of the worst quality and unmarketable, that the delay had arisen from the seller having failed to deliver it in October, and the buyer having then supplied himself with other rum, and on that in question arriving in December, he laid it aside as not required for immediate use. *Jaffray* v. *Webster*, 1801, Hume 680.

153. Rejection — Timeous — Goods Retained and Used—Alleged Understanding of Parties—Deduction from Price—Onus.—In an action for payment of the invoice price of wood delivered to the purchaser, he alleged that it was of inferior quality, and that it was the understanding of parties, that when this was the case, a large deduction was to be made from the invoice price at settling. *Held* that it was incumbent on him to prove the alleged understanding; and having failed to do so, and although he objected to the quality when he received the wood, yet having retained and made use of it, he was liable for the full invoice price. *Ramsay* v. *M'Lellan & Son*, 1845, 8 D. 142; 18 J. 62.

154. Rejection—Timeous—Goods Sent upon Order not Positively Refused. — A shopkeeper in Ballantrae gave a Manchester manufacturer an order for goods, which were dispatched and an invoice sent, the latter of which was received on the 30th July, whereupon the shopkeeper wrote complaining of the prices, and requesting the goods not to be sent; but the manufacturer, in August, refused to take them back, and no answer was made, and the goods were received by the shopkeeper, who, after keeping them for about six weeks and attempting to sell them, returned them, whereupon the manufacturer sent them back. *Held* that the shopkeeper was liable for the price. *M'Fadzean* v. *Harsewell*, 1802, Hume 330.

155. Rejection—Timeous—Goods Used without Objection.—A person ordering and using goods without objection is liable for the price, though he proves them insufficient. *Bailey & Co.* v. *Paterson*, 1828, 4 Mur. 478.

156. Rejection—Timeous—Horse—Inspection. — *Circumstances* under which a party who had employed another to purchase horses, and who alleged that his instructions had not been duly complied with as to height, was *found* not entitled to return them. *Cossar* v. *Marjoribanks*, 1826, 4 S. 685.

157. Rejection—Timeous—Horse—Unsoundness.—A person sold a horse to another,

who, after keeping it ten days, sold it to another, who kept it twenty-seven days, and then returned it as unsound; whereupon the first buyer proposed to return it to the original seller. *Held*, in respect of *mora*, not entitled to do so. *Bennoch* v. *M'Kail*, 27 Jan. 1820, F. C.

158. Rejection—Timeous—Implied Acceptance of Goods—Course of Dealing.—A shopkeeper had for several years been in the practice of receiving nails from a manufacturer, partly on written and partly on verbal orders, and partly without any order; and after an account had been settled, several packages of nails were, between January and July, sent to and kept by the shopkeeper. *Held* not entitled, on a demand for payment of the price, to reject them, and that he was liable for the price. *Gilbert* v. *Dickson*, 1803, Hume 334.

159. Rejection—Timeous—Objection to Quality—Part of Goods Used.—A party received kelp on 21st April, for which he accepted bills on the 22nd, and after using about six tons out of twenty-two, he intimated, on 10th September, that it was of bad quality. *Held* that although he alleged it was originally bad, and he did not discover this till he began to make soap, he was bound to pay the bills. *Stevenson* v. *Dalrymple*, 28 June 1808, F. C.; M. "Sale" App. No. 5.

160. Rejection — Timeous — Order only Partially Executed—Want of Notice.—A merchant who gave an order for nine pipes of red and three of white wine, having received the red and kept it, without any objection that the white had not also been sent till called on to pay the price of the red, *held* not entitled to object that the order had not been completely executed. *Smith* v. *Napier*, 1804, Hume 338.

161. Rejection—Timeous—Personal Bar.—If an article is commissioned on sale, and on receipt is returned to be repaired as damaged, and it is repaired, any objection to the original construction is precluded. *Morgan* v. *Hunter & Co.*, 1817, 1 Mur. 256.

162. Rejection — Timeous — Quality of Herrings. — In an action for the price of herrings, *held* not competent, ten years after they had been received, to object to them as insufficient in quality. *Pitcairn* v. *Brown*, 1823, 2 S. 576.

163. Rejection — Timeous — Wine — Quality.—A merchant in Greenock received wines from a merchant in Oporto, which he put into bond, and for which he granted his bill at nine months; and when it was about to fall due, he alleged that he had discovered that the wine was of bad quality, and therefore refused to pay the bill. *Held* too late to make such an objection, and that he was liable for the bill. *Newmann, Hunt, & Co.* v. *Harris*, 1803, Hume 335.

164. Rescission—Inadequacy of Price.—*Opinion* (*per* Lord Cowan) that mere inadequacy of price was not sufficient to reduce a contract of sale. *Latta* v. *Park & Co.*, 1865, 3 M. 508; 37 J. 242. See also *M'Kirdy* v. *Anstruther*, 1839, 1 D. 855; 14 Fac. 932.

165. Rescission—Right of Buyer to Rescind—Seller's Refusal to Implement Obligation—Insurance.—An undertaking by the seller of a cargo of grain to defray "cost, freight, and insurance" includes insurance against war risks, and on the refusal of the seller to implement this obligation, war having in the meantime broken out, the buyer is entitled to rescind the contract. *Birkett, Sperling, & Co.* v. *Engholm & Co.*, 1871, 10 M. 170; 44 J. 103.

166. Retention—Buyer's Right of Retention for Price — Retention by Buyer in Security of Damages.—A purchaser of goods not conform to order has a right of retention over them only in security of the price, and not of damage or expenses. *Melville* v. *Critchley & Co.*, 1856, 18 D. 643; 28 J. 277.

167. Risk—Completed Sale—Destruction of Cargo of Oil before Delivery—Transfer of Risk to Buyer—Suspensive Condition.—A cargo of oil prepared for sale, weighed and lying ready for delivery at a boiling-yard, was sold. Bought and sold notes were exchanged on these terms: "Bought this day all the merchantable oil, this year's produce of the ship *Polar Bear*." The number of tons of pale and boiled oil respectively (which are of different values) was stated, and a slump price per ton for the whole cargo to be delivered where it lay. By the usage of the trade, the buyers had right either before or after delivery to check the quantity and quality of the oil, and to a deduction for any sediment or "foots" that might be found in the casks. Before the delivery, the greater part of the oil was burnt in the yard. *Held* that, the bought and sold notes affording the means of ascertaining the price, and the right to check the weight and quality not being a suspensive condition, the contract of sale was complete, and the risk was transferred to the purchaser. *Hansen & Others* v. *Craig & Rose*, 1859, 21 D. 432; 31 J. 236.

168. Risk — Delivery Stipulated for at Place Different from Place of Sale—Agreement of Parties—Exception to Rule.—A party offered to sell grain to another, "to be delivered at Stirling shore at the mast," which was accepted, and the grain was put on board a vessel, but before arriving at the place of delivery, was injured. *Held* that the *periculum* was on the seller. *Milne & Co.* v. *Miller*, 1 Feb. 1809, F. C.

169. Risk—Deterioration of Goods Sold before Delivery—Delay in Taking Delivery—Duty of Seller.—Potatoes were sold not in very good condition to a buyer who was bound to take delivery within ten days. The buyer delayed to take delivery (notwithstanding his being frequently urged by the seller to do so) for two months, when a large portion of the potatoes had become rotten, and then only took delivery of those which were sound. There was no precise evidence as to the quantity which would have been sound at the time when delivery should have been taken. *Held*, in an action for the price, that the seller could only recover for the quantity actually

received by the buyer. *Morland* v. *Mackay*, 1829, 8 S. 188.

170. Risk—Goods Bought and Shipped—Insufficient Notice to Buyer.—A dealer in Ayr bought goods from a merchant in Glasgow, who on 22nd January sent an invoice containing a charge for freight, but saying nothing as to the shipment of the goods; and although the dealer wrote on the 16th February for information, no answer was given till he applied on the 27th, through a friend, when a bill of lading, dated the 2nd, was given. The vessel in which the goods had been shipped was lost on the 28th. *Held* that the dealer was not liable for the price of the goods. *Johnstone & Sharp* v. *Baillie*, 2 June 1815, F. C.

171. Risk—Goods Ordered and Sent to Shipping Company—Shipment Intimated—Change of Shipment—Notice—Mistake in Invoice.—A merchant in Edinburgh ordered tea from a dealer in London, who sent it to a Leith shipping company, by whom he was informed that it would be sent by the *Kelso*, which the dealer notified to the merchant, but afterwards, in consequence of a notice from the company, he wrote that the tea would be sent by the *Union*, which he notified to the merchant, and, after all, it was sent by the *Kelso*, which was wrecked, and the tea lost. *Held* that this not being a question with insurers, the *periculum* lay on the merchant, and he was bound to pay the price to the dealer. *Heseltines* v. *Arrol & Co.*, 15 Jan. 1802, F. C.; M. 10111.

172. Risk—Goods Ordered and Shipped—Notice—Mistake in Invoice.—*Held* that where merchants in Scotland purchased goods from a merchant in London, who shipped them on board a vessel, but gave the wrong name, the purchasers were liable for the price, although the vessel was lost. (*Heseltines* v. *Arrol & Co., followed*). *Elton, Hammond, & Co.* v. *Porteous*, 13 Dec. 1808, F. C. [Cf. No. 178.]

173. Risk—Goods Ordered and Shipped and Invoiced to Buyer—Seller's Obligation Discharged.—Goods were ordered by a party residing in Scotland from a merchant in London, who sent them by a public shipping company, after which they were embezzled. *Held* that, in a question between the seller and purchaser, the loss fell on the latter. *Hall & Co.* v. *Armstrong*, 1823, 2 S. 358.

174. Risk—Goods Ordered from Abroad and Shipment Intimated—Deviation from Orders without Objection—Loss—Duty of Buyer as Consignee.—A merchant in Leith ordered merchants in Riga to send him 120 barrels of linseed, of which 60 were to be shipped by one specified vessel, and 60 by another, without naming a price. The Riga merchants intimated the market prices were too high, and expected to fall, and that so soon as prices fell, they would send the seed to him. Although he had sufficient time to object, he did not do so. The Riga merchants thereafter sent 100 barrels by a ship which was lost on the voyage, of which they gave notice. *Held* that the Leith merchant was bound to pay the price, as he ought to have objected upon receiving notice of the change in the mode of sending the seed, and, at all events, he was bound to have insured the seed after he had been informed of its being dispatched. *Pierson* v. *Balfour*, 1 Dec. 1812, F. C.

175. Risk—Goods Shipped According to Order and Lost—Failure of Seller's Agent to Intimate Shipment—Liability.—Goods were ordered from London through a guaranteeing agent at Manchester in June, to be sent to Glasgow, and they were sent to the shipping wharf on 20th July, and the ship sailed on the 3rd August, and was lost on the 10th; and on that day the agent sent the invoices, and they were not received till the 14th. *Held*, in an action by him for the price against the purchasers, that as due notice had not been sent by him of the shipment, he had no claim. *Andrew* v. *Ross*, 6 Dec. 1810, F. C.

176. Risk—Goods Sold and Shipped—Alleged Unseaworthiness of Vessel—Proof—Onus.—A person at Inverary bought coals from one at Glasgow, and desired him to send them by a gabbart. The seller shipped them on board a gabbart, which was employed as an ordinary trader between the two ports, and it was lost on the voyage. *Held* in a question as to the liability of the purchaser, and on conflicting evidence as to whether the gabbart was reputed seaworthy, that it was necessary to establish *culpa lata* against the seller, in order to relieve the purchaser from the loss, and this had not been done. *Sword* v. *Milloy*, 17 Feb. 1813, F. C.

177. Risk—Goods Sold and Shipped—Delay in Intimating Shipment to Buyer.—A seller having shipped goods from London to Aberdeen by a steamer, did not send notice of shipment to the purchaser until the following day. The vessel having been lost on the passage, *held* that the seller's duty was to have given the purchaser immediate notice of shipment, so as to enable him to insure; and this not having been done, that the risk remained with the seller. *Fleet* v. *Morrison*, 1854, 16 D. 1122; 26 J. 607.

178. Risk—Goods Sold and Shipped—Notice—Mistake in Invoice.—A merchant in London sold goods to one in Scotland, which were shipped on board a vessel which sailed on the 24th February, and he sent an invoice on the 27th, bearing that date, and stating that the goods had been shipped, but not that the vessel had sailed, and the vessel was lost. *Held* (although it did not appear that the buyer intended to insure) that he was not liable for the price of the goods; and cases of *Heseltines*, 15 Jan. 1802, and *Elton, Hammond, & Co.*, 13 Dec. 1808, *criticised*. *Arnot* v. *Stewart*, 1817, 5 Dow 274; 6 Pat. 289. Affg. 25 Nov. 1813, F. C.

179. Risk—Goods Sold to be Delivered "Free on Board"—Question as to Port of Shipment.—Herrings were sold, to be delivered

"free on board," but nothing was said of the place of shipment. *Found* that this meant delivery free of expense, and that the herrings were at the risk of the purchaser from the time of sale. *Davidson* v. *Leslie*, 1817, 1 Mur. 281.

180. Risk—Horse—Death of Horse while in Hands of Intending Purchaser—Onus probandi.—A horse died in the hands of an intending purchaser on trial. It had been overwrought a day or two previous to its death, but this, though proved to tend to produce the disease of which it died, was not proved to be the cause of that disease. *Held* that the intending purchaser was liable in the same degree of diligence as a hirer and the *onus* lay upon him of proving that the horse had perished from a cause unconnected with the misuse. *Observed*, that had there been no proof of misuse, the *onus* on the intending purchaser as on a hirer was to prove the cause of death, and that he was blameless. *Pullars* v. *Walker*, 1858, 20 D. 1238; 30 J. 742.

181. Risk — Incomplete Contract — Unascertained Quantity of Fungibles—Exception where Sale of whole Subject Generally Estimated.—*Opinion*, if a certain and known mass of fungibles of unascertained quantity be sold at so much a gallon, or so much a ton, the personal contract of sale is not complete, and the risk remains with the seller; but *question*, whether the risk remains with the seller, where the sale has been of the whole of a specified *corpus* or subject generally estimated of a certain weight or measure, at so much per ton or other measure, and which requires to be weighed or measured to fix the precise amount of the price. *Hansen, etc.* v. *Craig & Rose*, 1859, 21 D. 432; 31 J. 236.

182. Risk—Loss of Goods Forming Part of Order — Factor — Foreign — Notice.—A merchant abroad purchased a parcel of flax (being part of an order) for a party in this country, and stored it till the order could be completed and the flax shipped. Meantime it was destroyed by fire. *Held* that he was entitled to recover the price from the party who ordered the flax. *Porter* v. *Sturrock & Co.*, 1786, 3 Pat. 45. Affg. C. of S.

183. Risk—Sale of Pony—Agreement between Parties—Deterioration during Custody—Negligence.—The seller of a horse having improperly refused to take it back when tendered, in terms of the bargain of sale, *held* that the purchaser did not incur liability for its subsequent deterioration whilst in his custody, unless imputable to his own act or gross negligence. *Graham* v. *Wilson*, 1839, 1 D. 407.

184. Risk—Unascertained Goods—Fungible—Oil Sold and Paid for but Stored with Seller without Specific Appropriation — Mutuum — Damages.—In June 1865 an oil merchant contracted to supply 750 gallons of sperm oil, to be delivered when required by the purchaser at any time within six months. The oil was not called for within the six months, and at the expiry of that time the seller invoiced it to the purchaser, the invoice bearing "in store to your order." He also wrote to the purchaser that he presumed the oil was to lie beside him as before. The purchaser paid the price at the date of invoice. No oil was then or at any time separately stored or set apart by the seller for the purchaser, but the whole oil in the seller's premises remained indiscriminately in tanks subject to his control, and dealt with by him as his property. In 1866 the whole oil in the seller's premises was destroyed by fire. At that time 713 gallons of the oil bought by the purchaser had not been delivered. In an action brought by the purchaser to enforce delivery, or alternatively for damages, *held* that the purchaser had no right of property in, or right to obtain delivery of, any specific portion of the oil destroyed by the fire, that no risk attached to him in respect thereof, and that he was entitled to delivery of the remaining quantity of oil purchased by him and still undelivered, or, in his option, in respect of the seller's delay to implement his obligation, to damages (*diss.* Lord Justice-Clerk Moncreiff, on the ground that the invoice and letter at the expiry of the six months created a new contract of gratuitous storage, which had become imprestable through a *damnum fatale*). *Anderson & Crompton* v. *Walls & Co.*, 1870, 9 M. 122; 43 J. 48.

185. Risk — Unascertained Goods — Seller's Undertaking to Deliver at Buyer's Wharf — Loss during Voyage.—A person sold a number of carcases of whales in Shetland at a price per ton, to be delivered at the buyer's wharf at Newcastle. The carcases became unfit for use on the voyage. *Held* that the risk was with the seller, as (1) neither the quantity sold nor the price could be ascertained till delivery; and (2) as the seller had undertaken to deliver at the buyer's wharf. *Walker* v. *Langdales Chemical Co.*, 1873, 11 M. 906; 45 J. 553.

186. Stoppage in transitu.—A seller is entitled to stop goods consigned to a buyer while they are *in transitu* and before actual delivery. Case remitted with this declaration. *Allan Stuart & Co.* v. *Stein's Crs.*, 1789, 1790, 3 Pat. 191. Revg. C. of S.

187. Stoppage in transitu—Duration of Transit—Delivery Fraudulently Obtained by Buyer—Preference.—A party ordered goods from a foreign merchant, which were shipped by a general vessel; and, on the arrival of the vessel at the port of delivery, he entered the goods at the custom-house in his own name, and paid the duty, but not the freight. He then intimated a suspension of payment to his creditors, but not to the agent of the seller, and on the following day took delivery. *Held*, in a question between the seller and the buyer's creditors, that the goods were still *in transitu* at the period of the bankruptcy; that the creditors were not entitled to take advantage of the delivery fraudulently obtained by the buyer; and that the seller was entitled to a

preference over the goods for the price, as if he had actually stopped them. *Shuurmans* v. *Goldie*, 1828, 6 S. 1110; 3 Fac. 1124.

188. Stoppage in transitu—Duration of Transit — Goods at Destination but in Carrier's Warehouse.—Although goods had remained, at the request of the purchaser, in a warehouse belonging to the carrier, at the place of destination, for about three months after their arrival, *held* that they were liable to be stopped as *in transitu*. *Black* v. *Cassels*, 1828, 6 S. 894.

189. Stoppage in transitu—Duration of Transit—Goods Lodged in Bonded Warehouse under 43 Geo. III. c. 132—Completed Delivery.—Where goods have been lodged by a purchaser in a bonded warehouse, under 43 Geo. III. c. 132, actual delivery has taken place, so as to divest the seller of his right of stoppage *in transitu*, upon the bankruptcy of the purchaser—the court distinguishing between that statute and that of 26 Geo. III. c. 59, in respect that the bonding under the latter statute was the act of the revenue officers, whereas under the former it was the act of the purchaser, and he could exercise ownership in relation to them. *Strachan* v. *Knox & Co.'s Tr.*, 21 Jan. 1817, F. C.

190. Stoppage in transitu — Effectual Stoppage — Bill of Lading — Bankruptcy — Fraud—1696, c. 5—Issues.—In an action brought by the sellers of certain goods, who alleged that they had stopped them *in transitu*, for reduction of successive indorsations of the bill of lading by the purchaser and others, on the ground that they were fraudulent, and in contravention of the Act, 1696, c. 5, *held* (1) that, in order to entitle the sellers to reduce the indorsations on either ground, they must prove that they had effectually exercised their right of stoppage *in transitu* before the goods were delivered to the purchaser, or any one in his right, under the bill of lading or indorsations thereof; and (2) that they must put in issue whether the bill of lading was fraudulently indorsed and fraudulently received by the successive indorsers and indorsees. *Adamson, Howie, & Co.* v. *Guild, etc.*, 1868, 6 M. 347.

191. Stoppage in transitu — Effectual Stoppage — Duration of Transit — Cargo Lodged in Public Warehouse for Shipper—Competition between Shipper and Creditor of Buyer Arresting.—A merchant in Arbroath ordered hemp from a merchant in Riga, which, according to order, he put on board a general ship belonging to a third party. The buyer having become bankrupt, and no one on his behalf being ready, on its arrival, to take delivery, the master lodged the hemp in a public warehouse, where it was arrested by a creditor of the buyer, and afterwards claimed as *in transitu* by the seller. *Held* that the seller was entitled to the hemp. *Neish* v. *Trompousky & Co.*, 1807, Hume 693.

192. Stoppage in transitu — Effectual Stoppage—Duration of Transit—Delivery of Part of Cargo—Transit not Ended.—A merchant in Kent shipped in his own vessel a cargo of wood on the order of and to a builder in Dysart, and part was delivered in his woodyard, and part was landed on the shore, and part remained in the vessel, when, in consequence of insolvency, further delivery was stopped. *Held*, in a question with creditors, that the merchant was preferable to all the wood except that in the woodyard. *Collins* v. *Marquis's Crs.*, 23 Nov. 1804, F. C.; M. 14223.

193. Stoppage in transitu — Effectual Stoppage—Exercise of Right—Interdict—Fraud.—A foreign merchant sold and shipped goods, and sent a bill of lading to a buyer in this country, who indorsed it to a third party, and became bankrupt before the arrival of, and without having paid for, the goods. The seller presented a note of suspension and interdict to stop them *in transitu*, and raised (with the trustee on the buyer's sequestrated estate) a reduction of the indorsation, on the grounds that the indorsee was not a *bona fide* onerous holder, that the transference to him was fraudulent, and on the Act, 1696, c. 5, as being in security or satisfaction of a prior debt. To try the question, issues were sent to a jury—(1) whether the bill of lading was fraudulently or without value indorsed or transferred to the indorsee, to the prejudice of the legal rights of the seller; (2) whether it was fraudulently indorsed or transferred, in the mutual knowledge of the buyer and the indorsee of his insolvency, or to disappoint the legal rights of his creditors; and (3) whether it was indorsed or transferred in security or satisfaction of a prior debt, contrary to the Act, 1696, c. 5; and the issues in *Hastie & Co.* v. *Warden & Son disapproved* of. Thereafter, a verdict being found for the pursuers on the issue as to the Act, 1696, and for the defender on the other issues, *held* that the goods had been effectually stopped, and that the seller was preferable for their proceeds. *Stoppel & Son* v. *M'Laren & Co.*, 1849, 11 D. 676; 21 J. 237. 1850, 13 D. 61; 23 J. 9, 154. As to form of issues, see *Adamson, Howie, & Co.* v. *Guild*, 1868, 6 M. 347.

194. Stoppage in transitu — Effectual Stoppage—Goods Arrived at Destination—Further Delivery in Contemplation—Arrestment.—A person in Glasgow sold goods to one in Edinburgh, which were sent by a carrier, with directions that they were to lie till called for; and on their arrival in Edinburgh, they were arrested by a creditor of the buyer in the warehouse of the carrier. *Held*, in a question between the seller and the arrester and the trustee on the sequestrated estate of the buyer, that the seller was entitled to stop them as *in transitu*. *Question*: What would have been the effect if the buyer had applied for delivery, and been refused in respect of the arrestment? *Dunlop* v. *Scott & Co.*, 22 Feb. 1814, F. C.

195. Stoppage in transitu — Effectual Stoppage—Goods in Bonded Warehouse—Ineffectual Delivery—Resale.—A merchant

in Glasgow sold a quantity of sugars, and gave to the buyer a delivery order on his importing agent in Greenock, in whose name (for behoof of the seller) the sugars were entered in the books of the bonded warehouse where they were deposited. The sugars were afterwards weighed over by the importing agent, and the warehouse rent subsequently incurred was charged in his books against the buyer. In the meantime the buyer sold the sugars, and indorsed the delivery order to a second buyer. The second buyer intimated the indorsation of the delivery order to the importing agent, who gave him an order of delivery on the keeper of the warehouse, but he did not take any further steps to obtain actual delivery of the sugars; and on the day following, the estates of the first buyer, who had neither paid nor granted his bill for the price, were sequestrated. *Held*, by the whole court, that the original seller was entitled to stop the goods *in transitu* against the second buyer. *M'Ewan & Co.* v. *J. & A. Smith*, 1849, 6 Bell 340; 21 J. 369. Affg. 9 D. 434; 19 J. 173.

196. Stoppage in transitu — Effectual Stoppage—Goods in Bonded Warehouse—6 Geo. IV. c. 112—No Effectual Delivery.—Goods imported were lodged in a bonded warehouse, of which the importers were tenants, and were sold by the importers, and the keys of the warehouse delivered to the purchaser; but no entry of the transfer was made in the books of the custom-house officer, under the 6 Geo. IV. c. 112. *Held*, on the bankruptcy of the purchaser, that there had been no effectual delivery, and that the goods were still liable to stoppage *in transitu* on the part of the seller. *Maxwell & Co.* v. *Stevenson & Co.*, 1831, 5 W. & S. 269. Revg. 8 S. 618; 5 Fac. 475.

197. Stoppage in transitu — Effectual Stoppage — Incomplete Delivery—Buyer's Refusal to Receive Goods.—Goods which had been ordered by a merchant were sent to him by a carrier; but on being offered at his warehouse, his son and a clerk, in his absence, knowing him to be on the eve of bankruptcy, refused to receive them, and directed them to be put into the warehouse of his son-in-law, which was done. *Held* that the delivery was not complete, and that the seller was entitled to stop *in transitu*; and *observed*, that the goods would have remained the property of the seller even if they had been taken into the warehouse of the merchant, if this were for custody only. *Mitchell & Gowans* v. *Phin*, 12 Jan 1813, F. C.

198. Stoppage in transitu — Effectual Stoppage — Vessel Freighted by Buyer—Notice — Constructive Delivery.—A Leith merchant bought grain from a dealer at Eyemouth, and sent a vessel for it, freighted by himself, on board of which it was carried to Leith; and the merchant having become bankrupt, the dealer came to Leith and notified his intention to the merchant to stop *in transitu*. *Held* that the delivery was constructive only; and although part was landed from the vessel, and put into the merchant's granary before a warrant to stop was got and intimated, the stoppage was effectual as to the whole; and *observed*, that the merchant did wrong in taking possession after his bankruptcy. *Robertsons & Aitken* v. *More*, 3 July 1801, F. C.; M. "Sale" App. No. 3. [Cf. No. 200.]

199. Stoppage in transitu — Effectual Stoppage — Vessel Hired by Buyer — Consignment to Trustee for all Concerned—Constructive Delivery.—A merchant in Scotland bought a cargo of timber from a merchant in Memel, and hired and sent a vessel to carry it to Belfast, and, on its arrival there, finding himself bankrupt, he declined to take delivery, but authorised a law agent to do so, for behoof of all concerned, in order to save demurrage, which he did. *Held* that as the cargo was *in transitu*, and that no such delivery had been taken as could prejudice the right of the Memel merchant to stop the cargo as *in transitu*, and having been sold, that he was preferable to the other creditors for the price. *Drake* v. *M'Millan*, 1807, Hume 691.

200. Stoppage in transitu — Effectual Stoppage—Vessel Hired by Buyer — Constructive Delivery.—Baxter sold wheat in Dundee to Thomson, who forthwith sold it to Crow in Leith, and it was shipped direct from Baxter's warehouse on board a vessel hired by Thomson to carry it to Crow. Thomson and Crow having failed, *held* (chiefly on evidence that Thomson acted as agent for Crow) that Baxter was entitled to arrest the wheat as *in transitu* before actual delivery to Crow. *Baxter* v. *Pearson*, 1807, Hume 688. See also *Robertsons & Aitken* v. *More*, *supra*, No. 198.

201. Stoppage in transitu—Ineffectual Stoppage—Contract Completed by Delivery—Bonded Goods Sold by Bankrupt Vendee to bona fide Onerous Purchaser with Intimated Order of Delivery.—Tod & Co. imported and bonded goods which they sold to Kippen, giving an order of delivery, which was intimated. Kippen, in like manner, sold and delivered to Strong, and Strong to Rattray, who paid the price, but Tod & Co. had not been paid. *Held*, in a question between them and Rattray, that he being a *bona fide* onerous purchaser, with an intimated order of delivery, was preferable to them. *Tod & Co.* v. *Rattray*, 1 Feb. 1809, F. C.

202. Stoppage in transitu—Ineffectual Stoppage—Interdict—Contract Completed by Delivery.—Sellers shipped goods on board a vessel, and the purchasers indorsed the bills of lading to a third party. In an application by the sellers for interdict against the sailing of the ship, and for stoppage of the goods as *in transitu*, averring that the purchasers, at the date of the sale, or at all events of the indorsasion, were hopelessly insolvent, as was known to the indorsee, *held* (1) that when the goods were shipped, the purchase was complete as between seller and purchaser, and that the principle of stoppage *in transitu* did not apply; (2) that false representations on the part of the

purchasers not being averred or proved, and although at the date of the purchase the purchasers were deeply embarrassed, yet it did not appear that they then meditated bankruptcy, and that the seller was not entitled to reclaim the goods. *Morton & Co.* v. *Abercromby*, 1858, 20 D. 362 ; 30 J. 193.

203. Stoppage in transitu—Insurance—Liability for Premium.—The stopper *in transitu* of goods sent by sea after arrival, is not liable for the premium of insurance on the goods, in respect he cannot derive any benefit from the insurance. *Smith & Jamieson* v. *Drake*, 9 Mar. 1809, F. C.

204. Subject Sold—"Goods."—The expression "goods" in Merc. Law Amend. Act, 1856, s. 5, comprehends horses. *Young* v. *Giffen*, 1858, 21 D. 87 ; 31 J. 60.

205. Subject Sold—Mistake in Value—Auction—Action for Restoration.—The trustee on the sequestrated estate of a colour manufacturer sold by private bargain all the machinery and paints within the premises occupied by the bankrupt to a party to whom he had previously sold the premises, and who afterwards sold the machinery and paints by auction. Among the articles sold were some vats, which were purchased at the auction at £2, but were afterwards discovered to contain a quantity of white lead, said to be worth £300. In an action by the trustee against the original purchaser, and the purchaser at the auction, for restoration of the white lead, on the ground that all parties were ignorant of its existence, *held* that the latter purchaser was entitled to retain the white lead, the original purchaser making no claim to it, and having withdrawn from the litigation. *Dawson* v. *Muir*, 1851, 13 D. 843 ; 23 J. 383.

206. Subject Sold—Ship—Ship's Stores not "Appurtenances" of Ship.—A ship's-husband, who was also part owner, bought his co-owner's share in the ship shortly after her return from a voyage. In an action of count and reckoning brought by the seller against the ship's-husband for the profits of the last voyage, *held* that ship's stores laid in for the voyage to be performed after the date of the sale were not appurtenances of the ship, but must be paid for by the purchaser. *Robertson* v. *Dennistoun*, 1865, 3 M. 829 ; 37 J. 428.

207. Subject Sold—Stolen Goods—Public Market—Bona fide Purchaser.—The proprietor of four bullocks which had been stolen from him, *held* entitled to recover them from a *bona fide* purchaser at a public market. *Henderson* v. *Gibson*, 17 June 1806, F. C. ; M. "Moveables" App. No. 1.

208. Subject Sold—Stolen Goods—Purchaser's Want of Caution.—The servant of a manufacturing chemist purchased a horse of the value of £10 for 12s. The horse was immediately killed. It turned out to have been stolen. *Circumstances* which *held* to disclose not *mala fides*, but such want of caution as to infer responsibility on the part of the chemist for the value of the horse. *Faulds* v. *Townsend*, 1861, 23 D. 437 ; 33 J. 224.

209. Unpaid Seller—Lien—Mercantile Agent—Insolvency.—A mercantile agent sold goods, and took the purchaser's bill, which he guaranteed and indorsed to the owner of the goods. The purchaser became bankrupt, and the owner accepted of a composition on the bill, and delivered it up. *Held* that the agent was not entitled to withhold delivery of the goods from the purchaser, till relieved of the effect of his guarantee. *Stirling & Sons* v. *Duncan*, 1823, 1 Shaw's App. 389.

210. Unpaid Seller — Resale — Bankruptcy of Original Purchaser—Multiplepoinding—Competition.—The Western Bank sold goods to Sillars, who resold them to Oxley. The price of both sales was unpaid. Sillars having become bankrupt, *held*, in a question between him and the Bank, that the Bank was entitled to the price payable by Oxley to the extent of the price fixed in the sale to Sillars. *Sillars, Oxley & Co.* v. *Western Bank*, 1850, 13 D. 431 ; 23 J. 189.

211. Unpaid Seller—Resale—Notice to Buyer — Loss on Resale — Damages.—A party in Scotland ordered from foreign merchants goods which were shipped to their correspondent in London, and bills were drawn for the amount. The correspondent, after repeatedly requiring the party to send the bills accepted, notified that, if not sent, the goods would be sold publicly in payment of the price and expenses. The party having made no answer, and the goods having been sold, and a loss arising, *held* that he was liable for the loss. *Serruys & Co.* v. *Watt*, 12 Feb. 1817, F. C.

212. Unpaid Seller—Resale—Purchaser put upon Inquiry—Bona fides.—A party sold wood, and thereafter sold it a second time to a third party, who had subscribed as witness to the missives with the previous purchaser, and who knew of the existence of the prior sale. *Held* that although the proprietor represented to this third party that the former purchaser had forfeited his bargain by failure to implement its conditions, yet as this party made the purchase without inquiring at the former purchaser, he was not entitled to be considered a *bona fide* purchaser ; and the first purchaser found entitled to the wood. *Marshall* v. *Hynd*, 1828, 6 S. 384.

213. Unpaid Seller—Right of Retention until Delivery.—*Observed* (per L. P. Inglis), that the property of goods sold remains with the seller until delivery, actual or constructive, and that in consequence he is entitled to retain them against the buyer and his assignees till every debt due to him by the buyer is paid or satisfied. *Black* v. *Incorporation of Bakers, Glasgow, etc.*, 1867, 6 M. 136 ; 40 J. 77.

214. Unpaid Seller—Right of Retention for Payment of General Balance Due—Resale by Buyer without Intimation—Question whether Transaction Regulated by Scots or English Law.—An English merchant

purchased in England from the agent of a Scots merchant 500 tons of iron "in the Clyde, for immediate delivery on payment." He paid the price, resold the iron, and thereafter made other purchases from the Scots merchant. The party who had bought from the English merchant having claimed delivery of the 500 tons of iron from the Scots merchant, the latter pleaded that he was entitled to retain the same until secured in payment of the balance due by the English merchant on his subsequent purchases. *Held* that the plea of retention was to be decided by the law of Scotland, and not that of England, and the plea *sustained*. *M'Naughton* v. *Baird & Co.*, 1852, 24 J. 623; 1 Stuart 1051.

215. Unpaid Seller—Right of Retention—Retention against Creditors of Purchaser—Separate Transaction.—A party purchased three lots of sugar, which were delivered, but he paid no part of the price. He thereafter bought another lot as a separate transaction, for which ready cash was to be paid, and of which he paid the greater part of the price, but became bankrupt before delivery. *Held*, in a question between the seller and the creditors of the purchaser, that the seller was entitled to retain the last lot in security and payment of the price of the former ones, independently of the specialty that the whole price of the last lot had not been paid. *Landale & Co.'s Trs.* v. *Bogle & Co.*, 1828, 6 S. 360; 3 Fac. 390.

216. Unpaid Seller—Right of Retention—Subsale — Bankruptcy — Merc. Law Amend. Act, 1856, ss. 1, 2, and 3.—Goods were sold and the price paid. The goods remained in the seller's custody. They were resold; and intimation was made but not till after (1) the first buyer was sequestrated and (2) the seller had arrested in his own hands for a general balance due by the first buyer. *Held* (1) that the seller's right of retention was not defeated as against the trustee in the sequestration, and (2) that the arrestment was preferable as against the subsale, because it was laid on before intimation of the subsale. *Wyper* v. *Harveys*, 1861, 23 D. 606; 33 J. 298.

217. Unpaid Seller—Right of Retention—Transmission of Document of Title—Bankruptcy of Original Purchaser. — A document issued by an ironmaster in these terms: (Date)—"I will deliver 1000 tons pig-iron when required after 10th September next to the party lodging this document with me,"—*held* (in C. of S.) to be *in re mercatoria*, not struck at by 1696, c. 25, transferable without indorsation, and not to require a stamp. A party who received such an obligation granted his bill for the price, which was not due till 10th October. He sold it to a third party, who presented the document, and demanded, on 28th September, delivery of the iron. The original purchaser had then become bankrupt, and the ironmaster refused delivery and pleaded retention, which plea the court repelled. The judgment on the first point was *reversed* on appeal, that on the second was *affirmed* in respect of the terms of correspondence between the parties. *Dixon* v. *Bovill*, 1856, 19 D. (H. L.) 9; 3 Macq. 1; 28 J. 684.

218. Unpaid Seller—Right of Retention—Transmission of Document of Title—Bankruptcy of Original Purchaser.—A document in these terms: "I will deliver 1000 tons of No. 1 pig-iron free on board here when required, after the 16th day of September next, to the party lodging this document,"—*held* (by C. of S.) to be transferable without indorsation, and to give to the holder of the document right to demand from the granter delivery of the iron, although the original purchaser of the iron, who had granted a bill for the price, had become bankrupt. *Dimmack* v. *Dixon*, 1856, 18 D. 428; 28 J. 362. *Opinions* adverse to the validity of such documents expressed in H. of L. in *Dixon* v. *Bovill*, 1856, 19 D. (H. L.) 9; 3 Macq. 1; 28 J. 684.

219. Warranty — Express Warranty—Fulfilment of Warranty—Quality of Seed—Merc. Law Amend. Act, 1856, s. 5—Damages. — In reply to an order given by a seedsman to another in the same trade for a certain species of carrot seed, "best growing seed, and true kind," there was sent the required quantity, with a letter stating that it was "all of crop 1856, and as good seed as to be had this season, but all carrot seed will require to be sown thicker than usual this season." There was an entire failure of crop. In an action by the purchaser against the seller for damages alleged to have been suffered through the seed being defective and of bad quality, and being also unfit for the purpose of growing, for which it had been sold, *held*, on a proof (1) that there was no ground for holding that the seller knew of any defect which he concealed from the purchaser; (2) that the seed, though bad as compared with the seed of some years, was of fair average quality for seed of that kind of crop 1856, and that the seller was not liable. *Observed* (1) that the terms of the seller's letter amounted to an express warranty that the seed was of fair average quality for 1856, and that that warranty had been fulfilled; (2) that a seller's liability for selling as good an article which he knows to be bad, arises not from warranty, but from fraud. *Stewart* v. *Jamieson*, 1863, 1 M. 525; 35 J. 314.

220. Warranty — Express Warranty — Horse — "Crib-Biting" and "Wind-Sucking"—Rejection.—A horse being sold under a warrandice that he was free of fault, and being returned on the same day on account of cribbiting and wind-sucking, the seller *ordained* to make repetition of the price. *Deuchars* v. *Shaw*, 1833, 11 S. 612.

221. Warranty — Express Warranty — Horse—Fitness for Particular Purpose—Proof.—A horse proved restive and unmanageable during the first four days it was in a purchaser's possession, and was then sold under a warrant. The horse had been quiet and steady in harness while in the possession of the

seller, and was proved to have been so also when resold. *Held* that there was no proof of unsoundness. *Thomson* v. *Miller*, 1859, 21 D. 726; 31 J. 382.

222. Warranty — Express Warranty — Horse — Full Price — Lameness — Rejection. —A party sold a horse on 29th April as a charger for military service, warranted sound, and for a full price, and on 9th May it became lame, in consequence of running thrushes in the feet. *Held*, on its being proved that these thrushes had existed at the date of the sale, that the buyer was entitled to return the horse, and get repetition of the price. *Jardine* v. *Campbell*, 15 Jan. 1806, see footnote to *Ralston* v. *Robb*, 9 July 1808, F. C.; M. "Sale" App. No. 6.

223. Warranty — Express Warranty — Horse — Full Price — Unmarketable — "Running Thrushes" — Rejection.—A party sold a horse on a Saturday, warranted sound, for a full price, and the buyer returned it on the following Monday, as being affected in the feet with running thrushes. *Held* that, whether that disease constitutes unsoundness or not, it renders a horse unfit for travelling on the high road; and therefore not being a marketable horse, the buyer was entitled to return it, and get repetition of the price. *Ralston* v. *Robb*, 9 July 1808, F. C.; M. "Sale" App. No. 6.

224. Warranty — Express Warranty — Horse — Latent Disease — Rejection. — The seller of a horse *held* bound to repeat the price, in respect of a latent disease, which was not discovered till after the death of the horse, and by means of dissection, but which, in the opinion of veterinary surgeons, existed anterior to the sale. *Wright* v. *Blackwood*, 1833, 11 S. 722.

225. Warranty — Express Warranty — Horse — Sale of two Hunters — Single Transaction — Unsoundness in One — Rejection. — *Circumstances* in which the purchase of two hunters was *held* to be a single transaction, to the effect that, on one proving unsound, the purchaser was entitled to return both. *Hamilton* v. *Hart*, 1830, 8 S. 596.

226. Warranty — Express Warranty — Horse — Sold as Sound and Subject to Veterinary Surgeon Inspection — Rejection. —A party sold a horse as sound, and subject to inspection by a veterinary surgeon; and he having, within five days after the sale, certified that the horse at the date of the sale had the tendons of both forelegs enlarged, and was unsound, and the fact being otherwise proved, the seller was *ordained* to repeat the price. *Hendrie* v. *Stewart*, 1842, 4 D. 1417.

227. Warranty — Express Warranty — Horse — "Staggers" — Negligence of Buyer. —A horse, soon after being sold, showed symptoms of the staggers, and, by the advice of a farmer, was bled, but the buyer would not, as advised, physic him; and on the twenty-eighth day after the sale the buyer offered him back to the seller, and on refusal, put him into a livery stable, but no farrier was called or anything done for him, and he died. *Held* that although the seller had warranted him sound, he was not bound to repay the price. *Wilson* v. *Marshall*, 1812, Hume 697.

228. Warranty — Express Warranty — Horse — Unsoundness — "Bad Corns" — Concealment — Rejection.—Bad corns *held* to amount to such a degree of unsoundness in a horse, as to entitle a purchaser, from whom his being affected with them was concealed, to reject him. *Hamilton* v. *Hart*, 1830, 8 S. 596.

229. Warranty — Express Warranty — Horse — Unsoundness — Evidence of. — *Verdict* for the pursuer, in an action for the price of a horse which was stated to be unsound on account of imperfect gelding, and having a running thrush in the hind foot. *Fisher* v. *Ure*, 1846, 9 D. 17.

230. Warranty — Express Warranty — Horse — Unsoundness — Issues. — *Issues* to try question whether horses were sold under warranty. *Croall* v. *Hunter*, 1855, 17 D. 652.

231. Warranty — Express Warranty — Horse — Unsoundness — Obvious Blemish — Buyer's Knowledge.—A horse was sold by auction, warranted sound; and the buyer, on inspecting it, discovered a spot or blemish in the eye, as to which there was a difference of opinion among persons of skill as to whether it constituted unsoundness; and the buyer having refused to take delivery or pay the price, the horse was judicially sold at a price only £3 less than what it had been originally sold for. *Held* that, notwithstanding the warranty, the buyer must be held to have observed the blemish, which was obvious, and bought the horse subject to it, and therefore that he was liable for the price. *Scott* v. *Hannah*, 1815, Hume 702.

232. Warranty — Express Warranty — Horse — Unsoundness — Proof.—A horse sold under a warranty of soundness, though proved to have been at the time labouring under a cold, which afterwards became strangles, of which the horse died, *held* not to be unsound. *Dykes* v. *Hill*, 1860, 22 D. 1523; 32 J. 682.

233. Warranty — Express Warranty — Horse — Unsoundness — Rejection — Application by Buyer for Warrant to Sell — Question whether Seller really Principal. — *Circumstances* in which *held* that a party, who alleged that he had been merely a bystander, was truly the principal in the sale of a horse on a warranty, and so was liable for repetition of the price, the horse having turned out unsound. *Henry* v. *Wyper*, 1857, 20 D. 56; 30 J. 35.

234. Warranty — Express Warranty — Horse — Unsoundness — Rejection — Damages — Issue — Counter Issue.—*Issue* in an action upon a warranty given at the sale of a horse in Scotland, the purchaser averring that he had taken the horse to England, and had there, upon discovering its unsoundness, sold it, admittedly without judicial authority,

after offering to return it to the seller, who declined to take it. *Counter issue*, whether the purchaser failed duly to return the horse to the seller. *Robson* v. *Thomson*, 1864, 2 M. 593; 36 J. 189.

235. Warranty — Express Warranty — Horse — Unsoundness — Rejection — Delay — Neutral Custody — Buyer's Claim Barred. —On 15th June a mare was sold to a horse-dealer, with a warranty of soundness. On 18th June and 4th July the purchaser intimated to the seller by letter that the mare was unsound, and called upon him to take her back, which he refused to do, denying the unsoundness. She was kept in the purchaser's stable for fifty-seven days, when there was intimated to the seller a petition to the sheriff for warrant of sale, under which she was sold. *Held* that the purchaser's claim for repetition of the price was barred by his failure to place the animal in neutral custody, and his delay in having recourse to judicial proceedings. *M'Bey* v. *Gardiner*, 1858, 20 D. 1151; 30 J. 691.

236. Warranty — Express Warranty — Horse — Vice — Rejection — Timeous. — A horse warranted "free of vice and trick of any kind," having been bought and ridden from Edinburgh to the county of Suffolk, and thence back to Edinburgh, *held* that the buyer was not then entitled to return it as vicious and unmanageable. *Sheriff* v. *Marshall*, 1812, Hume 697.

237. Warranty — Express Warranty — Horse — Vice — Shying — Rejection. —A mare was sold warranted quiet in harness, but being liable to shy greatly at meeting stage-coaches, was returned. *Held* that although she was completely cured in a short time after being returned, the purchaser was entitled to return her, and to get repetition of the price. *Begbie* v. *Robertson*, 1828, 6 S. 1014.

238. Warranty — Express Warranty (Written) — Horse — Vice — Verbal Misrepresentation — Effect of — Rejection. — A party bought a horse under a written warranty, which described him as "my dark bay horse," and as safe in harness; and the seller had verbally represented that the horse had been sent to him for sale by a gentleman in England, whereas he had bought him from a gentleman in Leith, who parted with him because he had been on one occasion vicious in a gig, which the seller knew, and did not disclose. After being kept for two months, the horse became restive in a gig, but this was attributable partly to the blame of the buyer. *Held*, in an action on the warranty, that verbal misrepresentation as to the former owner of the horse was not sufficient to annul the sale (the written warranty being silent as to the former owner), and that in other respects the buyer was not entitled to relief. *Geddes* v. *Pennington*, 1817, 5 Dow 159; 6 Pat. 312. Affg. 19 May 1814, F. C.

239. Warranty — Express Warranty — Implied Condition of Contract — Turnip Seed — Damages. —A tenant of a small farm sold to seed merchants a quantity of seed, in the belief and on the footing that it was the genuine seed of Swedish turnips. The merchants sold it to a party who sowed it; and on its turning out to be a bastard variety of the plant, he recovered damages from the seed merchants. *Held*, in an action by the merchants against the tenant, both under the implied warrandice of the contract of sale that the thing sold shall be of the kind described, and under the express warrandice that the seed was good Swedish turnip, the tenant, although acting *optima fide*, was liable in damages. *Dickson & Co.* v. *Kincaid*, 15 Dec. 1808, F. C.

240. Warranty — Express Warranty — Merc. Law Amend. Act, 1856, s. 5 — "Goods" Comprehends "Horses." — *Held* that "goods" in the Merc. Law Amend. Act comprehends "horses," and that in an action for repayment of the price of a horse, alleged to have been unsound at the date of the purchase, the pursuer must take an issue of express warranty. *Young* v. *Giffen*, 1858, 21 D. 87; 31 J. 60.

241. Warranty — Express Warranty — No Exclusion of Implied Warranty of Fitness for Particular Purpose — Ship's Stores — Damages — Proof — Onus. —In an action of damages for breach of a contract to furnish stores for an emigrant ship "for twenty weeks' consumption, as per charter-party, warranted to pass survey of Government inspectors," founded on allegations of bad quality and deficiency in quantity, *held* (1) on a construction of the contract, that the express warranty "to pass survey of Government inspectors" did not exclude the warranty implied at common law, that the goods should be fit for the purpose for which they were furnished; but (2) that the stores having been shipped, and having passed the survey, the *onus* of proving that they were bad and deficient rested on the pursuers; and (3) that although there was evidence that a penalty had been imposed upon the owners on the arrival of the ship, in consequence of the deficiency and bad quality of some of the stores, "in breach of the charter-party," yet the *onus* was not discharged, there being no sufficient evidence that the stores were deficient in quantity and defective in quality when shipped. *Cooper & Aves* v. *Clydesdale Shipping Co.*, 1863, 1 M. 677; 35 J. 383.

242. Warranty — Express Warranty — Requisites — Horse — Seller's Responsibility for Representations. —To make a seller liable in express warranty, it is not necessary that he shall use the words "I warrant"; it is sufficient if he make representations which the purchaser has given him to understand are essential to his buying. The fact that a purchaser tried a horse the day he bought him does not relieve the seller from responsibility for representations he may make after such a trial. *Scott* v. *Steel*, 1857, 20 D. 253; 30 J. 129.

243. Warranty — Implied Warranty — Custom of Trade — Proof. —*Held*, on evidence,

to be the custom of soap-dealers to warrant the weight specified in the invoice. *Hunter* v. *Bonar*, 1823, 2 S. 554.

244. Warranty — Implied Warranty — Cow—Unsoundness—Disease—Rejection.—The seller of a cow *held* bound to repeat the price, in respect of her being, at the time of the sale, ill of the disease whereof she shortly afterwards died. *Gilmer* v. *Galloway*, 1830, 8 S. 420.

245. Warranty — Implied Warranty — Fair Price — Cow — Latent Disease — Unsoundness.—After a cow labouring under a latent chronic disease had been sold for a fair price, the disease became excited into acute inflammation by the purchaser having driven her (relaxed by recent calving), immediately after the sale, a distance of sixty miles, of which she died. *Held* that the cow was not sound when sold, and that the act of the purchaser constituted no defence against repetition of the price, as it was proved to be a common practice to drive with impunity healthy cows, after recent calving, such distances. *Brown* v. *Boreland*, 1848, 10 D. 1460; 20 J. 537.

246. Warranty — Implied Warranty — Fitness for Particular Purpose—Contract for Bleaching Potash — Damages. — A bleacher bought potashes, on the faith of representations that they were equal to the American potashes, for bleaching and whitening clothes. Goods bleached with them, upon being exposed to the air, turned bluish or reddish according to the state of the atmosphere. *Held*, in an action for the price, conjoined with one for damages raised by the buyer, that the buyer was not liable in the price, but entitled to damages. *Birnie & Co.* v. *Weir*, 1800, 4 Pat. 144.

247. Warranty — Implied Warranty of Fitness—Good Sowing Seed—Rejection—Timeous.—A party bought good sowing seed, which he received in December 1818, and granted his bill for the price in February 1819. *Found* not entitled to suspend payment of it, on the allegation that the seed turned out unfit for sowing. *Bruce* v. *M'Kenzie*, 1821, 1 S. 77.

248. Warranty — Implied Warranty — Fitness for Particular Purpose—Merc. Law Amend. Act, s. 5.—In an action for breach of contract to supply whisky according to sample, but coloured with some innocent substance to adapt it for the African trade, (1) objections to issues that the whisky was not sold for a particular purpose, and that there was no warranty of fitness implied, *repelled*; and (2) exception to refusal of presiding judge to direct that the word innocent in the issue meant not injurious to health, and did not mean injurious to the whisky as a marketable subject, *disallowed*. *Observation* (*per* Lord Westbury) that though nothing was said as to the colouring matter to be used, there was an implied contract that the goods to be supplied should be fit for use. *Macfarlane & Co.* v. *Taylor & Co.*, 1868, 6 M. (H. L.) 1; 40 J. 300; L. R. 1 Sc. App. 245.

249. Warranty — Implied Warranty — Fitness for Particular Purpose—Purchase of Ale for Exportation—Merc. Law Amend. Act, 1856, s. 5—Application of—Buyer's Remedy. — In an action for the price of a quantity of ale, the defender averred that he had purchased it for exportation, and that when sent to the foreign market it had proved unsaleable. *Held* that the purchaser not having stated to the seller that the ale was deficient in quality and offered it back, or intimated that it was at the seller's risk abroad, was not entitled to an issue to prove that the ale was sold for exportation, and was unfit to stand a warm climate. *Edinburgh & Leith Brewing Co.* v. *Reid*, 1861, 24 D. 26; 34 J. 13.

250. Warranty — Implied Warranty — Grass Seeds—Quality—Damages—Bar.—A dealer in grass seeds *held* liable in damages and repetition of the price of seed grown by himself, and sold by him as good seed, but which, from its bad quality, did not vegetate; and not a bar to the buyer claiming damages, that, before sowing the seed, he observed it to have a bad colour and smell, without returning it, or intimating this to the seller. *Hill* v. *Pringle*, 1827, 6 S. 229; 3 Fac. 227.

251. Warranty — Implied Warranty — Horse—Conspiracy—Fraud.—A horse-dealer entered into a plot with others to sell an unsound mare as sound. *Found* liable in relief to a purchaser, although the sale was not made by the dealer, but by a coadjutor. *Hibbert* v. *Bruce*, 1822, 1 S. 422.

252. Warranty — Implied Warranty — Horse—Fair Price — Unsoundness — Evidence of — Onus. — *Circumstances* in which *held* that a horse which died the day after the sale was unsound. *Fulton* v. *Watt*, 1850, 22 J. 648.

253. Warranty — Implied Warranty — Horse—Fair Price—Vice—Rejection.—The seller of a mare, on being told by the buyer that he wanted "a quiet, useful, and thankful animal," answered "that the beast was canny and serviceable in every respect, and particularly in riding," whereupon she was bought at a fair price. *Held* that although the evidence was contradictory, yet as it was proved that, when ridden by strangers, she reared and plunged, and threw her riders, and the seller was aware that she had "tricks," he was bound to take her back, and repay the price. *Beddie* v. *Milroy*, 1812, Hume 695.

254. Warranty — Implied Warranty — Horse — Full Price — Unsoundness — Buyer put on Guard—Rejection.—A servant who was employed to buy a pair of carriage-horses, having done so at the full price asked for them, after he had been apprised that there was something awkward or faulty in the hind leg of one of them, but without inspecting it, or having the horse exhibited otherwise than in the stall of the stable, *held* that although the fault rendered the horse quite lame, and the seller had stated that he had received an offer of nearly the same amount from another

person, which was not true, yet as the buyer had been so far put on his guard as to render it incumbent on him carefully to inspect the horse, he was not entitled to repetition of the price. *Brand* v. *Wight*, 1813, Hume 697.

255. Warranty — Implied Warranty — Horse—Full Price—Unsoundness—Rejection—Timeous.—*Held* that the seller of a horse was not bound to take it back, although the sale had been for a full market price, where the purchaser worked it for about six weeks without objection, and it had in the meantime been in the hands of a third party for a few days, and he then alleged it to be unsound, but not that the unsoundness was latent. *Pollock* v. *Macadam*, 1840, 2 D. 1026; 15 Fac. 1131.

256. Warranty — Implied Warranty — Horse — "Restive and Unserviceable" — Rejection.—A lady purchased a pair of young carriage horses, which she was apprised were at "grass, and of course not in good order," and she sent them to a skilled person to bring them into training. One of them proving restive and refractory, was, with the other, after a few trials, rejected; and it afterwards was sold judicially, and on being properly broken, turned out an excellent carriage horse. *Held* that she was liable for the price. *E. of Wemyss* v. *Seton*, 1802, Hume 682.

257. Warranty — Implied Warranty — Horse—Unfit for Purpose for which Sold.—A horse which was specially bought and sold as a quiet well-tempered horse, fit to be riden by a gentleman advanced in life, having been found to be occasionally of a sulky and vicious temper, and apt to shy at carriages, wheelbarrows, etc., and on these occasions to rear, run back, and plunge, *held* not to answer the purpose for which it was sold, although it was often quite tractable, and might be cured of these vices; and the price ordered to be repeated. *Lord F. Campbell* v. *Mason*, 1801, Hume 678.

258. Warranty — Implied Warranty — Horse — Vice—"Not a Good Worker"—Rejection. — *Circumstances* in which *found* not to have been proved that a horse "was not a good worker" when sold. *M'Bey* v. *Reid*, 1842, 4 D. 349.

259. Warranty — Implied Warranty — Queys — Unsoundness — Construction —"Slump Sale" or "So much per Head."—A party bought at a fair a lot of twenty-seven queys at the price of £162, and two of them died within a few days afterwards of a disease of which they had then been ill. *Held* that unless it were proved that the lot was bought at so much per head, and not in slump, the buyer was not entitled to any deduction from the price. *Stewart* v. *M'Nicol*, 1814, Hume 701.

260. Warranty — Implied Warranty of Quality—Contract for Philadelphia Linseed —Rejection.—A bargain was entered into for the sale of 100 hgds. of Philadelphia linseed, of Messrs. Alexander's importation, for which £4, 4s. per hgd. was agreed to be paid. Instead of this, the seller himself purchased Virginia linseed of inferior quality at £3, 10s. per hgd., and sent it to the buyer as "American flax-seed." The seller refused to take it back. In an action for the price by the sellers, who contended on the evidence that the buyer had notice that the seed was not Philadelphian, *held* (rev. C. of S.) that the buyer was not liable for the price. *Gray & Stewart* v. *Ogilvy*, 1770, 2 Pat. 215.

261. Warranty — Implied Warranty of Quality — Fair Market Price — "Ichaboe Guano."—A party selling a commodity as "Ichaboe guano" at a fair market price, is bound to warrant it to be guano imported from Ichaboe, and of a fair quality. *Paterson* v. *Dickson*, 1860, 12 D. 502; 22 J. 147.

262. Warranty — Implied Warranty of Quality—Fair Price — Oranges—Exclusion by Express Agreement.—A quantity of oranges consigned to a merchant in Glasgow, which had been long on the voyage, and were stated by the master of the ship to be in good order, were sold by the consignee after exhibiting the master's letter, but refusing to warrant the truth of it, at a fair market price, and under a written agreement by the buyer, that they were to be taken delivery of at the ship's side "in the condition in which they may be found." *Held* that although a large part of the oranges were rotten, the buyer was bound to pay the price. *Parker & Finnie* v. *Paterson*, 1816, Hume 707.

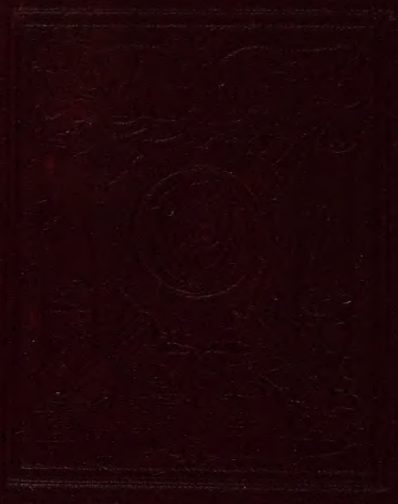
263. Warranty — Implied Warranty of Quality—Full Price—Terms of Contract— "Well-Cured Herrings for Exportation."—In an action under a contract to furnish "well-cured herrings for exportation at 22s. per barrel," *held* that if the highest price in the home market were paid, law implied a warranty of the best article in quality, unless the jury were satisfied that herrings for exportation were understood uniformly to be of an inferior quality; and that a purchaser contracted for such, notwithstanding the price he paid. *Whealler* v. *Methuen*, 1843, 5 D. 1221; 15 J. 508, 610.

264. Warranty — Implied Warranty of Quality — Representation — Agreement between Parties—Turnip Seed—Damages.—A seedsman *held* liable in damages for loss occasioned by his furnishing seed of an inferior quality and different from the kind agreed on betwixt him and the purchaser. Claim of consequential damage *disallowed*. *Taylor* v. *Sharp*, 1868, 6 S. L. R. 95.

265. Warranty—Merc. Law Amend. Act, 1856, s. 5—Effect of.—The enactments in s. 5 of the Merc. Law Amend. Act fixing the warrandice to be implied in sales of goods are only applicable when the buyer has acquired right *ad rem specificam*. *Hutchison & Co.* v. *Henry & Corry*, 1867, 6 M. 57; 40 J. 36.

266. Warranty — Representation — Whether Amounting to Warranty—Turnip Seed—Merc. Law Amend. Act, s. 5.—A seedsman purchased a lot of turnip seed,

represented by the seller as "East Lothian swede, grown in East Lothian, and first-class stock," and took delivery on 1st June. On 13th August he wrote that after trial of the seed in his nurseries he found it did not yield so large a crop as he expected, and he requested the seller to take it back, which the seller declined to do. In an action by the seller for the price, *held*, after a proof (1) that the seller did not, by the contract of sale or otherwise, warrant the quality or sufficiency of the said seed, and that it was not, within the meaning of the Merc. Law Amend. Act, expressly sold for a "specified and particular purpose"; (2) that the representation being true, the seller was not liable for alleged insufficiency in the germinating power of the seed. *Hardie* v. *Austin & M'Aslan*, 1870, 8 M. 798; 42 J. 450.

267. Warranty — Representation — Whether Amounting to Warranty—Turnip Seed—Merc. Law Amend. Act, s. 5.—A wholesale seed merchant sold to another wholesale seedsman a lot of East Lothian swede turnip seed, which he stated to be "first-class stock," and "good growth, having been tried in earth about one month since, it grew 90 per cent." The seed was delivered on 28th May, and on 28th June the purchaser objected to its quality, as on trial it produced only an average of 67 per cent., and finally declined to pay the price unless under abatement. *Held* (1) that the seller by the contract of sale did not warrant the quality and sufficiency of the seed, and that it was not, within the meaning of the Merc. Law Amend. Act, sold for a specified and particular purpose; (2) that the only representation made by him regarding it was true; and (3) that he was therefore not liable for the alleged deficiency in the germinating power of the seed. *Hardie* v. *Smith & Simons*, 1870, 42 J. 454.

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